

STATE OF MICHIGAN  
IN THE SUPREME COURT

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FRASER TREBILCOCK DAVIS & DUNLAP, P.C. Supreme Court No. 148931

Plaintiff/Appellee,

Court of Appeals Docket Nos. 302835,  
305149 and 307002

v

BOYCE TRUSTS 2350, 3649, and 3650,

Midland County Circuit Court  
Case No.: 09-6135-CZ-L

Defendants/Appellants.

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148931-3

**PLAINTIFF/APPELLEE'S BRIEF IN OPPOSITION TO  
DEFENDANTS' APPLICATION FOR LEAVE TO  
APPEAL**

**FILED**

APR 7 2014

LARRY S. ROYSTER  
CLERK  
MICHIGAN SUPREME COURT



**TABLE OF CONTENTS**

INDEX OF AUTHORITIES ..... ii

JURISDICTIONAL STATEMENT ..... vi

COUNTER STATEMENT OF QUESTIONS INVOLVED ..... vii

COUNTER STATEMENT OF FACTS..... 1

ARGUMENT ..... 6

I. FRASER TREBILCOCK DAVIS & DUNLAP, P.C., A MICHIGAN PROFESSIONAL CORPORATION WHICH WAS REPRESENTED BY ITS ATTORNEY/AGENT, IS ENTITLED TO RECOVER CASE EVALUATION SANCTIONS PURSUANT TO MCR 2.403(O)(6)..... 6

A. Standard of Review..... 6

B. Fraser Trebilcock is the prevailing party and is entitled to recover case evaluation sanctions. .... 7

C. The Court of Appeals' ruling is consistent with the plain language of MCR 2.403(O). .... 8

D. The Court of Appeals' ruling is consistent with the distinction between an ineligible individual pro per litigant and a corporation represented by its in-house counsel. .... 8

E. The Court of Appeals' Opinion is consistent with the federal decisions which have relied upon the distinction in *Kay, supra*, between an individual pro per litigant and an organization and have found that the latter is entitled to recover its attorney fees. .... 11

F. The Court of Appeals' decision is consistent with a substantial number of decisions from other states which have found that a law firm/litigant is entitled to recover legal fees. .... 14

G. MCR 2.117(B)(3)(b) is not inconsistent with the fact that Fraser Trebilcock's attorney/agent represented it in this litigation. .... 15

H. MCR 2.403(O)(6)(B) does not include the word incur..... 18

I. The public policy analysis of *Watkins, supra*, is inapplicable to this matter. .... 22

RELIEF REQUESTED ..... 23



## INDEX OF AUTHORITIES

### Cases

<i>Albert, Goldberg, Butler, Norton &amp; Weiss, PC v Quinn</i> , 410 NJ Super 510; 983 A2d 604 (App Div 2009).....	20, 21
<i>Alken-Ziegler v Waterbury Headers</i> , 461 Mich 219; 600 NW2d 638 (1999) .....	17
<i>Allard v State Farm Insurance Co.</i> , 271 Mich App 394; 722 NW2d 268 (2006) .....	7, 14
<i>Attard v Citizens Insurance Co.</i> , 237 Mich App 311; 602 NW2d 633 (1999) .....	18
<i>Baker &amp; Hostetler, LLP v United States Department of Commerce</i> , 473 F3d 312 (DC Cir. 2006) .....	12, 13
<i>Bennett v Weitz</i> , 220 Mich App 295; 559 NW2d 354 (1996) .....	7
<i>Bond v Blum</i> , 317 F3d 385 (4 <sup>th</sup> Cir., 2003) .....	12, 13
<i>Bourne v Muskegon Circuit Judge</i> , 327 Mich 175; 41 NW2d 515 (1950).....	9, 10
<i>Brach, Eichler, Rosenberg, Silver, Bernstein, Hammer &amp; Gladstone, PC v Ezekwo</i> , 783 A2d 246 (NJ Super App, 2001) .....	15
<i>Braun v York Props, Inc.</i> , 230 Mich App 138; 583 NW2d 503 (1998).....	8, 18
<i>Carpenter &amp; Zuckerman v Cohen</i> , 195 Cal App 4 <sup>th</sup> 373 (Cal App 2011) .....	14
<i>Christopher P. Aiello, PC v Morrison</i> , 2003 WL 22138029 (Mich App, unpublished 2003), <i>lv den</i> 470 Mich 859 (2004).....	17, 18
<i>Cleary v The Turning Point</i> , 203 Mich App 208; 512 NW2d 9 (1993).....	19
<i>Detroit City Council v Mayor of Detroit</i> , 283 Mich App 442; 770 NW2d 117 (2009).....	22
<i>Deutch v Shur, PC v Roth</i> , 663 A2d 1373 (Middlesex County, 1995) .....	15
<i>First Michigan Bank v Bailey</i> , 232 Mich App 711; 591 NW2d 676 (1998).....	20
<i>Gold, Weems v Metal Sales Manufacturing Corp.</i> , 236 F3d 214 (5 <sup>th</sup> Cir., 2000).....	13
<i>Hall v Laroi</i> , 238 P3d 714 (Hawaii App, 2010).....	14, 21
<i>Harkleroad v Stringer</i> , 499 SE 2d 379 (Ga App, 1998) .....	15
<i>Hinkle Cox Eaton, Coffield &amp; Hensley v Cadle Co of Ohio, Inc.</i> , 848 P2d 1079 (NM, 1993) .....	15



<i>In re Attorney Fees and Costs</i> , 233 Mich App 694; 593 NW2d 589 (1999), <i>lv den</i> 461 Mich 951 (2000).....	16
<i>Johnston v Detroit Hoist Co.</i> , 142 Mich App 597; 370 NW2d 1 (1985).....	19
<i>Jones v Ippoliti</i> , 727 A2d 713 (Conn App 1999).....	14
<i>Jones, Waldo, Holbrook &amp; McDonough v Dawson</i> , 923 P2d 1366 (Utah 1996).....	14
<i>Kay v Ehrler</i> , 499 US 432; 111 S Ct 1435; 113 L Ed 2d 486 (1991).....	passim
<i>McAuley v General Motors Corp.</i> , 457 Mich 513; 578 NW2d 282 (1998).....	19
<i>Mikael v Gallup</i> , 2006 WL 2141177 at *3 (Ohio App, 2006 Unpublished).....	14
<i>Mitchell v Dougherty</i> , 249 Mich App 668; 644 NW2d 391 (2002).....	17
<i>Omdahl v West Iron County Board of Education</i> , 478 Mich 423; 733 NW2d 380 (2007).....	9, 10, 22
<i>Plunkett v Capitol Bancorp</i> , 212 Mich App 325; 536 NW2d 886 (1995).....	16, 17
<i>Pullman v Brill, Brooks, Powell &amp; Yount</i> , 766 SW2d 527 (Tex App 1988).....	15
<i>Rafferty v Markovitz</i> , 461 Mich 265; 607 NW2d 367 (1999).....	19
<i>Schneider v Colegio de Abogados de Puerto Rico</i> , 187 F3d 30 (1 <sup>st</sup> Cir, 1999).....	15
<i>Smith v Khouri</i> , 481 Mich 519; 751 NW2d 472 (2008).....	7
<i>Swanson &amp; Setzke, Chtd v Henning</i> , 774 P2d 909 (Idaho 1989).....	14
<i>Tebo v Havlik</i> , 418 Mich 350; 343 NW2d 181 (1984).....	17
<i>Tonella v Kaufman</i> , 329 Mich 412; 43 NW 2d 911 (1950).....	8
<i>Treasurer, Trustees of Drury Industries, Inc., Health Care Plan and Trust v Goding</i> , 692 F3d 888 (8 <sup>th</sup> Cir, 2012), <i>cert denied</i> 133 S Ct 1655 (2013).....	12, 13, 21
<i>Trustees of Dartmouth College v Woodward</i> , 4 Wheat (17 US) 518; 4 L Ed 629.....	9
<i>Watkins v Manchester</i> , 220 Mich App 337; 559 NW2d 81 (1996).....	passim
<i>Wilson v Riedschler</i> , 2010 WL 1979290, at *6 (Mich App, 2010 Unpublished).....	19, 20

