

STATE OF MICHIGAN
IN THE SUPREME COURT

FRASER TREBILCOCK DAVIS & DUNLAP, P.C.

Plaintiff-Appellee

V

BOYCE TRUST 2350, BOYCE TRUST 3649, and
BOYCE TRUST 3650

Defendant- Appellant

Case No. Publ Opn 2-6-14

Court of Appeals Docket No.
302835, 305149, and 3007002

Midland County Circuit Court No.
09-006135-CZ

J. Landerbach

FRASER TREBILCOCK DAVIS & DUNLAP By: Michael H. Perry (P22890) Nicole L. Proulx (P67550) Attorneys for Plaintiff/ Appellees 124 West Allegan, Suite 1000 Lansing, MI 48933 (517) 482-5800	<i>JK</i> W. JAY BROWN PLC By: W. Jay Brown (P58858) Attorney for Defendants/ Appellants 213 East Main, Suite 2 Midland, Michigan 48640 (989) 486-3676 (866) 929-2108 (fax) brown@midlandmichiganlawyer.com
---	--

DEFENDANT-APPELLANTS' APPLICATION FOR LEAVE TO APPEAL

148931-3

APL

4/8

1343359

Submitted By:
W. Jay Brown PLC
By: W. Jay Brown (P58858)
213 East Main, Suite 2
Midland MI 48640
(989) 486-3676
brown@midlandmichiganlawyer.com

FILED

MAR 1 8 2014

LARRY S. ROYSTER
CLERK
MICHIGAN SUPREME COURT

TABLE OF CONTENTS

Index of Authorities	ii
Statement of Order Appealed from and Request for Relief	iv
Statement of Questions Presented for Review	iv
Application for Leave to Appeal	1
Introduction and Grounds for Appeal	1
Statement of Facts	4
Argument	9
Standard of Review	9
Legal Analysis	10
Relief Requested	22
Exhibits	23
Trial Court Order 2/15/11	23
Trial Court Opinion and Order 06/29/11	25
Trial Court Order 7/21/11	53
Trial Court Order 11/3/11	55
Court of Appeals Majority Opinion	59
Court of Appeals Dissenting Opinion	86

INDEX OF AUTHORITIES

Cases

<i>Alpert, Goldberg, Butler, Norton & Weiss, P.C. v. Quinn</i> , 410 N.J. Super. 510, 546-47, 983 A.2d 604, 625 (App. Div. 2009).....	21
<i>Aronson v. U.S. Dep't of Hous. & Urban Dev.</i> , 866 F.2d 1, 5 (1st Cir.1989).....	21
<i>Attard v. Citizens Ins. Co. of Am.</i> , 237 Mich. App. 311, 602 N.W.2d 633, 642 (1999).....	12
<i>Baker & Hostetler LLP v. U.S. Dep't of Commerce</i> , 473 F.3d 312, 324 (D.C. Cir. 2006).....	2,16
<i>Bolt v. City of Lansing (On Remand)</i> , 238 Mich.App. 37, 61, 604 N.W.2d 745 (1999).....	9
<i>Carpenter & Zuckerman v Cohen</i> , 124 Cal Rptr 3d 598 (2011).....	16,17
<i>Christopher P. Aiello P.C. v Morrison</i> , 2003 WL 22138029 (Mich App 2003).....	4,12
<i>Committee v. Dennis Reimer Co., LPA</i> , 150 F.R.D. 495 (D.Vt., 1993).....	14
<i>Dana v. Am. Youth Found.</i> , 257 Mich. App. 208, 215, 668 N.W.2d 174, 179 (2003).....	15,16
<i>Estate of Mitchell v. Dougherty</i> , 249 Mich. App. 668, 681, 644 N.W.2d 391, 398 (2002).....	14
<i>Falcone v IRS</i> , 714 F2d 646, 648 (6 th Cir 1983).....	18
<i>Florence Cement Co. v. Vittraino</i> , 292 Mich. App. 461, 474, 807 N.W.2d 917, 925 (2011).....	13
<i>FMB-First National Bank v Bailey</i> , 232 Mich App 711, 719; 591 NW2d 676 (1999).....	3,11,14,20
<i>Fraser Trebilcock Davis & Dunlap P.C. v Boyce Trusts</i> , Nos. 302835, 305149 and 307002, --- N.W.2d ---- (2014).....	13,15
<i>Hagen v. Jones-Hagen</i> , No. 270930, 2008 WL 902107 at *5 (Mich.Ct.App. Apr. 3, 2008).....	11
<i>Haliw v. Sterling Hts.</i> , 471 Mich. 700, 706, 691 N.W.2d 753 (2005).....	9
<i>In re Adams Estate</i> , 257 Mich App 230, 237, 667 N.W.2d 904 (2003).....	9
<i>In re Attorney Fees and Costs</i> , 233 Mich App 694, 593 NW2d 58 (1999).....	14
<i>In Tindall v. One 1973 Ford Mustang</i> , 315 F. App'x 533,534 (6th Cir. 2009).....	2,11
<i>James v. Alberts</i> , 464 Mich. 12, 15; 626 NW2d 158 (2001).....	13
<i>Jones v. Ippoliti</i> ,	

