

STATE OF MICHIGAN  
IN THE SUPREME COURT

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

Plaintiff-Appellee/Cross-Appellant, Court of Appeals Docket Nos. 302835,  
305149 and 307002

v

BOYCE TRUST \$ 2350, 3649, and 3650, <sup>BOYCE TRUST</sup> <sup>BOYCE TRUST</sup> Midland County Circuit Court  
Case No.: 09-6135-CZ-L

Defendants-Appellants/Cross-Appellees

Fraser Trebilcock Davis & Dunlap, P.C.  
Attorneys for Plaintiff-Appellee/Cross-Appellant  
124 W. Allegan, Suite 1000  
Lansing, Michigan 48933  
Telephone: (517) 482-5800  
Fax: (517) 482-0887

W. Jay Brown (P58858)  
W. Jay Brown, PLC  
Attorney for Defendants-  
Appellants/Cross-Appellee  
213 East Main, Suite 2  
Midland, MI 48640  
Telephone: (989) 486-3676  
Fax: (866) 929-2108

148931 (54)

XAPPL

**PLAINTIFF-APPELLEE'S APPLICATION FOR LEAVE TO  
APPEAL AS CROSS-APPELLANT**

5/6

43811



**FILED**

APR 14 2011

LARRY S. ROYSTER  
CLERK  
MICHIGAN SUPREME COURT

**TABLE OF CONTENTS**

INDEX OF AUTHORITIES ..... iii

JUDGMENT APPEALED FROM, RELIEF REQUESTED AND JURISDICTIONAL STATEMENT ..... iv

GROUND FOR THE APPLICATION FOR LEAVE TO APPEAL ..... v

STATEMENT OF QUESTION INVOLVED ..... vi

STATEMENT OF FACTS ..... 1

    A. Fraser Trebilcock's Request for Case Evaluation Sanctions ..... 3

    B. The Trial Court's June 29, 2011 Opinion and Order ..... 4

    C. Fraser Trebilcock's motion for a supplemental award of reasonable attorney fees from March 4, 2011 forward. .... 5

    D. The Trial Court's October 18, 2011 Opinion. .... 6

    E. The Court of Appeals' Ruling. .... 7

ARGUMENT ..... 8

    I. THE PROCEEDINGS TO OBTAIN THE AWARD OF CASE EVALUATION SANCTIONS WERE NECESSITATED BY THE DEFENDANTS' REJECTION OF THE CASE EVALUATION. .... 8

        A. Standard of Review ..... 8

        B. Fraser Trebilcock is the prevailing party and is entitled to recover case evaluation sanctions. .... 8

        C. There is a causal nexus between the Defendants' rejection of case evaluation and the Trial Court's proceedings to obtain the award of case evaluation sanctions. .... 8

            1. Case Evaluation Sanctions Process ..... 10

            2. The meanings of "nexus" and "process" ..... 11

            3. The Court of Appeals' Decision Conflicts with its Prior Unpublished Opinion in *Wilson v Riebschleger*, 2010 WL 1979290 (2010, Mich App), *lv den* 488 Mich 857 (2010), *reh den* 488 Mich 951 (2010). .... 13



4. Awarding Attorney Fees for the Time Spent During the Case Evaluation  
Sanctions Process is Consistent with and Serves the Purpose of the "Fee-  
Shifting" Mechanism of MCR 2.403(O)(6). ..... 14

RELIEF REQUESTED ..... 15



## INDEX OF AUTHORITIES

### Cases

<i>Allard v State Farm Insurance Co.</i> , 271 Mich App 394; 722 NW2d 268 (2006) .....	8
<i>Haliw v Sterling Heights</i> , 471 Mich 700; 691 NW2d 753 (2005) .....	9, 13
<i>Markethos v American Employers Ins Co.</i> , 465 Mich 407; 633 NW2d 371 (2001).....	14
<i>People v Borchard-Ruhland</i> , 460 Mich 278, 285; 597 NW2d 1 (1999).....	14
<i>People v Laider</i> , 491 Mich 339; 817 NW2d (2012) .....	11
<i>Smith v Khouri</i> , 481 Mich 519; 751 NW2d 472 (2008).....	8, 10, 11, 14
<i>Wilson v Riebschleger</i> , 2010 WL 1979290 (2010, Mich App Unpublished), <i>lv den</i> 488 Mich 857 (2010), <i>reh den</i> 488 Mich 951 (2010) .....	v, 13, 14
<i>Young v Nandi</i> , 490 Mich 889; 804 NW2d 316 (2011).....	9, 13