**Statutes**

5 USC 552.....	12
----------------	----



17 USC 505 .....	12
29 USC 1132 .....	13, 21
42 USC 1988 .....	11
MCL 15.261 .....	9
MCL 37.1101 .....	19
MCL 37.1606 .....	19
MCL 37.2101 .....	19
MCL 37.2802 .....	19
MCL 450.221 .....	8
MCL 450.222 .....	8, 9, 10
MCL 450.224 .....	8, 9, 10
MCL 450.225 .....	8, 9, 10
MCL 450.681 .....	8
MCL 600.2591 .....	16, 20
MCL 600.6013 .....	4
MCL 600.901 .....	8

**Rules**

<i>1 Longhofer</i> , Mich Court Rules Practice, Rule 2.117 .....	16, 17
Fed R Civ P 11 .....	20
GCR 1963 .....	19
GCR 316.7 .....	19
GCR 316.8 .....	19
MCR 2.114 .....	20
MCR 2.117 .....	15, 16, 17
MCR 2.403 .....	passim



MCR 2.625..... 4

MCR 7.215..... 17

MCR 7.302..... vi

MCR 9.103..... 8



## JURISDICTIONAL STATEMENT

The Plaintiff agrees that the Court has jurisdiction to consider the Defendants' timely Application for Leave to Appeal from the Court of Appeals' February 6, 2014 Opinion.<sup>1</sup>



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<sup>1</sup> MCR 7.302(C)(2)(a).

**COUNTER STATEMENT OF QUESTIONS INVOLVED**

- I. WHETHER THE COURT OF APPEALS CORRECTLY FOUND THAT FRASER TREBILCOCK DAVIS & DUNLAP, P.C., A MICHIGAN PROFESSIONAL CORPORATION WHICH WAS REPRESENTED BY ITS ATTORNEY/AGENT, IS ENTITLED TO RECOVER CASE EVALUATION SANCTIONS PURSUANT TO MCR 2.403(O)(6)?

The Court of Appeals would say "Yes."

The Defendants/Appellants say "No."

The Plaintiff/Appellee says "Yes."



## COUNTER STATEMENT OF FACTS

### Nature of this Action

Fraser Trebilcock Davis & Dunlap, P.C. ("Fraser Trebilcock") filed this action to recover the unpaid legal fees and costs incurred in its representation of the Boyce Trusts 2350, 3649, and 3650 ("Defendants") in a complicated transaction regarding the purchase of four Synex-Michigan hydroelectric power plants, more than 200 parcels of related real estate, and the business entities which operated the four power plants in 2006, plus some post-closing events and matters for which the Defendants requested and received Fraser Trebilcock's representation.<sup>2</sup> This lawsuit culminated in a jury verdict which found that the Defendants had breached the parties' agreement and awarded Fraser Trebilcock \$70,000 in damages.<sup>3</sup> On December 17, 2010, the Trial Court entered a judgment in favor of Fraser Trebilcock in the principal amount of \$70,000 plus \$380 in taxable costs and mandatory statutory interest for a total judgment in favor of Fraser Trebilcock in the amount of \$73,501.90.<sup>4</sup>

The Defendants' Application for Leave to appeal arises out of the Court of Appeals' affirmance of the Trial Court's determination that as the prevailing party, Fraser Trebilcock was entitled to award of case evaluation sanctions.<sup>5</sup>

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<sup>2</sup> See generally, Trial Tr. II, pp. 80-81, 86, 113, 123-124, Tr. III, p. 143; Plaintiff's Trial Exhibit 1 - Legal Representation Agreement, p. 1 (fourth full paragraph). There are four volumes of the trial transcript, one for each day of the November 1 - November 4, 2010 trial. They are identified in this Brief as Trial Tr. I, II, III and IV, respectively. The exhibits cited herein are either the Plaintiff's numbered trial exhibits and the numbered exhibits attached to the Plaintiff's Trial Court Brief in Support of Motion for Award of Case Evaluation Sanctions or the lettered exhibits attached to the Appellee's Court of Appeals' Brief In Docket No. 305149. A list of those exhibits is attached hereto as Appellees' Appendix 2.

<sup>3</sup> Trial Tr. IV, p. 96.

<sup>4</sup> Exhibit "E," December 17, 2010 Judgment for Plaintiff ("Judgment").

<sup>5</sup> Exhibit "E," Trial Court's February 15, 2011 Order, ¶2, p. 2.



**Fraser Trebilcock Davis & Dunlap, P.C.**

The Plaintiff, Fraser Trebilcock, is a Michigan professional corporation.<sup>6</sup> It was represented throughout the proceeding primarily by its attorney and agent Michael H. Perry.<sup>7</sup> Other Fraser Trebilcock agents and attorneys who participated in this matter include Douglas J. Austin, Edward J. Castellani, Jeremy J. Burchman, Ryan K. Kauffman, Samantha A. Kopacz, and Nicole L. Proulx.<sup>8</sup> The attorneys are employees of Fraser Trebilcock. They are also members of the State Bar of Michigan.<sup>9</sup> Those attorneys and agents provided the services necessitated by the Defendants' rejection of the case evaluation.

It was reasonable for Fraser Trebilcock to represent itself in this matter.<sup>10</sup> Given the nature of the matter and the Plaintiff's prior relationship with the Boyce Trusts, Fraser Trebilcock was able to efficiently represent itself.<sup>11</sup> As the Defendants' expert witness said in response to a question of whether it was unreasonable for Fraser Trebilcock to represent itself in light of its knowledge of the underlying matters with the Defendants, that it possessed all of the files, and that is personnel were involved in those underlying matters:

"Not -- not per se as long as -- I guess to me, it would be unreasonable if everyone at Fraser Trebilcock was a highly specialized attorney with high rates, but aside from that, no; that strikes me as a reasonable decision."<sup>12</sup>

<sup>6</sup> Exhibit 6 attached to Plaintiff's Brief in Support of Motion for Award of Case Evaluation Sanctions - Restated Articles of Incorporation and Exhibit 7 - 2010 annual report.

<sup>7</sup> Exhibit 4 attached to Plaintiff's Brief in Support of Motion for Award of Case Evaluation Sanctions, p. 1 identifies "MHP" as a "time keeper." "MHP" is Michael H. Perry.