52 Conn. App. 199, 212, 727 A.2d 713, 719-20 (1999).....	19
<i>Jones, Waldo, Holbrook & McDonough v. Dawson,</i> 923 P.2d 1366, 1375 (Utah 1996).....	2,17
<i>Kay v. Ehrler,</i> 499 U.S. 432, 436, 111 S. Ct. 1435, 1437, 113 L. Ed. 2d 486 (1991).....	15,16
<i>Laracey v. Fin. Institutions Bureau,</i> 163 Mich. App. 437, 446, 414 N.W.2d 909, 913 (1987).....	2,11,16,20
<i>Law Offices of Joumana Kayrouz, P.L.L.C. v. Gappy,</i> 305008, 2012 WL 3590183 (Mich. Ct. App. Aug. 21, 2012).....	4
<i>Lisa v. Strom,</i> 183 Ariz. 415, 419, 904 P.2d 1239, 1243 (Ct. App. 1995).....	3,21
<i>McAuley v GM,</i> 457 Mich 513; 578 NW2d 282 (1998).....	3,12,19,20
<i>Mossman v. Millenbach Motor Sales,</i> 284 Mich. 562, 568, 280 N.W. 50, 53 (1938).....	13
<i>Nemeth v. Abonmarche Dev., Inc.,</i> 457 Mich. 16, 37-38, 576 N.W.2d 641 (1998).....	9
<i>Omdahl v West Iron County Board of Education,</i> 478 Mich 423; 733 NW2d 380 (2007).....	1,2,10,11
<i>Peterson v. Fertel,</i> 283 Mich. App. 232, 235, 770 N.W.2d 47 (2009).....	9
<i>Plunkett & Cooney, PC v. Capitol Bancorp, Ltd.,</i> 212 Mich.App 325, 329; 536 NW2d 886 (1995).....	3,13
<i>Rafferty v Markovitz,</i> 461 Mich 265; 602 NW2d 367.....	19
<i>Sands & Associates v. Juknavorian,</i> 209 Cal. App. 4th 1269, 1272, 147 Cal. Rptr. 3d 725, 726 (2012).....	2
<i>Sherman v. Sea Ray Boats, Inc.,</i> 251 Mich. App. 41, 47, 649 N.W.2d 783, 786 (2002).....	15
<i>Smith v. Khouri,</i> 481 Mich. 519, 751 N.W.2d 472 (2008).....	6,9
<i>Swanson & Setzke v Henning,</i> 774 P2d 909 (1989).....	18
<i>Troszak v. Prantera,</i> Nos. 280285, 282112, 2008 WL 5273547 at *4 (Mich.Ct.App. Dec.18, 2008).....	11,14
<i>Watkins v. Manchester,</i> 220 Mich. App. 337, 344-45, 559 N.W.2d 81, 85(1996).....	3,10,12,20
<i>White v. Arlen Realty & Development Corp.,</i> 614 F.2d 387, 388 (4th Cir.1980).....	18
<i>Yake v. Michigan State Police,</i> 199083, 1997 WL 33331035 (Mich. Ct. App. Nov. 21, 1997).....	16

Statutes

MCLA 15.240 (6) 20
MCLA 600.2405 (6).....9
MCLA 600.2591.....15
42 USLA 1988.....15

Court Rules

MCR 2.114.....14
MCR 7.302 (B).....1
MCR 2.117 (B)(3)(B).....12,14

STATEMENT OF ORDER APPEALED FROM AND REQUEST FOR RELIEF

Defendant Boyce Trust 2350, Boyce Trust 3649 and Boyce Trust 3650 (hereafter “Boyce Trusts”) hereby appeal the Opinion of the Michigan Court of Appeals issued February 6, 2014. Boyce Trusts requests that this Court reverse the opinion of the Court of Appeals which is conflicts with the dissenting opinion of Chief Judge Murphy. Boyce Trust requests that this Court adopt the result consistent with Judge Murphy’s dissent, whether by adopting his reasoning or on another basis. Boyce Trusts requests that this Court order that Plaintiff is not entitled to any case evaluation sanctions.

STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

Did the Court of Appeals err by holding that the Plaintiff law firm was entitled to collect case evaluation sanction when it represented itself in the underlying case?

Defendant-Appellant answers “Yes”

Plaintiff- Appellee answers “No”

APPLICATION FOR LEAVE TO APPEAL

Defendants-Appellants appeal the Court of Appeals Majority 2-1 decision which allowed the Plaintiff law firm to collect case evaluation sanctions. Defendant-Appellants request that this Court hold, consistent with the partial dissenting opinion of Chief Judge Murphy, that the Plaintiff-Appellee is not entitled to any case evaluation sanctions.

INTRODUCTION AND GROUNDS FOR APPEAL

This appeal concerns the propriety of an award of case evaluation sanctions to a law firm that appeared pro se in a matter on its own behalf in a collection case. In the broadest terms, the inquiry is whether a law firm may be afforded a special and preferred status over other pro se parties that also incur lost time during a litigation case but cannot be so compensated. Is a lawyer's time more important or special than an engineer or doctor's time? An order upholding the Court of Appeals majority decision sends such a message to society.

The Michigan Court Rules, MCR 7.302(B) dictate that an application for leave to appeal show sufficient grounds for the Supreme Court to accept the application. Defendant-Appellants rely upon MCR 7302(B)(3) ("the issue involves legal principles of major significance to the state's jurisprudence") and MCR 7.302(B)(5) (the majority opinion "conflicts with a Supreme Court decision or another decision of the Court of Appeals.") In particular, the majority opinion of the Court of Appeals (the "Decision") provides the following specific grounds to justify the grant of leave to appeal:

1. The Decision is Directly Contrary to *Omdahl v West Iron County Board of Education*, 478 Mich 423; 733 NW2d 380 (2007). As noted by Chief Judge Murphy in his partial dissent, the *Omdahl* case required separate identities between the attorney and

the client in order for attorney fees to be recovered. This separate identity was not present in the instant case.

2. The Decision Invites Expansion. The Court of Appeals decision also opens the door to a significant expansion of statutory attorney fee requests under such acts as the Open Meetings Act, Freedom of Information Act and Consumer Protection Act. To date, Michigan Courts have always held that lawyers representing themselves cannot obtain attorney fees under these three acts. *Omdahl v West Iron County Board of Education*, 478 Mich 423; 733 NW2d 380 (2007); *Laracey v FIB*, 163 Mich App 437; 414 NW2d 909 (1987); *Tindall v. One 1973 Ford Mustang*, 315 F. App'x 533, 534 (6th Cir. 2009) Now, based on the Court of Appeals majority decision, such attorney fees will only be denied if the attorney making the request is unincorporated. This has happened under Federal jurisprudence based on the Kay footnote. *Baker & Hostetler LLP v. U.S. Dep't of Commerce*, 473 F.3d 312, 324 (D.C. Cir. 2006).
3. The Decision Encourages a Cottage Fee Industry. Michigan law has long recognized the dangers of creating a cottage industry of allowing lawyers to use the law “solely as a way to generate fees rather than to vindicate personal claims.” *Laracey v. Fin. Institutions Bureau*, 163 Mich. App. 437, 446, 414 N.W.2d 909, 913 (1987). In addition to expanding fees recoverable via statutes, the Decision will encourage lawyers to put attorney fee provisions in their retainer agreements. *See Sands & Associates v. Juknavorian*, 209 Cal. App. 4th 1269, 1272, 147 Cal. Rptr. 3d 725, 726 (2012).¹ *See Also Jones, Waldo, Holbrook & McDonough v. Dawson*, 923 P.2d 1366, 1375 (Utah 1996)

¹ The decision denied a law firm contractual attorney fees based upon an earlier decision which rejected the argument based on the Kay footnote.