### Statutes

MCL 600.6013 .....	2, 7
--------------------	------

### Rules

MCR 2.403(O)(6)(b) .....	passim
MCR 2.621 .....	5
MCR 2.625 .....	2
MCR 7.215(C)(1).....	14
MCR 7.302.....	iv, v

### Other Authorities

Black's Law Dictionary (Revised 4 <sup>th</sup> Ed., 1968).....	12
<i>Webster's Third New International Dictionary Unabridged Edition</i> (1993).....	11, 12



**JUDGMENT APPEALED FROM, RELIEF REQUESTED AND  
JURISDICTIONAL STATEMENT**

The Plaintiff/Appellee ("Fraser Trebilcock") applies for leave to appeal as Cross-Appellant from part of the Court of Appeals' February 6, 2014 Opinion which held that Fraser Trebilcock, the prevailing party entitled to case evaluation sanctions, was not entitled to recover case evaluation sanctions for the time it devoted to pursuing them.<sup>1</sup>

Fraser Trebilcock requests the Court to grant this Application for Leave to Appeal and find that Fraser Trebilcock is entitled to case evaluation sanctions for the time it devoted to pursuing them and reverse the Court of Appeals' decision.

Fraser Trebilcock filed the instant Application for Leave to Appeal as Cross-Appellant within 28 days after the Defendants/Appellants filed their Application for Leave to Appeal. For that reason, the Court has jurisdiction to consider the instant Application as Cross-Appellant.<sup>2</sup>



---

<sup>1</sup> Cross-Appellant's Appendix 1 - Court of Appeals' Opinion, p. 24.

<sup>2</sup> MCR 7.302(D)(2).

## GROUNDS FOR THE APPLICATION FOR LEAVE TO APPEAL

This Application for Leave to Appeal as a Cross Appellant involves a legal principal of major significance to the jurisprudence of the state, i.e., whether a prevailing party entitled to recover case evaluation sanctions pursuant to MCR 2.403(O)(6)(b) is entitled to include a reasonable attorney fee for the case evaluation sanctions proceedings.<sup>3</sup>

The Court of Appeals' decision that a prevailing party entitled to recover case evaluation sanctions is not entitled to include a reasonable attorney fee for services pertaining to the case evaluation proceedings is clearly erroneous and will cause a material injustice in both this matter and all other matters in which prevailing parties seek to recover case evaluation sanctions.<sup>4</sup>

The Court of Appeals' decision conflicts with the Court of Appeals' decision in *Wilson v Riebschleger*, 2010 WL 1979290 (2010, Mich App Unpublished), *lv den* 488 Mich 857 (2010), *reh den* 488 Mich 951 (2010). *Wilson* held that the Trial Court therein had properly included 20 hours of post-judgment legal services, including the prevailing party's attorney's preparation and filing of a motion for case evaluation sanctions, in calculating the reasonable attorney fee to which that party was entitled pursuant to MCR 2.403(O)(6)(b).<sup>5</sup> The instant Court of Appeals' decision conflicts with *Wilson, supra*.<sup>6</sup>

---

<sup>3</sup> MCR 7.302(B)(3).

<sup>4</sup> MCR 7.302(B)(5).

<sup>5</sup> Cross-Appellant's Appendix 2 - *Wilson, supra*, 2010 WL 1979290, at \*6.

<sup>6</sup> MCR 7.302(B)(5).



## STATEMENT OF QUESTION INVOLVED

- I. WHETHER THE PROCEEDINGS TO OBTAIN THE AWARD OF CASE EVALUATION SANCTIONS WERE NECESSITATED BY THE DEFENDANTS' REJECTION OF THE CASE EVALUATION?

The Court of Appeals said "No."

The Defendants-Appellants/Cross-Appellee would say "No."

The Plaintiff-Appellee/Cross-Appellant says "Yes."