<sup>8</sup> Exhibit 15 attached to Plaintiff's Brief in Support of Motion for Award of Case Evaluation Sanctions - Affidavit of Thomas M. Smith. The attorneys' biographies were attached to that Brief as Exhibits 8-14, inclusive.

<sup>9</sup> Exhibits 8-14 attached to Plaintiff's Brief in Support of Motion for Award of Case Evaluation Sanctions.

<sup>10</sup> Exhibit 59, p. 27 and Exhibit 61, p. 50 attached to Plaintiff's Post-Expert Witness Deposition Brief in Support of Reasonable Attorney Fee Award.

<sup>11</sup> Exhibit 59, pp. 14 and 19; see also Exhibit 22, ¶¶19 and 20, p. 6 attached to Plaintiff's Post-Expert Witness Deposition Brief in Support of Reasonable Attorney Fee Award.

<sup>12</sup> Exhibit 61, p. 50 attached to Plaintiff's Post-Expert Witness Deposition Brief in Support of Reasonable Attorney Fee Award.

The Trial Court found that Fraser Trebilcock had made an economically rational decision to represent itself in this lawsuit.<sup>13</sup>

Unlike a situation in which a sole practitioner prevails in a civil action and would personally receive the amount of the case evaluation sanctions award, Fraser Trebilcock's attorneys will not receive the amount of the case evaluation sanctions. They did not represent their own interests. Instead they represented the interests of the law firm. Fraser Trebilcock will receive the amount of the case evaluation sanctions. It will not pay that amount to its attorneys. Instead, after accounting for the receipt of its costs, the law firm will allocate the net amount of the case evaluation sanctions to the collection account and credit the attorneys whom represented the law firm in the collection action with their pro rata share of the "income produced," i.e., the net amount of the case evaluation sanctions. However, Fraser Trebilcock will not pay that amount to the collection attorneys.<sup>14</sup> Instead, Fraser Trebilcock pays a salary to its employees, including the attorneys who participated in this litigation.<sup>15</sup>

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<sup>13</sup> Exhibit "C," p. 11.

<sup>14</sup> Exhibit 16 attached to Plaintiff's Brief in Support of Motion for Award of Case Evaluation Sanctions - Fraser Trebilcock's policy regarding allocation of revenue and Exhibit 15 attached to Plaintiff's Brief in Support of Motion for Award of Case Evaluation Sanctions - Thomas M. Smith's Affidavit.

<sup>15</sup> Exhibit 15 attached to Plaintiff's Brief in Support of Motion for Award of Case Evaluation Sanctions - Affidavit of Thomas M. Smith.



## Case Evaluation and Subsequent Trial Court Proceedings

On or about August 19, 2010, the case evaluation panel unanimously evaluated this case in the amount of \$60,000 to the Plaintiff.<sup>16</sup> On or about August 23, 2010, the Plaintiff accepted the case evaluation award.<sup>17</sup> The Defendants rejected the case evaluation award.<sup>18</sup>

As a result of the Defendants' rejection of the case evaluation award, it was necessary to conduct a jury trial in this matter. The Trial Court conducted the jury trial on November 1, 2, 3, and 4, 2010.<sup>19</sup> On November 4, 2010, the jury found that the Defendants had breached the parties' contract and awarded the Plaintiff \$70,000.<sup>20</sup>

On or about December 17, 2010, the Trial Court entered a Judgment in favor of the Plaintiff and against the Defendants in the principal amount of \$70,000 plus mandatory statutory interest upon the amount of the Judgment and the amount of the Plaintiff's taxable costs (\$380), compounded annually pursuant to MCL 600.6013(8) for a total award to the Plaintiff as of December 3, 2010 in the amount of \$73,501.90.<sup>21</sup>

The Defendants are the "rejecting party" as that phrase is used in MCR 2.403(O). Fraser Trebilcock is the "prevailing party" as that phrase is used in MCR 2.403(O)(6) and MCR 2.625. The \$70,000 verdict was not more favorable to the rejecting party either on its face amount of \$70,000 or as adjusted by adding to it the assessable costs and interest in

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<sup>16</sup> Exhibit 1 attached to Plaintiff's Brief in Support of Motion for Award of Case Evaluation Sanctions - Notice of Case Evaluation and Acceptance or Rejection of Award, p. 1 (Case Register of Action item 121, p. 6). Hereafter, this Brief shall refer to the Case Register of Action as "CRA."

<sup>17</sup> Exhibit 1, p. 2 and Exhibit 2 attached to Plaintiff's Brief in Support of Motion for Award of Case Evaluation Sanctions - September 24, 2010 Notice of Acceptance/Rejection of Case Evaluation Award (CRA, item 121, p. 6).

<sup>18</sup> Exhibit 2 attached to Plaintiff's Brief in Support of Motion for Award of Case Evaluation Sanctions (CRA, Item 121, p. 6).

<sup>19</sup> See Trial Tr. I-IV, inclusive.

<sup>20</sup> Trial Tr. IV, p. 96.

<sup>21</sup> Exhibit 3 attached to Plaintiff's Brief in Support of Motion for Award of Case Evaluation Sanctions - December 17, 2010 Judgment, ¶2, p. 2.

accordance with MCR 2.403(O)(3). For that reason, the Defendant, as the "rejecting party," must pay the Plaintiff's actual costs.<sup>22</sup>

For the purposes of MCR 2.403(O), the Plaintiff's actual costs are those costs taxable in any civil action and a reasonable attorney fee based on a reasonable hourly or daily rate as determined by the Trial Court for services necessitated by the Defendants' rejection of the case evaluation. MCR 2.403(O)(6)(a) and (B).<sup>23</sup> The reasonable attorney fee component of Fraser Trebilcock's actual costs under MCR 2.403(O)(6) is the subject of the Court of Appeals' decision and the Defendants' Application for Leave to Appeal.

The Trial Court held a hearing on the Plaintiff's motion for an award of case evaluation sanctions on February 4, 2011.<sup>24</sup> At the conclusion of the hearing, the Trial Court found that Fraser Trebilcock, "the law firm litigant in this case is entitled to recover legal fees."<sup>25</sup> The Trial Court also determined that the amount of the legal fees would be determined at the conclusion of an evidentiary hearing.<sup>26</sup> On February 15, 2011, the Trial Court entered its "Order Regarding the Parties' Post-Trial Motions" in which it denied the Defendants' motion for a new trial and granted Fraser Trebilcock's motion for an award of case evaluation sanctions.<sup>27</sup>

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<sup>22</sup> MCR 2.403(O)(1). The Trial Court correctly observed that there was no dispute that Fraser Trebilcock is the "prevailing party" as that phrase is used in MCR 2.403(O)(6). See Exhibit "C," June 29, 2011 Opinion and Order, p. 2.

<sup>23</sup> The Defendants failed to appeal from the award of the Plaintiff's taxable costs.

<sup>24</sup> CRA, Item No. 129, p. 6; see also February 4, 2011 transcript.

<sup>25</sup> February 4, 2011 Tr., pp. 31-32.

<sup>26</sup> February 4, 2011 Tr., p. 32. The Court also heard and ruled upon the Defendants' motion for new trial (February 4, 2011 Tr., pp. 3-13).

<sup>27</sup> Exhibit "E," p. 2, ¶¶1-2, respectively.