4. The Decision Serves to Undermine the Public Perception of the Justice System.

Michigan Courts have recognized that allowing lawyers to collect fees when appearing pro per “would most likely contribute to the widespread public perception that the courts exist primarily for the benefit of the legal profession.” *Watkins v. Manchester*, 220 Mich. App. 337, 344-45, 559 N.W.2d 81, 85 (1996). The Decision and its inevitable expansion will contribute this widespread public perception. *See Also Lisa v. Strom*, 183 Ariz. 415, 419, 904 P.2d 1239, 1243 (Ct. App. 1995)

5. The Decision is contrary to other existing decisions. The Decision is in direct conflict with the following Michigan cases:

- a. *FMB-First National Bank v Bailey*, 232 Mich App 711, 719; 591 NW2d 676 (1999) (holding that a law firm representing itself did not “incur” any attorney fees.)
- b. *Watkins v. Manchester*, 220 Mich. App. 337, 344-45, 559 N.W.2d 81, 85 (1996) (holding that an attorney collecting his own fees cannot recover case evaluation sanctions)
- c. *Plunkett & Cooney, PC v. Capitol Bancorp, Ltd.*, 212 Mich.App 325, 329; 536 NW2d 886 (1995) (holding that “a client’s employment of one member of a law firm is deemed to be the employment of the firm itself” and that there is no identity separate from the law firm for the lawyers within in the firm.)
- d. *McAuley v GM*, 457 Mich 513; 578 NW2d 282 (1998) (holding that fees must be incurred as a prerequisite for case evaluation sanctions)

- e. *Law Offices of Joumana Kayrouz, P.L.L.C. v. Gappy*, 305008, 2012 WL 3590183 (Mich. Ct. App. Aug. 21, 2012) (holding that fees must be incurred prior to being entitled to sanctions)
- f. *Christopher P. Aiello P.C. v Morrison*, 2003 WL 22138029 (Mich App 2003) (holding that a law firm was not entitled to case evaluation sanctions when it represented itself)

6. The Decision is based on Unsound Reasoning. The Decision is based on unsound reasoning which will likely have lasting significance in Michigan jurisprudence if not corrected. It is not logical to use whether a lawyer has incorporated to determine whether attorney fees can be awarded A sole practitioner who works under a PLC (such as the undersigned) would be able to collect attorney fees under the Court of Appeals' decision while a different unincorporated sole practitioner could not.

For the reasons that follow, Boyce Trusts requests that this Court reverse the Court of Appeals majority decision and instead hold, consistent with the partial dissenting opinion of Chief Judge Murphy, that the Plaintiff is not entitled to any case evaluation sanctions.

Statement of Facts

This case involves the collection of attorney fees by the Plaintiff law firm. From its initial complaint through the subsequent appeals, the pleadings have always been signed as follows:

**“FRASER TREBILCOCK DAVIS & DUNLAP P.C.,
Attorney for Plaintiff”**

By: s/Michael H. Perry
Michael H. Perry (P22890)

Plaintiff did not hire outside counsel and all attorneys involved were employees of the Plaintiff law firm. At certain times in the litigation, different attorneys from within the law firm attended different proceedings. The primary attorney on the file was Michael H. Perry. At no time was Plaintiff represented by an attorney outside the umbrella or employment of the Plaintiff law firm.

The case was evaluated on August 19, 2010 and the panel returned an evaluation of \$60,000 in favor of the Plaintiff. The Plaintiff accepted this award and the Defendant rejected. The matter was tried before a jury in November of 2010. On December 17, 2010, a judgment was entered against Defendants for \$70,000 plus interest and costs.

Plaintiff then brought its motion for case evaluation sanctions. Plaintiff requested that the Court award it \$81,149.50 in attorney fees plus such additional attorney fees that would be accrued after January 10, 2011. (*Plaintiff's brief in support of its motion for award of case evaluation sanctions at page 15, register of actions #s 120-123*) Plaintiff sought compensation for seven separate attorneys within the law firm (*Id* at page 2). None of the requested costs were for attorneys outside of Plaintiff's law firm.

Plaintiff provided no evidence of payment of any attorney fees in support of its request. Plaintiff conceded that it pays a salary to the employees that participated in the litigation. (*Id* at page 3). Plaintiff alleged that the case evaluation sanctions would result in "income produced" which would then be allocated to participating attorneys. (*Id*). However, no attorneys would directly receive the fee awarded. All attorneys are employees of the Plaintiff law firm and are paid a salary. *Id*.

Defendants opposed the request for case evaluation sanctions by raising the arguments which are restated in this appeal. (*Defendants' Brief in response to the motion for case evaluation sanctions, Register of Actions #s 125*). Defendants also requested an evidentiary

hearing on the amount of the sanctions to be awarded if the Court determined that it would award sanctions.

Hearing on the motion was held on February 4, 2011. The circuit court found in favor of the Plaintiff as reflected on pages 31-32 of the transcript. The circuit court only discussed two cases and found that it was not bound by published Michigan case law prohibiting an attorney from recovering attorney fees representing him or herself because in this case the plaintiff was a corporation rather than an individual lawyer. (Hearing Transcript, 2/4/11 at pages 31-32). The circuit court also granted the Defendants the right to an evidentiary hearing on the amount of the sanctions. (Hearing Transcript, 2/4/11 at page 32) and noted that “[a]nd as far as I’m concerned, the meter’s still running.” (Hearing Transcript, 2/4/11 at page 33).

The parties engaged in discovery with expert witnesses on the attorney fee issue and filed supplemental briefs. Plaintiff also requested an additional \$34,052.50 for time spent between January 6, 2011 and March 3rd, 2011. (*Plaintiff’s post expert witness deposition brief in support of reasonable attorney fee award at page 7, register of actions # 180*).

Defendants resisted the motion raising the arguments restated below. Hearing was held on the matter and the Court issued its opinion and order on June 29, 2011. The Court noted that the Plaintiff had sought a total of \$120,625.85 in attorney fees and costs from September 21, 2010 to March 3, 2011. (Circuit Court Opinion and Order, 6/29/11 at 2).