## 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>7</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>8</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>9</sup>

Fraser Trebilcock's Application for Leave to Appeal as a Cross-Appellant arises out of the Court of Appeals' determination that Fraser Trebilcock was not entitled to recover case evaluation sanctions for the time it spent pursuing those sanctions.<sup>10</sup>

---

<sup>7</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 3.

<sup>8</sup> Trial Tr. IV, p. 96.

<sup>9</sup> Exhibit "E," December 17, 2010 Judgment for Plaintiff ("Judgment").

<sup>10</sup> Appellee's Appendix 1 - Court of Appeals' Opinion, p. 24.

## 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>11</sup> On or about August 23, 2010, the Plaintiff accepted the case evaluation award.<sup>12</sup> The Defendants rejected the case evaluation award.<sup>13</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>14</sup> On November 4, 2010, the jury found that the Defendants had breached the parties' contract and awarded the Plaintiff \$70,000.<sup>15</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>16</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

---

<sup>11</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>12</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>13</sup> Exhibit 2 attached to Plaintiff's Brief in Support of Motion for Award of Case Evaluation Sanctions (CRA, Item 121, p. 6).

<sup>14</sup> See Trial Tr. I-IV, inclusive.

<sup>15</sup> Trial Tr. IV, p. 96.

<sup>16</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>17</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>18</sup>

**A. Fraser Trebilcock's Request for Case Evaluation Sanctions.**

Fraser Trebilcock initially requested a reasonable attorney fee award for the legal services necessitated from September 21, 2010 to January 6, 2011 by the Defendants' rejection of the \$60,000 case evaluation in the amount of \$81,149.50.<sup>19</sup> The Trial Court held a hearing on the Plaintiff's motion for an award of case evaluation sanctions on February 4, 2011.<sup>20</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>21</sup>

The Defendants requested an evidentiary hearing to contest the award of case evaluation sanctions.<sup>22</sup> The Trial Court granted that request.<sup>23</sup> On February 15, 2011, the Trial Court entered its "Order Regarding the Parties' Post-Trial Motions" in which it denied

---

<sup>17</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>18</sup> The Defendants failed to appeal from the award of the Plaintiff's taxable costs.

<sup>19</sup> CRA, Item 121, p. 6 - Plaintiff's Brief in Support of Plaintiff's Motion for Award of Case Evaluation Sanctions, p. 2 and Exhibits cited therein and attached thereto.

<sup>20</sup> CRA, Item No. 129, p. 6; see also February 4, 2011 transcript.

<sup>21</sup> February 4, 2011 Tr., pp. 31-32.

<sup>22</sup> February 4, 2011 Tr., p. 30.

<sup>23</sup> February 4, 2011 Tr., p. 32. The Court also heard and denied the Defendants' motion for new trial (February 4, 2011 Tr., pp. 3-13).



the Defendants' motion for a new trial, granted Fraser Trebilcock's motion for an award of case evaluation sanctions and scheduled an evidentiary hearing for March 9, 2011.<sup>24</sup>

On March 8, 2011, the Plaintiff filed a brief in support of a reasonable attorney fee award in which the Plaintiff requested attorney fees from September 21, 2010 to January 6, 2011 in the amount of \$81,149.50 and thereafter to March 3, 2011 in an additional amount of \$34,052.50 for a total reasonable attorney fee request in the amount of \$115,202.<sup>25</sup> The evidentiary hearing did not occur on March 9, 2011. Instead, the Trial Court rescheduled the hearing for May 6, 2011.<sup>26</sup> The parties also stipulated that they would present the testimony of their respective expert witnesses and would submit post-deposition briefs before the May 6, 2011 hearing.<sup>27</sup>

After the parties deposed the expert witnesses and filed their briefs, the Trial Court conducted its hearing on May 6, 2011.<sup>28</sup> The Trial Court took the Plaintiff's Motion for an Award of Reasonable Attorney Fees under advisement.<sup>29</sup>

#### **B. The Trial Court's June 29, 2011 Opinion and Order<sup>30</sup>**

On June 29, 2011, the Trial Court found that Fraser Trebilcock was entitled to a reasonable attorney fee in the amount of \$80,434.<sup>31</sup> The Trial Court also granted the Plaintiff's request to seek an award of attorney fees from March 4, 2011 forward.<sup>32</sup>

---

<sup>24</sup> Exhibit "E," ¶¶ 1, 2 and 3, respectively, p. 2.