## The Trial Court's June 29, 2011 Opinion and Order<sup>28</sup>

On June 29, 2011, the Trial Court issued its "opinion and order" in which it opined that Fraser Trebilcock was entitled to a reasonable attorney fee in the amount of \$80,434.<sup>29</sup>

### Court of Appeals<sup>30</sup>

The Court of Appeals affirmed the Trial Court's decision that Fraser Trebilcock, the prevailing party which accepted the case evaluation recommendation, is entitled to case evaluation sanctions.<sup>31</sup> The Court of Appeals found that a law firm represented by its own attorneys is not a pro se litigant for purposes of its entitlement to attorney fee sanctions under MCR 2.403(O).<sup>32</sup> The Court of Appeals also found that MCR 2.403(O) does not require that the attorney fee be "incurred," but instead requires only that the Trial Court must determine a reasonable attorney fee for the services necessitated by the rejection of the case evaluation.<sup>33</sup>

### ARGUMENT

#### I. FRASER TREBILCOCK DAVIS & DUNLAP, P.C., A MICHIGAN PROFESSIONAL CORPORATION WHICH WAS REPRESENTED BY ITS ATTORNEY/AGENT, IS ENTITLED TO RECOVER CASE EVALUATION SANCTIONS PURSUANT TO MCR 2.403(O)(6)

##### A. Standard of Review.

MCR 2.403(O)(1) provides that the party which rejected case evaluation "...**must pay the opposing party's actual costs** where the verdict is not more favorable to the rejecting

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<sup>28</sup> Exhibit "C."

<sup>29</sup> Exhibit "C," p. 26. Neither the amount of the reasonable attorney fees nor the Court of Appeals' remand for a determination of the amount of the fees pertaining to the case evaluation sanctions dispute is the subject of the instant Application for Leave to Appeal.

<sup>30</sup> Appellees' Appendix No. 1.

<sup>31</sup> Appellees' Appendix No. 1 - Court of Appeals - February 6, 2014 Opinion.

<sup>32</sup> Appellees' Appendix No. 1, p. 21.

<sup>33</sup> Appellees' Appendix No. 1, p. 22.

party than the case evaluation" (emphasis added). An award of case evaluation sanctions is mandatory.<sup>34</sup>

An appellate court reviews *de novo* the question of law as to whether a Trial Court correctly granted case evaluation sanctions to a prevailing party under MCR 2.403(O).<sup>35</sup>

**B. Fraser Trebilcock is the prevailing party and is entitled to recover case evaluation sanctions.**

The jury's verdict of \$70,000 exceeds the case evaluation of \$60,000. Fraser Trebilcock is the prevailing party. The Court of Appeals and the Trial Court correctly applied the plain language of MCR 2.403(O)(1) and found that Fraser Trebilcock is entitled to receive a reasonable attorney fee. This Court should do the same and deny the Defendants' Application for Leave to Appeal.

*Allard, supra*, observed that the purpose of awarding case evaluation sanctions is to place "... the financial burden of trial onto 'the party who demands a trial by rejecting a proposed [case evaluation] award.'"<sup>36</sup> The instant Defendants demanded a trial when they rejected the proposed case evaluation award. The award of case evaluation sanctions to Fraser Trebilcock serves the purpose of MCR 2.403 by placing the financial burden of the trial onto the Defendants who demanded a trial by rejecting the case evaluation award. Likewise, this Court's denial of the Defendants' Application for Leave to Appeal from the Court of Appeals' affirmance of the Trial Court's correct decision will serve the same purpose.

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<sup>34</sup> *Allard v State Farm Insurance Co.*, 271 Mich App 394, 398; 722 NW2d 268 (2006).

<sup>35</sup> *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008).

<sup>36</sup> *Allard, supra*, 271 Mich App at 398, quoting from *Bennett v Weitz*, 220 Mich App 295, 301; 559 NW2d 354 (1996).

**C. The Court of Appeals' ruling is consistent with the plain language of MCR 2.403(O).**

The plain language of MCR 2.403(O), which mandates that the rejecting party must pay the prevailing party's actual costs, does not contain an exception where the prevailing party is a law firm incorporated under Michigan's Professional Service Corporation Act. A court must "... apply the clear language of a court rule as written."<sup>37</sup> The Court of Appeals correctly applied the clear language of MCR 2.403(O) and found that Fraser Trebilcock, as the prevailing party, was entitled to an award of case evaluation sanctions.

**D. The Court of Appeals' ruling is consistent with the distinction between an ineligible individual pro per litigant and a corporation represented by its in-house counsel.**

Fraser Trebilcock is a Michigan professional service corporation incorporated under Michigan's Professional Service Corporation Act, being MCL 450.221.<sup>38</sup> A corporation cannot practice law.<sup>39</sup> Legal counsel must represent a Michigan corporation in court. A Michigan professional corporation, like Fraser Trebilcock, provides professional services through its licensed attorneys.<sup>40</sup> A Michigan professional services corporation, such as Fraser Trebilcock, provides legal services through its duly licensed agents.<sup>41</sup> These active members of the State Bar are considered to be licensed to practice law in this state.<sup>42</sup>

<sup>37</sup> *Braun v York Props, Inc.*, 230 Mich App 138, 150; 583 NW2d 503 (1998).

<sup>38</sup> Exhibit 6 attached to Plaintiff's Brief in Support of Motion for Award of Case Evaluation Sanctions - Fraser Trebilcock's Restated Articles of Incorporation.

<sup>39</sup> MCL 450.681.

<sup>40</sup> MCL 450.222(c) and MCL 450.224(2).

<sup>41</sup> MCL 450.225.

<sup>42</sup> See, MCL 600.901 [State Bar membership consists of persons licensed to practice law], State Bar Rules of Michigan 2 [Membership - "those persons ... licensed to practice law ...] and 3(a) [Active Member ... includes a person licensed to practice law ....], MCR 9.103(A) and *Tonella v Kaufman*, 329 Mich 412, 419; 43 NW 2d 911 (1950) which recognized that an active member of the Michigan Bar is "... legally licensed to practice law in Michigan...."



A corporation is an entity which is separate and apart from its shareholders.<sup>43</sup> Fraser Trebilcock, a professional corporation, is an entity separate and apart from its attorneys. For that reason, as explained below, the Defendants' reliance upon the line of cases which found that an individual attorney not represented by an attorney/agent was ineligible to recover attorney fees, including among others *Watkins v Manchester*, 220 Mich App 337; 559 NW2d 81 (1996), is misplaced.

Fraser Trebilcock acknowledges that *Watkins, supra*, held that as a matter of public policy, an attorney whom appeared in pro per was not entitled to recover case evaluation sanctions.<sup>44</sup> The attorney/party in *Watkins, supra*, appeared in pro per. A Michigan professional corporation was not a party in that action.<sup>45</sup>

Unlike the prevailing party/attorney in *Watkins, supra*, Fraser Trebilcock was represented by its agents. Unlike the in pro per sole practitioner in *Watkins, supra*, Fraser Trebilcock can only provide legal services through its agents.<sup>46</sup> Those agents represented Fraser Trebilcock.