The Court addressed the fee request consistent with the framework provided by the Michigan Supreme Court’s opinion in *Smith v. Khouri*, 481 Mich. 519, 751 N.W.2d 472 (2008). It found that the reasonable rate for attorney Michael Perry to be \$300 per hour. (Circuit Court Opinion and Order, 6/29/11 at 8). It also found a specific rate for other attorneys who provided minor amounts of services in the matter. (*Id* at 12).

The Court then determined its view of a reasonable amount of hours to be awarded. It broke this time into three periods (1) pre-trial hours (119.5 hours), (2) trial time (96.8 hours) and (3) post-trial time (172.6 hours). (Opinion at 13). The Court rejected the Defendants' argument that post-judgment hours were not subject to recovery and found that Plaintiff could recover for the significant time spent seeking case evaluation sanctions. (Opinion and Order at pages 14-16).

In discussing the pre-trial hours, the circuit court deducted 13.25 hours from the requested time. This reflected 9 hours of travel time and 4.25 hours spent preparing a motion that was never filed. (Opinion at pages 18-19).

The circuit court made significant deductions for the trial time. Plaintiff had sought to recover 34.5 hours spent by attorney Douglas Austin who attended the trial as the corporate representative. (Opinion and Order at 20). The Court denied Plaintiff recovery for that time. (Id.) Plaintiff also sought to recover 14 hours that attorney Edward Castellani spent attending trial to testify as a witness. (Id.) The Court denied this request. Finally, the Court reduced by 3 hours the time spent by Mike Perry that reflected travel time. (Opinion and Order at page 21).

The circuit court also reduced the post-trial hours claimed by Plaintiff. The Court agreed that the time claimed to have been expended by Mike Perry was "somewhat generous." (Opinion at 21). The Court reduced his post-trial time by 20% across the board and further reduced it by an additional 6 hours of travel time. (Opinion and Order at 23). The Court also reduced the time sought for attorney Kopacz by 5 hours. (Id.)

All totaled, the Court found the reasonable attorney fee amount to be \$80,434.00 (Opinion and Order at 24). This was a 1/3 reduction in the total amount sought (\$120,625.85). The Court also awarded \$4,316.45 in expenses.

In a concluding footnote, the Court granted the Plaintiff's request to file for supplemental attorney fees. By order dated July 28, 2011, the Court entered an order for the amount it previously awarded and further provided Plaintiff a period of 28 days to supplement its request for fees. The July 28th order specifically noted that it "neither resolves the last pending claim nor closes the case." (July 28 Order at page 3).

The Plaintiff subsequently filed its motion for supplemental attorney fees and for taxable costs. On October 18, 2011, the Circuit Court issued its Opinion and Order Granting Reasonable Supplemental Attorney Fees and Costs. The Court awarded Plaintiff an additional \$21,253.60 in attorney fees. On November 3, 2011, a final order was entered by the Court awarding Plaintiff supplemental attorney fees and costs. (November 3, 2011 order)

The Court of Appeals majority decision first found that a law firm representing itself is not a pro se litigant for purposes of entitlement to case evaluation sanctions (Court of Appeals Majority Opinion at page 21). The Court of Appeals majority decision further found that a law firm did not have to actually incur attorney fees to be awarded case evaluation sanctions. (Court of Appeals Majority Opinion at page 22).

Chief Judge Murphy dissented on the issue of entitlement to attorney fees. He reasoned that the law firm which represented itself in the litigation appeared *in propria persona* and did not have "an identity separate from its attorney(s) for purposes of establishing an attorney-client relationship." (Court of Appeals Partial Dissenting Opinion at page 3).

For the reasons that follow, Boyce Trusts request that this Court hold, consistent with the partial dissent of Chief Judge Murphy, that Plaintiff-Appellee is not entitled to any case evaluation sanctions.

ARGUMENT

I. **WHERE A LAW FIRM REPRESENTS ITSELF IN A COLLECTION CASE, IT IS NOT ENTITLED TO CASE EVALUATION SANCTIONS FOR THE REASON THAT IT DOES NOT HAVE AN ATTORNEY-CLIENT RELATIONSHIP AND APPEARS PRO PER AND BECAUSE IT DOES NOT INCUR ATTORNEY FEES.**

Standard of Review

The circuit court's decision to award case evaluation sanctions is a question of law which is subject to de novo review. *Peterson v. Fertel*, 283 Mich. App. 232, 235, 770 N.W.2d 47 (2009). Michigan adheres to the "American rule" which provides that "attorney fees are not ordinarily recoverable unless a statute, court rule, or common-law exception provides the contrary." *Nemeth v. Abonmarche Dev., Inc.*, 457 Mich. 16, 37-38, 576 N.W.2d 641 (1998); *Haliw v. Sterling Hts.*, 471 Mich. 700, 706, 691 N.W.2d 753 (2005). *Smith v. Khouri*, 481 Mich. 519, 526, 751 N.W.2d 472, 477 (2008).

The party requesting attorney fees bears the burden of proving they were incurred, and that they are reasonable. *Bolt v. City of Lansing (On Remand)*, 238 Mich.App. 37, 61, 604 N.W.2d 745 (1999). Because case evaluation sanctions are in degradation of the American Rule for attorney fees codified at *MCLA* 600.2405(6), for any fees to be recovered they must be "expressly authorized" *Haliw*, 471 Mich., 707. The fact that certain fees are not expressly excluded is not the question. If there is any question regarding the entitlement to fees, the request must be denied. A trial court may not award attorney fees on the basis of what it perceives to be fair or on equitable principles. *In re Adams Estate*, 257 Mich App 230, 237, 667 N.W.2d 904 (2003).

Legal Analysis

The analysis of the issue must begin with the Michigan Supreme Court's holding in *Omdahl v West Iron County Board of Education*, 478 Mich 423; 733 NW2d 380 (2007), related to the Open Meetings Act. The Open Meetings Act allows a successful plaintiff to recover actual attorney fees. The Court discussed each word within the phrase. As for the requirement that the fee be an "attorney fee," the Court noted that:

Attorney" is defined as a "lawyer" or an "attorney-at-law." Random House Webster's College Dictionary (2001). The definition of "lawyer" is "a person whose profession is to represent clients in a court of law or to advise or act for them in other legal matters." *Id.* (emphasis added). And the definition of "attorney-at-law" is "an officer of the court authorized to appear before it as a representative of a party to a legal controversy." *Id.* (emphasis added). Clearly, the word "attorney" connotes an agency relationship between two people

Omdahl v. W. Iron County Bd. of Educ., 478 Mich. 423, 428, 733 N.W.2d 380, 383-84 (2007)

Further, "fee" is relevantly defined as "a sum charged or paid, as for professional services or for a privilege." *Id.* In denying the request for attorney fees made by the Plaintiff attorney, the Court cited *Watkins v. Manchester*, 220 Mich. App. 337, 344-45, 559 N.W.2d 81, 85 (1996) in determining that there was no agency relationship between two separate people present, which is necessary for the incurrence of attorney fees. *Id.* at 432.