<sup>25</sup> CRA Item 138, p. 6 and Exhibit 24, p. 1 attached thereto. See also Exhibit "C," p. 2.

<sup>26</sup> CRA Item 142, p. 7.

<sup>27</sup> CRA Item 144, p. 7.

<sup>28</sup> May 6, 2011 Tr., pp. 3 and 12-43. The Trial Court also heard the Defendants' motion for a stay (May 6, 2011 Tr., pp. 3-11).

<sup>29</sup> May 6, 2011 Tr., p. 43.

<sup>30</sup> Exhibit "C."

<sup>31</sup> Exhibit "C," p. 26.

<sup>32</sup> Exhibit "C," p. 27, n. 135.



The Trial Court opined that Fraser Trebilcock was entitled to recover reasonable attorney fees for its post-trial trial court level legal services, including the Plaintiff's defense against the Defendants' motion for a new trial and the Plaintiff's motion for case evaluation sanctions.<sup>33</sup>

**C. Fraser Trebilcock's motion for a supplemental award of reasonable attorney fees from March 4, 2011 forward.**

Pursuant to the Trial Court's June 29, 2011 Opinion and Order, Fraser Trebilcock filed a Supplemental Motion for Reasonable Attorney Fees from March 4, 2011 to August 11, 2011 in the amount of \$38,566.50.<sup>34</sup> Those fees pertained to the services rendered on the following four general categories of activities:

- Motion for Case Evaluation Sanctions, including the instant supplemental combined motion and brief.
- Post-Judgment discovery undertaken pursuant to MCR 2.621(A)(2-3), MCR 2.621(B)(2) and (C).
- Post-judgment collection activities undertaken pursuant to MCR 2.621.
- Matters pertaining to whether the Trial Court should stay its Judgment.<sup>35</sup>

The Plaintiff summarized the dates on which Fraser Trebilcock worked on those four principal tasks and in detail listed the various dates on which these services were performed in whole or in any part.<sup>36</sup> Fraser Trebilcock itemized the dates on which the post-judgment collection activities were performed.<sup>37</sup> Fraser Trebilcock determined that its attorneys had devoted 60.4 hours and \$17,312 in fees on collection-related activities.<sup>38</sup>

<sup>33</sup> Exhibit "C," pp. 14-16.

<sup>34</sup> Case Register of Action, item 216, p. 10; see also Exhibit "P," p. 4 the Plaintiff's combined motion and brief without exhibits.

<sup>35</sup> Exhibit P, p. 5.

<sup>36</sup> Exhibit Q, ¶¶13-17, ¶¶4-6.

<sup>37</sup> Exhibit Q, ¶16, pp. 5-6.

<sup>38</sup> See Exhibit "R," p. 4.

On September 15, 2011, the Trial Court conducted a hearing upon, among other things, the Plaintiff's motion.<sup>39</sup> The Trial Court found that Fraser Trebilcock's fees associated with collection activities were not recoverable.<sup>40</sup> The Trial Court found "that the post-judgment collection related fees that would have been incurred anyway (if the Defendants had accepted the case evaluation) don't (sic) have a causal nexus to the rejection of case evaluation."<sup>41</sup> The Trial Court found that if the Defendant had accepted case evaluation and a judgment was entered, Fraser Trebilcock would be unable to recover its attorney fees for its post-judgment collection activities.<sup>42</sup> The Court ruled that if the parties were unable to agree upon the amount of those non-recoverable collection related fees, the parties should submit their respective arguments on that point and the Court would thereafter issue a written opinion.<sup>43</sup> The parties disagreed upon the amount of the non-recoverable collection related attorney fees and instead submitted a supplemental filing on that issue.<sup>44</sup>

**D. The Trial Court's October 18, 2011 Opinion.**

On October 18, 2011, the Trial Court issued its opinion which referenced its finding that Fraser Trebilcock was entitled to recover attorney fees from March 4, 2011 through August 11, 2011 but was not entitled to recover fees for collection activities.<sup>45</sup> The Court discussed and analyzed the parties' respective post-hearing submissions regarding the non-recoverable collection fees, found that the Plaintiff's determination of those fees was more accurate than that provided by the Defendants, subtracted Fraser Trebilcock's calculation of

---

<sup>39</sup> A copy of the Trial Court's September 15, 2011 motion transcript is Exhibit "S."