*Omdahl v West Iron County Board of Education*, 478 Mich 423; 733 NW2d 380 (2007) found that an attorney who had appeared in pro per in a matter arising under the Open Meetings Act, MCL 15.261, *et seq*, was unable to recover attorney fees because he lacked an agency relationship with himself. *Omdahl* found that a party prevailing in an Open Meetings Act case is entitled to recover its attorney fees and costs if there is an agency relationship

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<sup>43</sup> *Bourne v Muskegon Circuit Judge*, 327 Mich 175, 191; 41 NW2d 515 (1950), quoting from United States Supreme Court Chief Justice Marshall's observation in *Trustees of Dartmouth College v Woodward*, 4 Wheat (17 US) 518; 4 L Ed 629 that a corporation "... is an artificial entity separate and distinct from the holders of its individual stock."

<sup>44</sup> *Watkins, supra*, 220 Mich App at 343.

<sup>45</sup> *Watkins, supra*, 220 Mich App at 337-338.

<sup>46</sup> MCL 450.222(c), MCL 450.224(2) and MCL 450.225.



between an attorney and the prevailing litigant.<sup>47</sup> Absent an agency relationship between an attorney and the litigant, there is no attorney-client relationship and the prevailing party in that instance is unable to recover its attorney fees.<sup>48</sup> *Omdahl* held that there must be a separate identity between the attorney and the client to entitle the client to recover attorney fees.<sup>49</sup>

There is a separate identity between Fraser Trebilcock and its agents. A corporation is an entity separate and apart from its shareholders.<sup>50</sup> Fraser Trebilcock's agents are duly licensed to practice law. Fraser Trebilcock is only allowed to provide professional legal services through its authorized agents.<sup>51</sup> As *Omdahl, supra* requires, there is an agency relationship between Fraser Trebilcock and its employees/agents.<sup>52</sup> The touchstone in this analysis is the existence of an agency relationship.<sup>53</sup> There is an agency relationship between Fraser Trebilcock and its employees. For that reason, *Watkins* and *Omdahl, supra*, are inapplicable to this matter and the Trial Court correctly found that Fraser Trebilcock is entitled to recover case evaluation sanctions.

The Court of Appeals correctly relied upon the United States Supreme Court's recognition of the distinction between an individual attorney/litigant's ineligibility to receive an award of attorney fees and an organization which has an attorney-client relationship with its in-house counsel is eligible to receive an award of attorney fees.<sup>54</sup> During the course of its opinion, *Watkins, supra*, relied upon, among others, *Kay v Ehrler*, 499 US 432; 111 S Ct 1435; 113 L Ed 2d 486 (1991), which held that a pro se litigant/attorney was not entitled to an

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<sup>47</sup> 478 Mich at 430-431.

<sup>48</sup> *Omdahl, supra*, 478 Mich at 432.

<sup>49</sup> *Id.*

<sup>50</sup> *Bourne, supra*.

<sup>51</sup> MCL 450.222(c), MCL 450.224(2) and MCL 450.225.

<sup>52</sup> *Omdahl, supra* recognized that *Watkins, supra*, was based upon a public policy analysis. *Omdahl* expressly did not rely upon that line of public policy analysis. 478 Mich at 429, n. 2.

<sup>53</sup> *Omdahl, supra*, 478 Mich at 430-432.

<sup>54</sup> Appellees' Appendix No. 1, p. 21.

award of attorney fees under the federal civil rights statute, 42 USC 1988, and found that the reasoning in *Kay* was "persuasive."<sup>55</sup> During the course of finding that an in pro per litigant who was an attorney was not entitled to an award of attorney fees, *Kay, supra*, a unanimous decision, distinguished between an individual litigant and an organization, stating:

"An organization is not comparable to a pro se litigant because the organization is always represented by counsel, whether in-house or pro bono, and thus, there is always an attorney-client relationship."<sup>56</sup>

The Court of Appeals correctly relied upon that reasoning to find that Fraser Trebilcock, a Michigan professional services corporation, is an organization which was represented by its in-house counsel. There was, and is, an agency relationship between Fraser Trebilcock and its in-house counsel. Fraser Trebilcock was "...not a pro se litigant for purposes of entitlement to attorney fee sanctions under MCR 2.403(O)."<sup>57</sup> In accordance with *Kay's* distinction between an individual pro se litigant whom is not represented by counsel and an organization which is represented by its agent/attorney, the Court of Appeals correctly found that Fraser Trebilcock is entitled to recover its reasonable attorney fees necessitated as a result of the Defendants' rejection of the case evaluation award.<sup>58</sup>

**E. The Court of Appeals' Opinion is consistent with the federal decisions which have relied upon the distinction in *Kay, supra*, between an individual pro per litigant and an organization and have found that the latter is entitled to recover its attorney fees.**

The Court of Appeals' decision is consistent with the published Fourth, Fifth, D.C. and Eighth federal Circuit Court of Appeals cases which have addressed this issue and have relied upon the United States Supreme Court's distinction in *Kay, supra*, between an individual pro per litigant and an organization to find that a law firm/litigant is entitled to recover legal fees.

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<sup>55</sup> *Watkins, supra*, 220 Mich App at 344.

<sup>56</sup> 499 US at 436, n. 7.

<sup>57</sup> Appellees' Appendix No. 1, p. 21.

<sup>58</sup> *Id.*

The Court of Appeals cited two of those cases.<sup>59</sup> There are two additional federal Circuit Court of Appeals cases which have recognized that "...there is no meaningful distinction between a law firm and any other organization on the issue of whether there exists an attorney-client relationship between the organization and its attorney."<sup>60</sup>

*Bond v Blum, supra*, a copyright infringement action, found that the defendants/law firms therein were entitled to recover attorney fees under 17 USC 505. It relied upon *Kay's, supra*, distinction between an individual pro per litigant who is ineligible to recover fees and an organization which is represented by its attorney. *Bond, supra*, found that the relationship between a law firm and its members (i.e., attorneys) is analogous to a state or a corporation represented by its in-house counsel. It found that in the latter situation, an entity which is represented by his house counsel is entitled to an award of attorney fees.<sup>61</sup>

Likewise, *Baker & Hostetler, LLP*, an action filed by a law firm under the federal Freedom of Information Act (5 USC 552) applied the "plain language" of the statute which provides for the assessment of reasonable attorney fees to a "complainant (which) has substantially prevailed," and *Kay's, supra*, distinction between an ineligible individual litigant/attorney and an organization represented by its in-house counsel to find that the law firm of Baker & Hostetler, LLP was entitled to recover attorney fees.<sup>62</sup> While doing so, the Court in *Baker & Hostetler, LLP* approvingly quoted from *Bond v Blum's, supra*, observation that a law firm is a "... professional entity distinct from its members, and the member

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<sup>59</sup> Appellee's Appendix 2, pp. 19-20, citing *Bond v Blum*, 317 F3d 385, 399-400 (4<sup>th</sup> Cir., 2003) and *Baker & Hostetler, LLP v United States Department of Commerce*, 473 F3d 312, 324 (DC Cir. 2006).

<sup>60</sup> *Treasurer, Trustees of Drury Industries, Inc., Health Care Plan and Trust v Goding*, 692 F3d 888, 898 (8<sup>th</sup> Cir, 2012), *cert denied* 133 S Ct 1655 (2013).

<sup>61</sup> 317 F3d at 399-400.