Michigan has a strong history of denying attorney fees to attorneys that represent themselves. In *Watkins*, the Defendant was an attorney who was sued by his former divorce client. After the Defendant prevailed, the trial court awarded him case evaluation sanctions.

The Court of Appeals reversed the trial court and held that an attorney who represents himself should be treated the same as other pro se litigants. To do otherwise and "allow litigant-attorneys to recover compensation for time spent in their own behalf, while not extending such a

rule to non-attorneys would most likely contribute to the widespread public perception that the courts exist primarily for the benefit of the legal profession.” *Id*

In *Laracey v FIB*, 163 Mich App 437; 414 NW2d 909 (1987), the Michigan Court of Appeals considered whether a pro per party could recover attorney fees in a FOIA action. Again, the Court found that a pro se party has no attorney and thus the pro se party could not recover attorney fees after prevailing in a FOIA action. Doing otherwise would “afford them a windfall for costs that were never incurred.” *Id* at 445.

In *Tindall v. One 1973 Ford Mustang*, 315 F. App'x 533 (6th Cir. 2009), the Federal Court of Appeals denied an attorney representing himself attorney fees pursuant to the Michigan Consumer Protection Act. In doing so, the Court summarized Michigan law as follows:

Defendants correctly contend that under Michigan law, a party proceeding *pro se* has not incurred attorney fees and therefore cannot recover attorney fees, even if the party is a licensed attorney. See *Omdahl v. West Iron County Bd. of Educ.*, 478 Mich. 423, 733 N.W.2d 380, 386 (2007) (“[T]here must be separate identities between the attorney and the client, and a person who represents himself or herself cannot recover actual attorney fees even if the *pro se* individual is a licensed attorney.”); *FMB-First Mich. Bank v. Bailey*, 232 Mich.App. 711, 591 N.W.2d 676, 683 (1998) (“Because an attorney is an agent or substitute who acts in the stead of another, a party acting *in propria persona* cannot truly be said to be an attorney for himself. It is thus impossible to incur attorney fees when one is not represented by an attorney, i.e., someone other than the actual party.”); *Troszak v. Prantera*, Nos. 280285, 282112, 2008 WL 5273547 at *4 (Mich.Ct.App. Dec.18, 2008) (unpublished) (“*pro se* parties are not eligible for attorney fee sanctions”); *Hagen v. Jones-Hagen*, No. 270930, 2008 WL 902107 at *5 (Mich.Ct.App. Apr. 3, 2008) (unpublished) (“No party representing him or herself, even a party who is a licensed attorney, is entitled to attorney fees.”).

Id at 534-535.

Given the clear prohibition by Michigan law for an attorney recovering fees when representing themselves, Plaintiff crafted an argument in an attempt to avoid the clear law of Michigan. Plaintiff argued that it was a professional corporation with a distinct existence apart

from its attorneys and was therefore not subject to the bar against recovery. This distinction was accepted by the Majority Decision of the Court of Appeals.

The Majority Decision is directly contrary to the case of *Christopher P. Aiello P.C. v Morrison*, 2003 WL 22138029 (Mich App 2003). There, the professional corporation sued to collect its attorney fees. Case evaluation sanctions were sought at the conclusion of trial. The Court of Appeals affirmed the denial of sanctions by holding as follows:

“[A] litigant representing himself may not recover attorney fees as an element of costs or damages under either a statute or a court rule because no attorney fees were incurred.” *McAuley*, supra at 520. Litigant-attorneys are not permitted to recover compensation for time spent in their own behalf. *Watkins v. Manchester*, 220 Mich.App 337, 344-345; 559 NW2d 81 (1996). Moreover, MCR 2.117(B)(3)(b), provides that the appearance by an attorney is deemed to be the appearance of every member of the law firm. Therefore, the appearance in this case of Aiello PC for Aiello would include the appearance of Aiello, a member of that firm. ***Consequently, the trial court did not err in treating the two parties, Aiello and Aiello PC, as pro se litigants and in denying their request for attorney fees. (emphasis added)***

Leave to appeal the decision to the Michigan Supreme Court was sought. This court denied leave to appeal by finding that it was “not persuaded that the questions presented should be reviewed by this Court.” *Christopher P. Aiello, P.C. v Morrison*, 470 Mich. 859, 680 N.W.2d 415 (2004)

In another case addressing the case evaluation rule, the Court of Appeals in *Attard v. Citizens Ins. Co. of Am.*, 237 Mich. App. 311, 602 N.W.2d 633, 642 (1999) held that the Court rule allowing of a “reasonable attorney fee” did not limit the fee to a single attorney. Rather, time spent by multiple attorneys could be considered because:

[A] client is represented by every member of the law firm which that client employs. See MCR 2.117(B)(3)(b), which provides that “[t]he appearance of an attorney is deemed to be the appearance of every member of the law firm,” and that “[a]ny attorney in the firm may be required by the court to conduct a court ordered conference or trial.”

Id at 329

Therefore, the entire law firm was the “attorney” for purposes of the case evaluation rule.

In this case, Plaintiff represented itself and brought suit on its own behalf. It presented no separate retainer agreement with any attorney. It presented no evidence of payment of fees to any attorney. No attorneys appeared in the matter in their individual capacities. Plaintiff appeared pro se.