<sup>40</sup> Exhibit "S," p. 23.

<sup>41</sup> Exhibit "S," pp. 10-11.

<sup>42</sup> Exhibit "S," p. 23.

<sup>43</sup> Exhibit "S," p. 24.

<sup>44</sup> Case Register of Actions, items 231 (Plaintiff) and 233 (Defendants), p. 11; see also, Exhibit "R," which is a copy of the Plaintiff's Identification of Collection-Related Billings and Supplementation of Case Evaluation Sanctions Request (without exhibit).

<sup>45</sup> Defendants' Exhibit 4 - October 18, 2011 Trial Court Opinion, p. 1.

\$17,312.90 from its requested fees and awarded Fraser Trebilcock a net amount of \$21,253.60 (plus interest pursuant to MCL 600.6013 [8]).<sup>46</sup> In accordance with its Opinion, the Trial Court entered its November 3, 2011 Final Order.<sup>47</sup>

**E. The Court of Appeals' Ruling.**

The Court of Appeals found that the proceedings to obtain the award of case evaluation sanctions were not necessitated by the Defendants' rejection of the case evaluation.<sup>48</sup> The Court of Appeals found that because the case evaluation proceedings had been "complicated" by the Defendants' contention that the Plaintiff was unable to receive attorney fees and by the Defendants' objections to the amount of those fees, that the law firm's entitlement to attorney fees "was a close issue" but "not clearly settled" under Michigan law and because the Trial Court had reduced the Plaintiff's claim by approximately 30 percent there was an "... insufficient causal nexus between Defendants' rejection of case evaluation and the resources Plaintiff expended claiming attorney fees."<sup>49</sup> The Court of Appeals set aside the supplemental attorney fee award and reversed in part the Trial Court's June 29, 2011 and November 3, 2011 Orders and remanded the matter to the Midland County Circuit Court to recalculate the case evaluation sanctions.<sup>50</sup>



---

<sup>46</sup> Defendants' Exhibit 4 - Opinion, pp. 2-3.

<sup>47</sup> Defendants' Exhibit 5.

<sup>48</sup> Appendix 1, p. 24.

<sup>49</sup> Appendix 1, p. 24.

<sup>50</sup> Appendix 1, pp. 24 and 27.

## ARGUMENT

### I. THE PROCEEDINGS TO OBTAIN THE AWARD OF CASE EVALUATION SANCTIONS WERE NECESSITATED BY THE DEFENDANTS' REJECTION OF THE CASE EVALUATION.

#### 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 party than the case evaluation" (emphasis added). An award of case evaluation sanctions is mandatory.<sup>51</sup>

This Court reviews *de novo* the question of law of whether a Trial Court correctly granted case evaluation sanctions to a prevailing party under MCR 2.403(O).<sup>52</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 ruling is the subject of the Defendants' Application for Leave to Appeal.

#### C. There is a causal nexus between the Defendants' rejection of case evaluation and the Trial Court's proceedings to obtain the award of case evaluation sanctions.

MCR 2.403(O)(1) provides that, "if a party has rejected an evaluation and the action proceeds to verdict, that party must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the case evaluation." The rule also defines "actual costs" to include "a reasonable attorney fee based on a reasonably hourly or daily rate as

<sup>51</sup> *Allard v State Farm Insurance Co.*, 271 Mich App 394, 398; 722 NW2d 268 (2006).

<sup>52</sup> *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008).

determined by the trial judge for services necessitated by the rejection of the case evaluation."<sup>53</sup>

The Defendants rejected the case evaluation, the action proceeded to verdict and the verdict was not more favorable to the Defendants than the case evaluation. That means that the Plaintiff, which had accepted the case evaluation and obtained the favorable jury verdict, was entitled to case evaluation sanctions for services necessitated by the Defendants' rejection of the case evaluation.<sup>54</sup> This Court has determined that the phrase "necessitated by the rejection of the case evaluation" "... requires a causal nexus between (the) rejection and incurred expenses."<sup>55</sup> *Haliw, supra*, held that there was not a "causal nexus" between the rejection of case evaluation and a "decision to bring an appeal." Instead, *Haliw* found that "... appellate attorney fees and costs are arguably 'necessitated by' a perceived erroneous Trial Court ruling."<sup>56</sup>