<sup>62</sup> 473 F3d at 324-326.

representing the firm as an entity represents the firm's distinct interests in the agency relationship inherent in the attorney-client relationship."<sup>63</sup>

*Gold, Weems v Metal Sales Manufacturing Corp.*, 236 F3d 214, 218-219 (5<sup>th</sup> Cir., 2000) found that a law firm which had obtained a judgment against its former client to recover unpaid fees and used one of its own attorneys to handle that action, could recover attorney fees under a Louisiana statute which allows a prevailing party in an "open account" action to recover its reasonable attorney fees. While doing so, *Gold Weems, et al* approvingly quoted *Kay's, supra*, distinction between an organization which is represented by counsel and an individual pro se litigant.<sup>64</sup>

*Treasurer, Trustees of Drury Industries, supra*, an ERISA subrogation action brought against a plan beneficiary and its law firm, followed *Kay's, supra*, footnote and the other federal Court of Appeals cases discussed above to find that the law firm which was represented by one of its employees/attorneys was entitled to attorney fees pursuant to 29 USC 1132 (g)(1) which grants a court discretion to allow a reasonable attorney fee to a party in such a lawsuit.<sup>65</sup>

The four federal appellate opinions discussed above, which applied the plain language of their respective governing statutes and *Kay v Ehler's* "organization exception," support the Court of Appeals' decision.

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<sup>63</sup> 473 F3d at 326, quoting from *Bond v Blum, supra*, 317 F3d at 400.

<sup>64</sup> *Id.*

<sup>65</sup> *Treasurer, Trustees of Drury Industries, supra*, 692 F3d at 898, citing *Kay, Bond v Blum, Baker & Hostetler, and Gold, Weems, supra*.



**F. The Court of Appeals' decision is consistent with a substantial number of decisions from other states which have found that a law firm/litigant is entitled to recover legal fees.**

The Defendants have relied upon some opinions from foreign states.<sup>66</sup> Fraser Trebilcock acknowledges that those opinions exist. However, there are a number of other state court decisions which have found that a prevailing law firm litigant is entitled to recover a reasonable attorney fee. These opinions are briefly summarized below.

The Hawaiian Court of Appeals has found that a law firm which prevailed in an action to collect fees from a client is entitled to recover its attorney fees for the services provided by the attorney employed by the law firm who represented the firm in that action.<sup>67</sup> *Hall v Laroi* enforced the express terms of the governing statute which provides, among other things, that "in all actions in the nature of assumpsit," reasonable attorney fees "shall be taxed."<sup>68</sup> As we have seen in Michigan, an award of case evaluation sanctions under MCR 2.403 is mandatory.<sup>69</sup> The Hawaiian statute is consistent with MCR 2.403.

Likewise, one was entitled to recover attorney fees in Ohio regarding the representation of a law firm/litigant.<sup>70</sup> *Mikael, supra*, specifically noted that the attorney represented his colleagues in the law firm and recognized that pursuant to his attorney-client relationship was required to consider the interests of the client at all times and to exercise the

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<sup>66</sup> *Carpenter & Zuckerman v Cohen*, 195 Cal App 4<sup>th</sup> 373 (Cal App 2011), *Jones v Ippoliti*, 727 A2d 713 (Conn App 1999), *Jones, Waldo, Holbrook & McDonough v Dawson*, 923 P2d 1366 (Utah 1996) and *Swanson & Setzke, Chld v Henning*, 774 P2d 909 (Idaho 1989) (Defendants' Application for Leave, pp. 16-19 and 21).

<sup>67</sup> *Hall v Laroi*, 238 P3d 714, 718 (Hawaii App, 2010).

<sup>68</sup> *Id.*

<sup>69</sup> *Allard v State Farm Insurance Company, supra*.

<sup>70</sup> *Mikael v Gallup*, 2006 WL 2141177 at \*3 (Ohio App, 2006 Unpublished). A copy of *Mikael* is Exhibit "K" in the Appellee's Appendix 2.

attorney's best professional judgment, thereby satisfying the concerns which underlie *Kay v Ehler's, supra*, requirement of an attorney/client relationship.<sup>71</sup>

In an action similar to the instant one in which a law firm brought suit against a former client to collect unpaid attorney fees, the Georgia Court of Appeals found that the prevailing law firm which had represented itself through its employed attorney was allowed to recover its attorney fees as a sanction against the defendant therein.<sup>72</sup>

In New Jersey, law firm litigants were found to be entitled to recover their attorney fees where their opposing party had rejected an offer of judgment and had asserted a frivolous claim.<sup>73</sup> Likewise in New Mexico a prevailing law firm which represented itself in an action to recover legal fees was found to be entitled to recover its litigation fees, noting that it would have been unjust to deny the fees.<sup>74</sup> In Texas, a law firm which represented itself to recover unpaid legal fees was also found entitled to recover its fees in the collection action pursuant to a Texas statute which provided that fees are recoverable where one is represented by an attorney.<sup>75</sup> The weight of authority and the common sense view of the above referenced foreign opinions also support the Court of Appeals' decision.

**G. MCR 2.117(B)(3)(b) is not inconsistent with the fact that Fraser Trebilcock's attorney/agent represented it in this litigation.**

The Defendants' reliance upon part of MCR 2.117(B)(3)(b) is misplaced.<sup>76</sup> First, the Defendants have ignored the second sentence of MCR 2.117(B)(3)(b), which provides that

<sup>71</sup> *Id.*, citing *Schneider v Colegio de Abogados de Puerto Rico*, 187 F3d 30, 39-40 (1<sup>st</sup> Cir, 1999).

<sup>72</sup> *Harkleroad v Stringer*, 499 SE 2d 379 (Ga App, 1998).

<sup>73</sup> *Brach, Eichler, Rosenberg, Silver, Bernstein, Hammer & Gladstone, PC v Ezekwo*, 783 A2d 246 (NJ Super App, 2001) (rejection of offer of judgment) and *Deutch v Shur, PC v Roth*, 663 A2d 1373 (Middlesex County, 1995) (sanction for frivolous pleading).

<sup>74</sup> *Hinkle Cox Eaton, Coffield & Hensley v Cadle Co of Ohio, Inc.*, 848 P2d 1079 (NM, 1993).

<sup>75</sup> *Pullman v Brill, Brooks, Powell & Yount*, 766 SW2d 527 (Tex App 1988).

<sup>76</sup> Defendants' Application for Leave, pp. 12-14.



"any attorney in the firm may be required by the Court to conduct a Court-ordered conference or trial." That is the purpose of this court rule.<sup>77</sup> This rule "... is designed to allow the Court to avoid adjournments because the designated attorney is unavailable."<sup>78</sup>

Likewise, the cases upon which the Defendants have relied arose in other contexts and are not inconsistent with the fact that Fraser Trebilcock's attorney and agent represented it in this litigation. For example, *Plunkett v Capitol Bancorp*, 212 Mich App 325, 329; 536 NW2d 886 (1995), an action regarding a dispute whether the plaintiff law firm therein was entitled to legal fees for services provided by one of its former attorneys for the defendant therein, cited among other things MCR 2.117(B)(3) for the proposition that a client's employment of one member of a law firm is deemed to be the employment of the law firm itself in the course of finding that although the individual attorney had performed work for the client therein, the "employment relationship" was with the law firm and the defendant had a contractual obligation to pay the law firm for the attorney's services. This basic principle regarding one's contractual obligation to pay the law firm for the services rendered by its employee attorney was pertinent to the principal action in which Fraser Trebilcock obtained a judgment against the Defendants. It is also not inconsistent with the fact that Fraser Trebilcock was represented by some of its employees/attorneys. *Plunkett, supra*, essentially recognized that the attorney who provided legal services for the defendant therein was the law firm's employee/agent.