The argument made in the circuit court and again on appeal by the Plaintiff is that the corporation wasn't representing itself because individual attorneys appeared. This argument holds no weight because a corporation can only act through its agents. *Mossman v. Millenbach Motor Sales*, 284 Mich. 562, 568, 280 N.W. 50, 53 (1938); *Florence Cement Co. v. Vittrano*, 292 Mich. App. 461, 474, 807 N.W.2d 917, 925 (2011). Further, as Chief Judge Murphy pointed out:

A law firm necessarily acts through its attorneys and other personnel. The firm's attorneys are thus agents of the law firm, and this agency relationship exists because the attorneys are employed by the law firm, not because the law firm is a client of its attorneys. And “[u]nder fundamental agency law, a principal is bound by an agent's actions within the agent's actual or apparent authority.” *James v. Alberts*, 464 Mich. 12, 15; 626 N.W.2d 158 (2001). Stated otherwise, when an attorney acts within his or her actual or apparent authority, the firm employing the attorney has acted.

Fraser Trebilcock Davis & Dunlap P.C. v Boyce Trusts, Nos. 302835, 305149 and 307002, --- N.W.2d ---- (2014). (CJ Murphy, partially dissenting)

Beyond case evaluation, it has long been the rule in Michigan that a law firm does not have an identity separate from those attorneys who appear in court on its behalf. In *Plunkett & Cooney v Capitol Bancorp*, 212 Mich App 325; 536 N.W.2d 886 (1995), the Court considered the possibility of a separate identity in context of an attorney fee payment dispute. The Court found that “a client’s employment of one member of a law firm is deemed to be the employment of the firm itself.” *Id* at 329. Accordingly, it was the law firm and not the individual attorney that was

entitled to an attorney fee as the law firm was the client's lawyer. *See also Estate of Mitchell v. Dougherty*, 249 Mich. App. 668, 681, 644 N.W.2d 391, 398 (2002)

There has been significant recognition of the unity between lawyers and the law firms in which they practice in cases involving requests for attorney fees pursuant to MCR 2.114. In *FMB-First National Bank v Bailey*, 232 Mich App 711, 719; 591 NW2d 676 (1999), the Court denied the Defendant law firm attorney fee sanctions because it appeared pro se and even though it was certainly represented by individual lawyers within the firm. The Court stated:

One who represents himself cannot be said to have had a liability case on himself. A person cannot impose a liability for attorney fees on oneself. Thus, Koetje and S, B & J² did not "incur" attorney fees, because they represented themselves. Similarly, the definition of "attorney" seems to preclude the possibility of incurring attorney fees unless someone is represented by a separate individual. Because an attorney is an agent or substitute who acts in the stead of another, a party acting in propria persona cannot truly be said to be an attorney for himself. It is thus impossible to incur attorney fees when one is not represented by an attorney, i.e., someone other than the actual party. *See Committee v. Dennis Reimer Co., LPA*, 150 F.R.D. 495 (D.Vt., 1993) (no attorney fees for pro se litigants under FR Civ P 11 because pro se parties do not "incur" attorney fees within the meaning of the court rule).

FMB- First National at 725-26

The same result occurred in the unpublished case of *Troszak v Prantera*, 2008 WL 5273547 (Mich App 2008)

Under Michigan law, the appearance of a lawyer is deemed to be the "appearance of every member of the law firm." *MCR 2.117(B)(3)*. Numerous courts have relied on this provision to emphasize the lack of separate entity between an individual attorney and the firm he or she represents and that the law firm, rather than the individual, is the attorney in an action.

The Court in *In re Attorney Fees and Costs*, 233 Mich App 694, 593 NW2d 58 (1999) determined that an individual lawyer and his law firm were each held liable for sanctions

² The law firm

pursuant to MCLA 600.2591. The Court looked to the pleadings and found that the “pleadings, motions, and other papers filed by [the individual] identified him as part of [the law firm].” *Id* at 707. As such, the law firm was properly considered the attorney in the case. *Id*.

Here too, the pleadings, motions and other papers were signed under the Plaintiff’s corporate heading. Moreover, the law firm was not represented by Michael Perry in his individual capacity – all pleadings were filed by Fraser Trebelcock with Michael Perry signing on the law firm’s behalf.

Like the circuit court, the Court of Appeals Majority based its decision upon footnote 7 in the United States Supreme Court case of *Kay v Ehrler*, 499 US 432 (1991), a case considering an attorney fee request under a specific federal discrimination statute. In dicta, the *Kay* court stated as follows in footnote #7:

Petitioner argues that because Congress intended organizations to receive an attorney’s fee even when they represented themselves, an individual attorney should also be permitted to receive an attorney’s fee even when he represents himself. However, 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.

Kay v. Ehrler, 499 U.S. 432, 436, 111 S. Ct. 1435, 1437, 113 L. Ed. 2d 486 (1991)

Kay concerned a request for attorney fees under 42 U.S.C.A. § 1988 (West). It is not binding on Michigan Courts and both the Court of Appeals Majority and the circuit court erred in basing its ruling on law construing a federal anti-discrimination statute and by failing to recognize and abide by controlling Michigan law.

When Michigan law provides adequate guidance for the determination of a question, it is not proper to expand the inquiry outside the decisions of this state. *Sherman v. Sea Ray Boats, Inc.*, 251 Mich. App. 41, 47, 649 N.W.2d 783, 786 (2002). Even federal interpretations of closely parallel provisions are only persuasive authority. *Dana v. Am. Youth Found.*, 257 Mich.

App. 208, 215, 668 N.W.2d 174, 179 (2003). Where Michigan law is dispositive, it is unnecessary to consider decisions from other jurisdictions. *Yake v. Michigan State Police*, 199083, 1997 WL 33331035 (Mich. Ct. App. Nov. 21, 1997). In *Laracey v. Fin. Institutions Bureau*, 163 Mich. App. 437, 444, 414 N.W.2d 909, 912 (1987), the Court reviewed and rejected federal law which would allow a lawyer-litigant to recovery fees under the federal FOIA act.

Moreover, this Court should find *Kay* inapplicable. It is important to consider the entire language of the *Kay* footnote and the indication that an “organization” is represented by “in house” or “pro-bono” counsel. It is clear from the context that the Supreme Court was not referring to a law firm collecting its own fees. As has been noted in a subsequent case, those cases applying the *Kay* footnote to private law firms acting on their own behalf use “slim reed dictum and disregard[] the reasoning underlying the *Kay* holding.” *Baker & Hostetler*, 473 F3d 312, 372 (DC CA 2006)(in dissent).