The Court in *Young v Nandi*, 490 Mich 889-890; 804 NW2d 316 (2011) found that the prevailing party therein was not entitled to attorney fees and costs for post-appeal proceedings in a trial court after the appellate process, finding "(t)here is not a sufficient causal nexus between the post-appeal proceedings and the Defendants' rejection of the case evaluation."<sup>57</sup>

Unlike *Haliw*, the instant case does not involve a request for appellate attorney fees. Unlike *Young*, the instant matter does not involve post-appeal proceedings in the Trial Court. Instead, the instant matter arises out of a request for attorney fees for the time spent in the Trial Court's case evaluation sanctions process.

---

<sup>53</sup> MCR 2.403(O)(6)(b) (emphasis added).

<sup>54</sup> MCR 2.403(O)(1) and (6)(b).

<sup>55</sup> *Haliw v Sterling Heights*, 471 Mich 700, 711, n. 8; 691 NW2d 753 (2005).

<sup>56</sup> *Id.*

<sup>57</sup> *Young v Nandi, supra*, 490 Mich at 890, citing MCR 2.403(O)(6)(b) and *Haliw, supra*.

## I. Case Evaluation Sanctions Process.

This Court in *Smith v Khouri*, 481 Mich 519; 751 NW2d 472 (2008) established the process by which a Trial Court must determine the amount of a reasonable attorney fee to be awarded pursuant to MCR 2.403(O). First, a "...Trial Court should begin the process of calculating a reasonable attorney fee ..." by determining the reasonably hourly or daily rate customarily charged in the locality for similar legal circumstances using surveys "... or other credible evidence."<sup>58</sup> The Trial Court should then multiply that reasonable hourly rate by the number of hours expended.<sup>59</sup> *Smith* said that one seeking the attorney fees has the burden of proving the reasonableness of the requested fees.<sup>60</sup> During the course of considering the attorney fee request, the Trial Court must evaluate "... the totality of special circumstances applicable to the case at hand."<sup>61</sup> *Smith* requires the "fee applicant" to submit evidence such as detailed billing records which the Trial Court "... must examine and opposing parties may contest for reasonableness."<sup>62</sup> The party opposing the attorney fee request has a right to an evidentiary hearing to both challenge the fee applicant's evidence and to present its own contrary evidence.<sup>63</sup>

The following activities occurred consistent with *Smith v Khouri's* delineation of the case evaluation sanctions process:

- The Plaintiff moved for an award of case evaluation sanctions.
- The Defendant opposed the Plaintiff's motion and requested an evidentiary hearing.

---

<sup>58</sup> *Smith*, 481 Mich at 522.

<sup>59</sup> *Id.*

<sup>60</sup> *Smith*, 481 Mich at 528.

<sup>61</sup> *Smith*, 481 Mich at 529.

<sup>62</sup> *Smith*, 481 Mich at 532.

<sup>63</sup> *Smith*, 481 Mich at 532.

- The parties presented their respective evidence, including the testimony of their experts witnesses, in support of and in opposition to Fraser Trebilcock's attorney fee request.
- The parties presented their respective arguments to the Trial Court as to whether the Plaintiff was entitled to receive attorney fees.
- The Trial Court found that Fraser Trebilcock was entitled to case evaluation sanctions and exercised its discretion to determine a reasonable attorney fee in accordance with *Smith v Khouri*.

All of the above activities were "necessitated" by the Defendants' rejection of the case evaluation. There is a direct "causal nexus" between the Defendants' rejection of the case evaluation and the parties' Trial Court activities which resulted in the Trial Court's award of a reasonable attorney fee to Fraser Trebilcock pursuant to MCR 2.403(O)(6)(b).