*In re Attorney Fees and Costs*, 233 Mich App 694; 593 NW2d 589 (1999), *lv den* 461 Mich 951 (2000) simply found that an individual attorney and the law firm with which he was employed were responsible for sanctions under MCL 600.2591. In addition to specifically limiting its decision to the facts before it,<sup>79</sup> *In re Attorney Fees and Costs* is consistent with

<sup>77</sup> *1 Longhofer*, Mich Court Rules Practice, Rule 2.117, Author's Commentary, p. 606.

<sup>78</sup> *1 Longhofer*, Mich Court Rules Practice, Rule 2.117.5, Author's Commentary, p. 610.

<sup>79</sup> *In re Attorney Fees and Costs, supra*, 233 Mich App at 707, n. 7.

(but failed to recite) the general rule that a principal is liable for the acts of its agent.<sup>80</sup> *Mitchell v Dougherty*, 249 Mich App 668, 681; 644 NW2d 391 (2002), cited MCR 2.117(B)(3) and *Plunkett, supra*, during the course of finding that the facts in that legal malpractice case showed that the plaintiffs therein had intended to terminate their relationship with the defendant law firm when the individual attorney who represented the plaintiffs in an underlying matter had ceased their association with the law firm and the firm did not provide any further services for the plaintiff.<sup>81</sup> The factual situations in both of the above cases have nothing to do with the instant matter. They also have nothing to do with the purpose of MCR 2.117(B)(3)(b), which is to allow a court to avoid an adjournment because a designated attorney is unavailable.<sup>82</sup>

Defendants' reliance upon *Christopher P. Aiello, PC v Morrison*, 2003 WL 22138029 (Mich App, unpublished 2003), *lv den* 470 Mich 859 (2004) is also misplaced.<sup>83</sup> First, *Aiello, supra*, is unpublished. It has no precedential value.<sup>84</sup> Second, this Court's denial of leave to appeal in that matter was not a ruling upon the merits.<sup>85</sup> Third, although *Aiello* relied upon *Watkins, supra*, and MCR 2.117(B)(3)(b), *Watkins* involved an in pro per individual attorney rather than a law firm but also found that the reasoning of *Kay v Ehler, supra*, was "persuasive."<sup>86</sup> Fourth, *Aiello, supra*, also had nothing to do with the purpose of MCR 2.117(B)(3)(b). Fifth, it failed to address a situation similar to the instant matter in which the

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<sup>80</sup> See generally, *Alken-Ziegler v Waterbury Headers*, 461 Mich 219, 224; 600 NW2d 638 (1999) ["a party is responsible for any action or inaction by the party or party's agent." (internal citation omitted).

<sup>81</sup> *Mitchell, supra*, 249 Mich App at 685.

<sup>82</sup> *l Longhofer*, Mich Court Rules Anno, Author's Commentary, section 2117.5, p. 610.

<sup>83</sup> Defendants' Application for Leave, p. 4 and 12.

<sup>84</sup> MCR 7.215(C)(1).

<sup>85</sup> *Tebo v Havlik*, 418 Mich 350, 362, n. 2; 343 NW2d 181 (1984).

<sup>86</sup> *Watkins*, 220 Mich App at 344.

plaintiff law firm was represented by its attorneys/agents where none of them sought to recover individual fees as did Mr. Aiello, the sole attorney at Aiello, P.C.<sup>87</sup>

*Attard v Citizens Insurance Co.*, 237 Mich App 311, 329; 602 NW2d 633 (1999),<sup>88</sup> found that the plaintiff could recover a reasonable attorney fee pursuant to MCR 2.403(O)(6)(b) for the services provided by two attorneys for the law firm which had represented the plaintiff in that action.<sup>89</sup> Because the plaintiff therein was represented by the law firm, *Attard* held that the reasonable attorney fee awarded pursuant to MCR 2.403(O)(6) may include the fees for work performed on the Plaintiff's case by different lawyers within the firm.<sup>90</sup> *Attard, supra*, is consistent with the fact that Fraser Trebilcock was represented by more than one of its attorneys/agents in this litigation. The instant Trial Court found that Fraser Trebilcock's reasonable attorney fee award under MCR 2.403(O)(6) included the fees for the work performed on the instant Plaintiff's case by different attorneys within the firm.<sup>91</sup> The Defendants failed to challenge the Trial Court's decision regarding the hourly rates applicable to those other attorneys' services in the Court of Appeals and have likewise failed to include such a challenge in the instant Application for Leave.

**H. MCR 2.403(O)(6)(B) does not include the word incur.**

A Court must enforce the plain language of a court rule as it is written.<sup>92</sup> MCR 2.403(O)(6)(b) provides for an award of "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." This rule does not include the word "incurred." The Defendants'

<sup>87</sup> *Aiello, supra*, 2003 WL 22138029 at \*1.

<sup>88</sup> Defendants' Application for Leave to Appeal, p. 12.

<sup>89</sup> 237 Mich App at 329.

<sup>90</sup> *Attard, supra*, 237 Mich App at 329-330.

<sup>91</sup> Exhibit "C," June 29, 2011 Opinion and Order, p. 24.

<sup>92</sup> See generally, *Braun v York Props, Inc., supra*.

"incurred" argument is inconsistent with the plain language of MCR 2.403.<sup>93</sup> Also, it has been long established that MCR 2.403(O) and its predecessor GCR 1963, 316.7 and 316.8 do not require a Trial Court to assess or award one's actual attorney fees.<sup>94</sup>

The decisions upon which the Defendants have relied do not apply to the instant matter. *McAuley v General Motors Corp.*, 457 Mich 513, 525; 578 NW2d 282 (1998) and *Rafferty v Markovitz*, 461 Mich 265, 272; 607 NW2d 367 (1999), which held that a prevailing party was not entitled to recover attorney fees under both the statute under which one's claim had been made and MCR 2.403, are inapposite.<sup>95</sup> *McAuley*, an action arising under the Michigan Handicapper's Civil Rights Act, MCL 37.1101 and its attorney fee recovery provision of MCL 37.1606(3) and *Rafferty*, *supra*, which arose under the Civil Rights Act, MCL 37.2101 and its attorney fee provisions in MCL 37.2802, held that a prevailing party was unable to recover an attorney fee under MCR 2.403 where that party had been fully compensated for a reasonable attorney fee under the governing statute.<sup>96</sup>

In the instant case, the Trial Court awarded a reasonable attorney fee to Fraser Trebilcock only under MCR 2.403. This matter does not involve a "double recovery." As the Court recognized in *Wilson*, *supra*, "it is the recovery of a full reasonable attorney fee, not the

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<sup>93</sup> Defendants' Application for Leave, pp. 19-22.