A very good discussion of the distinction between a law firm representing itself and an “organization” as contemplated by the *Kay* footnote #7 was presented in the recent California case of *Carpenter & Zuckerman v Cohen*, 124 Cal Rptr 3d 598 (2011). There, a law firm sought “reasonable attorney fees” for work performed by an associate of the firm. The law firm argued that it was entitled to reasonable attorney fees because the associate “was not a partner in the law firm and did not have any financial interest in that firm.” *Id* at 607.³

The Court distinguished a law firm proceeding on its own behalf from a corporation proceeding via an in-house counsel. In particular, the Court cited a previous panel’s holding in this regard:

“There is no problem [in this case] of disparate treatment; in-house attorneys, like private counsel but unlike pro se litigants, do not represent their own personal interests and are not seeking remuneration simply for lost opportunity costs that

³ The law firm had apparently already conceded that it could not recover for time spent by a partner.

could not be recouped by a nonlawyer. A corporation represented by in-house counsel is in an agency relationship, i.e., it has hired an attorney to provide professional legal services on its behalf. Nor is there any impediment to the effective and successful prosecution of meritorious claims because of possible ethical conflict or emotional investment in the outcome. The fact that in-house counsel is employed by the corporation does not alter the fact of representation by an independent third party.

Carpenter & Zuckerman v. Cohen, 195 Cal. App. 4th 373, 381, 124 Cal. Rptr. 3d 598, 604 (2011) (quoting *PLCM Group v Drexler* 22 Cal.4th at p. 1093, 95 Cal.Rptr.2d 198, 997 P.2d 511 (2000))

The Court then found that a private law firm was distinguishable from an in-house counsel situation:

[T]he law firm and its partners, in seeking to recover the reasonable value of her services on appeal, in effect, were seeking to recover “lost opportunity costs” (*PLCM, supra*, 22 Cal.4th at p. 1093, 95 Cal.Rptr.2d 198, 997 P.2d 511; *Gilbert, supra*, 87 Cal.App.4th at p. 221, 104 Cal.Rptr.2d 461), i.e., the value they would have received from a client had Ms. Klein expended a comparable amount of hours representing that client's interests. The involvement of “lost opportunity costs” is one rationale for denying attorney fees for self-representation. (*PLCM, supra*, 22 Cal.4th at 1093, 95 Cal.Rptr.2d 198, 997 P.2d 511.) Therefore, notwithstanding that Ms. Klein was not a partner of the law firm, plaintiff with a direct financial interest in the outcome of the claims asserted against it, she was an employee of that firm hired primarily to perform services for firm clients and, presumably, to generate profits for the firm. This status distinguishes her from the “independent third party” in-house counsel in *PLCM* and makes her status analogous to the attorneys who represented their pro se law firm in *Witte, supra*, 141 Cal.App.4th 1201, 46 Cal.Rptr.3d 845. As the court in that case observed, the attorneys of the pro se law firm were the “product” of the firm and were therefore “comparable to a sole practitioner representing himself or herself.” (*Id.* at p. 1211, 46 Cal.Rptr.3d 845.)

Carpenter & Zuckerman v. Cohen, 195 Cal. App. 4th 373, 385, 124 Cal. Rptr. 3d 598, 608 (2011). Like the attorney discussed in *Carpenter*, all Plaintiff attorneys involved are employees of the firm and primarily represent clients of the firm.

Courts in other states have also recognized and explained the rationale in denying attorney fees to law firms that sue to collect their own fees. In *Jones, Waldo, Holbrook & McDonough*, 923 P2d 1366 (2000), the Utah Supreme Court considered a law firm's request for

attorney fees incurred for representing itself in a collection action. The Court denied the law firm attorney fees and set forth its reasoning for doing so as follows:

We remain “loath to enhance that advantage by giving the lawyer-litigant recovery not only as a successful party, but also as that party's attorney.”

There are other compelling public policy reasons for holding that “pro se litigants should not recover attorney fees, regardless of their professional status.” *Id.* “Financing litigation by fee awards provides a new incentive to lawyers to increase their fees. The adversary's predictable response is to litigate the fee claim itself.” Dan B. Dobbs, Awarding Attorney Fees Against Adversaries: Introducing the Problem, 1986 Duke L.J. 435, 438 [hereinafter Dobbs]. This gives rise to the danger of “creating a cottage industry for claimants . . . as a way to generate fees rather than to vindicate personal claims. *Falcone v IRS*, 714 F.2d 646, 648 (6th Cir 1983) (declining to award attorney fees for pro se representation to prevailing plaintiffs under Freedom of Information Act). As the court in *White v. Arlen Realty & Development Corp.*, 614 F.2d 387, 388 (4th Cir.1980), observed: “It is axiomatic that effective legal representation is dependent not only on legal expertise, but also on detached and objective perspective. The lawyer who represents himself necessarily falls short of the latter.”

In addition, “[i]n the case of a paying client, the lawyer who wants to retain client satisfaction will have an incentive to limit the total fee. That incentive is not present in fee award cases.” *Dobbs*, supra, at 485. Although the case at hand provides a working illustration of all of the above problems, this last concern is probably the most serious. By way of example, Shaw sought to charge Dawson \$900 for his time preparing for and appearing at trial as a witness. A captive client, such as Dawson became in this collection action, has no control over the amount of time the attorney will spend or how it will be spent. And plaintiff has no motivation to explore less expensive collection alternatives.

Id at 1374-1375.

The Court further expressly found that “**a law firm does not incur fees when it uses its own attorneys in a collection action.**” *Id.* (*emphasis added*)

A second case which presents substantial rationale for the bar against pro se law firms receiving attorney fees is *Swanson & Setzke v Henning*, 774 P2d 909 (1989). There, the Idaho Court of Appeals specifically said:

The law firm in this case has not attempted to avoid pro se status by arguing that as a professional service corporation, it has been represented by separate counsel.

However, we note that even if such an argument were made, it would not alter our conclusion. When a rule of law is enunciated on whether pro se lawyer litigants are entitled to attorney fee awards, that rule should be applied consistently. It should not turn on distinctions among proprietorships, partnerships, corporations, or other modes of law practice.

Id., n 3 (See Also *Jones v. Ippoliti*, 52 Conn. App. 199, 212, 727 A.2d 713, 719-20 (1999))

The Plaintiff acted to collect its own fees and appeared pro se. As such, it may not recover case evaluation sanctions and the Court should reverse the case evaluation award in its entirety.