<sup>94</sup> See generally, *Johnston v Detroit Hoist Co.*, 142 Mich App 597, 601; 370 NW2d 1 (1985) finding that the trial court therein had properly exercised its discretion to calculate a reasonable attorney fee for the defendant's in-house counsel in excess of the attorney's salary paid by the defendant's insurer pursuant to GCR 1963, 316.7 and 316.8 and *Cleary v The Turning Point*, 203 Mich App 208, 211-212; 512 NW2d 9 (1993) which affirmed an award of case evaluation sanctions under MCR 2.403(O) at a higher hourly rate than the defendant had been charged by defense counsel.

<sup>95</sup> Defendants' Application for Leave, pp. 19-20.

<sup>96</sup> *McAuley*, *supra*, 457 Mich at 523 and *Rafferty*, *supra*, 461 Mich at 271-272. See also, *Wilson v Riedschler*, 2010 WL 1979290, at \*6 (Mich App, 2010 Unpublished), a copy of which is Exhibit "J" in Appellee's Appendix 2 attached hereto.

actual billings of counsel....," which establishes the limits of a reasonable attorney fee under MCR 2.403.<sup>97</sup>

The Defendants' reliance upon *First Michigan Bank v Bailey*, 232 Mich App 711; 591 NW2d 676 (1998) is also misplaced.<sup>98</sup> *First Michigan Bank, supra*, found that the third party defendants therein, an attorney and a law firm which had represented themselves, were ineligible for attorney fee sanctions under MCR 2.114(F) and MCL 600.2591(2) where both the court rule and the statute provided for the award of a sanction for the "fees incurred."<sup>99</sup> *First Michigan Bank* contrasted RJA 2591, which is incorporated by reference in MCR 2.114(F), both of which provide that a trial court may award a sanction for the "cost and fees incurred," with MCR 2.114(E), which gives the trial court discretion to impose a sanction which is not restricted to the expenses or costs incurred.<sup>100</sup> Likewise, the Court of Appeals recognized that "... MCR 2.403(O)(6)(b) does not restrict the trial court's authority to award a prevailing party only 'the costs and fees incurred'" and that the rule "...does not require that the attorney fee be 'incurred'...." Instead, the rule only requires the trial court to determine a "reasonable' attorney fee ... for services necessitated by the rejection of the case evaluation."<sup>101</sup> A prevailing party is entitled to a mandatory award of case evaluation sanctions without regard to whether attorney fees have been "incurred."

The foreign authority upon which the Defendants have relied, *Albert, Goldberg, Butler, Norton & Weiss, PC v Quinn*, 410 NJ Super 510; 983 A2d 604 (App Div 2009), found that a law firm litigant was not entitled to recover attorney fees under the New Jersey analog to Fed R Civ P 11 because the New Jersey rule, similar to the federal rule, only allowed for

<sup>97</sup> *Wilson, supra*, Exhibit "J," at \*6.

<sup>98</sup> Defendants' Application for Leave, pp. 3, 14 and 20.

<sup>99</sup> *First Michigan Bank, supra*, 232 Mich App at 720-721 and the items cited therein.

<sup>100</sup> 232 Mich App at 726-727.

<sup>101</sup> Appellee's Appendix 1, p. 22, quoting from MCR 2.403(O)(6)(b).

the recovery of attorney fees "incurred."<sup>102</sup> *Albert, Goldberg, et al, supra*, enforced the "plain language" of the New Jersey rule which included the word "incur."<sup>103</sup> *Albert, Goldberg, et al* limited its decision to the particular rule before it and offered no opinion as to the allowance of attorney fees to a law firm litigant under another statute, court rule, or contract.<sup>104</sup> *Albert, Goldberg, supra*, is inapplicable to MCR 2.403.

Other courts have found that law firm litigants are entitled to recover attorney fees where the governing statute or court rule does not include the word "incur." The District Court in *Treasurer, Trustees of Drury Industries, Inc. Healthcare Plan and Trust*, distinguished between the ERISA statute before it, 29 USC 1132 (g)(1) which fails to include the word "incur" and the incur-laden statutes involved in other cases which did not allow recovery of attorney fees.<sup>105</sup> Also, in *Hall v Laroi, supra*, the Hawaiian Supreme Court found that the governing Hawaiian statute did not require the law firm litigant to have incurred fees.<sup>106</sup> *Hall, supra*, distinguished its statute which did not include the word "incurred" from other statutes which included language that the attorneys' fees be "incurred."<sup>107</sup> MCR 2.403(O)(6)(b); does not use the word "incurred." The Defendants' argument is inconsistent with the plain language of that court rule.

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<sup>102</sup> *Albert, Golberg, et al, supra*, 983 A2d at 623-625; Defendants' Application for Leave, p. 21.

<sup>103</sup> *Albert, Golberg, et al, supra*, 983 A2d at 625.

<sup>104</sup> 983 A2d at 625, n. 8.

<sup>105</sup> *Treasurer, Trustees of Drury Industries, Inc. Healthcare Plan and Trust*, 2011 WL 3204756 (ED Mo 2011, unpublished), at \*3 (Exhibit "H"), affirmed 692 F3d 888 (8<sup>th</sup> Cir 2012).

<sup>106</sup> 238 P3d at 718 ["...in all actions in the nature of assumpsit, reasonable attorneys' fees **shall** be taxed."] (emphasis in original).

<sup>107</sup> 238 P3d at 722.

I. The public policy analysis of *Watkins, supra*, is inapplicable to this matter.

*Watkins, supra*, held that as a matter of public policy, an individual attorney whom appeared in pro per was not entitled to recover case evaluation sanctions.<sup>108</sup> However, the plain language of MCR 2.403(O) and the law applicable to an organization's right to recover attorney fees are determinative of the instant appeal. For that reason, it is unnecessary for the Court to undertake or rely upon a public policy analysis.<sup>109</sup> Generally, a court will not rule upon public policy grounds contrary to the plain language of a governing statute.<sup>110</sup> In *Detroit City Council*, the Court of Appeals found that the statute at issue therein did not authorize the Mayor to veto a certain resolution. During the course of its ruling, the Court reiterated the general rule that it "... cannot rule on policy grounds in contravention of the plain language of the statute."<sup>111</sup>

Likewise, the plain language of MCR 2.403(O), which lacks an exception for a Michigan professional corporation, together with *Kay v Ehler's, supra*, recognition that an organization represented by its attorney is entitled to recover fees, are determinative of this matter. It is unnecessary for the Court to consider the policy-based analysis of *Watkins, supra*.

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<sup>108</sup> *Watkins, supra*, 220 Mich App at 343.

<sup>109</sup> *Omdahl, supra*, 478 Mich at 429, n. 2, "while this public policy reasoning may be of interest, we decline to rely on it here because the statutory language can be applied plainly without resort to public policy analysis ...."

<sup>110</sup> *Detroit City Council v Mayor of Detroit*, 283 Mich App 442, 461; 770 NW2d 117 (2009).

<sup>111</sup> *Id.*

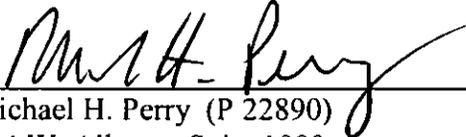
**RELIEF REQUESTED**

The Plaintiff requests the Court to deny the Defendants' Application for Leave to Appeal.

Respectfully submitted,

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