The Michigan Supreme Court has twice addressed the necessity of incurring attorney fees as a pre-requisite for recovery of case evaluation sanctions. The first instance was in *McAuley v GM*, 457 Mich 513; 578 NW2d 282 (1998). There, this Court denied case evaluation sanctions where the litigant had already received statutory attorney fees. The Court noted that “[i]t is well established that generally only compensatory damages are available in Michigan and that punitive sanctions may not be imposed.” *Id.* at 519-520. Further, “the purpose of compensatory damages is to make the injured party whole for the losses **actually suffered**” and therefore “the amount of recovery for such damages is inherently limited by the amount of the loss; the party may not make a profit or obtain more than one recovery.” *Id.* at 520 (*emphasis added*). This Court emphasized that this is demonstrated by the “well-established body of law holding that a litigant representing himself may not recover attorney fees as an element of costs or damages under either a statute or a court rule because no attorney fees were incurred.” Therefore, the Court concluded that “*[i]n order for a party to recover attorney fees under the mediation rule, he must show that he has incurred such fees.*” *Id.* (*emphasis added*)

In the year following the *McAuley* decision, this Court reaffirmed its holdings in the case of *Rafferty v Markovitz*, 461 Mich 265; 602 NW2d 367. There, this Court went even further and

specifically repudiated “the dicta in *McAuley* that left open the possibility of recovering attorney fees under both a court rule and a statute where each attorney-fee provision serves an independent purpose.” *Rafferty*, note 6.

In *FMB-First National Bank v Bailey*, 232 Mich App 711, 719; 591 NW2d 676 (1999), the court held that a law firm representing itself did not “incur” any attorney fees. It is undisputed that Plaintiff paid no attorney fees in this matter. Indeed, Plaintiff’s argument and the circuit court’s reasoning on this point is that Plaintiff incurred costs in the form of an opportunity cost. This “opportunity cost” argument has been soundly rejected in Michigan and throughout the country.

In *Watkins, Supra*, the Court fully rejected the “opportunity cost” argument:

- Moreover, we believe that to allow litigant-attorneys to recover compensation for time spent in their own behalf, while not extending such a rule to non-attorneys would most likely contribute to the widespread public perception that the courts exist primarily for the benefit of the legal profession. Pro se litigants who are not attorneys also may suffer lost income or lost business opportunities as the result of their time spent in litigation.

Watkins v. Manchester, 220 Mich. App. 337, 344-45, 559 N.W.2d 81, 85 (1996)

The Plaintiff incurred no attorney fees and had no costs outside of lost business opportunities as a result of time spent in litigation.

In *Laracey v FIB*, 163 Mich App 437; 414 NW2d 909 (1987), the Court rejected the “lost opportunity cost” argument in the context of a Freedom of Information Act claim by upholding the trial court’s finding that “it was irrelevant that plaintiff himself is an attorney, and that plaintiff’s lost opportunity cost has no greater significance than the lost opportunity costs of laymen who proceed pro se.” *Id* at 441.⁴

⁴ Plaintiff has taken the position that the case evaluation rule does not use the word “incur.” This is a distinction without meaning as the Freedom of Information Act provision on attorney fees likewise does not use the word incur. *MCLA 15.240(6)*.

Other cases have echoed the inherent problem with compensating attorneys and law firms for lost opportunity costs. As an example, the New Jersey Court of Appeals offered the following:

To compensate an attorney for his lost hours would confer on the attorney a special status over that of other litigants who may also be subject to frivolous claims and are appearing pro se. There is nothing to indicate that that was the intent of the rule. As stated in *Aronson v. U.S. Dep't of Hous. & Urban Dev.*, 866 F.2d 1, 5 (1st Cir.1989),

[n]or are we impressed by the argument that a pro se lawyer should be awarded fees because of the time he/she must spend on the case. The inference is that the time so spent means the sacrifice of fees he/she would otherwise receive. But a lay pro se must also devote time to the case. If such a litigant is a professional person, such as an author, engineer, architect, etc.[.] the time expended may also result in loss of income. Lawyers are not the only persons whose stock in trade is time and advice.

This concept was also articulated in *Lisa v. Strom*, 183 Ariz. 415, 904 P.2d 1239, 1243 (1995):

A non-lawyer pro se litigant, however, also suffers an "opportunity" cost, yet has no right to recover for his time spent preparing for litigation. Moreover, because of his unfamiliarity with the practice of law, a *layman* appearing pro se must spend more time preparing for the case than the *lawyer* appearing pro se. The time a layman spends in court preparing memoranda, investigating facts, is time when he cannot be practicing his own trade-but we do not allow him an award of fees for time spent working on the case because his recoverable attorney's fees are those he is reasonably obligated to pay his attorney, not his "opportunity" costs. The judicial system would be unfair if an attorney-litigant could qualify for a fee award without incurring the potential out-of-pocket obligation that the opposing non-lawyer party must bear in order to qualify for a similar award. Moreover, when both parties opt to litigate pro se, it would be palpably unjust for one of them (the pro se lawyer) to be eligible for an attorney's fee award, while the other (the pro se layman) would not. [(Emphasis in original).]

Alpert, Goldberg, Butler, Norton & Weiss, P.C. v. Quinn, 410 N.J. Super. 510, 546-47, 983 A.2d 604, 625 (App. Div. 2009)

Plaintiff incurred no attorney fees. Plaintiff did not even present any evidence of any lost business opportunities. Plaintiff had the advantage in this litigation of not paying attorney fees

while Defendants had to pay their counsel. If Plaintiff and its attorneys were lay persons, they could not be compensated for their time.

An award of attorney fees to Plaintiff rewards it for suing to collect its attorney fees. It compensates them beyond its damages and is punitive. As Plaintiff did not incur any attorney fees, it may not be awarded any attorney fees as case evaluation sanctions.

CONCLUSION AND REQUEST FOR RELIEF

Defendant-Appellants request that this Court reverse the Majority Opinion of the Court of Appeals insofar as it allows the Plaintiff-Appellee law firm to obtain any case evaluation sanctions. Specifically, Defendant-Appellants requests that this Court hold that a law firm which represents itself is not entitled to case evaluation sanctions

Dated: March 17, 2014

W. JAY BROWN PLC



By: W. Jay Brown (P58858)
Attorney for Defendants/Appellants
213 East Main, Suite 2
Midland MI 48640
(989) 486-3676
brown@midlandmichiganlawyer.com