## 2. The Meanings of "Nexus" and "Process."

The Court often uses dictionary definitions to assist it in determining the meaning of undefined terms.<sup>64</sup> The meaning of the words "nexus" and "process" support a finding that there was a causal nexus between the Defendants' rejection of case evaluation and the resources which the Plaintiff expended during the *Smith v Khouri* process of determining the amount of the Plaintiff's reasonable attorney fees. Synonyms for the word "nexus" include "connection, interconnection, tie, (and) link."<sup>65</sup> A "nexus" is also "a connected group or series."<sup>66</sup>

There was clearly a connection, interconnection, tie or link between the Defendants' rejection of case evaluation and the Plaintiff's request for case evaluation sanctions. The Trial Court's process of determining whether Fraser Trebilcock was entitled to a reasonable attorney fee and if so, the amount thereof, involved a "connected group or series" of activities

<sup>64</sup> See generally, *People v Laider*, 491 Mich 339, 347; 817 NW2d (2012).

<sup>65</sup> *Webster's Third New International Dictionary Unabridged Edition* (1993), p. 1524.

<sup>66</sup> *Webster's Third New International Dictionary Unabridged Edition* (1993), p. 1524.

such as the preparation of the motions and briefs, the gathering and presentation of evidence in support of the parties' respective positions and attendance at the Trial Court's hearings. All of these activities occurred during the course of the Trial Court's process of evaluating and ruling upon the Plaintiff's request for a reasonable attorney fee.

The first definition of the word "process" is "a progressive forward movement from one point to another on the way to completion...." It also includes "the action of passing through continuing development from a beginning to a contemplated end" and "the action of continuously going along through each of a succession of acts, events or developmental stages."<sup>67</sup> A "process" is also defined as "a series of actions, motions or occurrences; progressive act or transaction; continuous operation; method, mode or operation, whereby a result or effect is produced; normal or actual course of procedure...."<sup>68</sup>

The Defendants' rejection of case evaluation required and led to a series of actions, motions or occurrences which produced a result: the Trial Court conducted a jury trial, the jury found in favor of the Plaintiff, the Plaintiff was entitled to case evaluation sanctions because the Defendants had rejected the case evaluation, the parties participated in various Trial Court hearings regarding the case evaluation sanctions request and the Trial Court rendered certain decisions during the course of that process.

The issues which the Trial Court addressed during the case evaluation sanctions process and upon which the Court of Appeals relied as the reasons for its erroneous conclusion were part and parcel of the determination of the Plaintiff's right to receive a reasonable attorney fee and the amount of that fee.<sup>69</sup> The Defendants opposed Fraser Trebilcock's request for a reasonable attorney fee. The Defendants also objected to the

---

<sup>67</sup> *Webster's Third New International Dictionary Unabridged Edition* (1993), p. 1808.

<sup>68</sup> *Black's Law Dictionary* (Revised 4<sup>th</sup> Ed., 1968), p. 1369.

<sup>69</sup> Appendix 1, p. 24.

amount of those fees. The Trial Court addressed and ruled upon these issues. Each of those issues and decisions were part of the connected group or series of matters which culminated in the Trial Court's decision. There clearly was a "causal nexus" between the Defendants' rejection of case evaluation and the resources which Fraser Trebilcock expended during the Trial Court's process of ruling upon Fraser Trebilcock's request for case evaluation sanctions.

The Court in *Haliw* found that there was no "causal nexus" because "a perceived erroneous Trial Court ruling" "necessitated" the appellate attorney fees and costs.<sup>70</sup> In *Young v Nandi*, an appellate court's decision to remand the case to the Trial Court "necessitated" the fees pertaining to the post-appellate Trial Court activities.<sup>71</sup> In the instant case, the Plaintiff's entitlement to case evaluation sanctions and the parties' respective arguments regarding the case evaluation issues and the Trial Court's decisions were directly "necessitated by" the Defendants' rejection of case evaluation.

**3. The Court of Appeals' Decision Conflicts with its Unpublished Opinion in *Wilson v Riebschleger*, 2010 WL 1979290 (2010, Mich App), *lv den* 488 Mich 857 (2010), *reh den* 488 Mich 951 (2010).**

*Wilson, supra*, found that one was entitled to a reasonable attorney fee for the preparation and filing of a motion for case evaluation sanctions because those services were "necessitated by the rejection of the mediation award." *Wilson* found that if the defendant/rejecting party therein had "... accepted the case evaluation award as did plaintiff, it would not have been necessary for plaintiff's counsel to prepare for and attend both the trial and post-trial motions."<sup>72</sup> Although *Wilson* did not either cite or discuss the "causal nexus" test of *Haliw, supra*, its ruling is consistent with an application of the "causal nexus" analysis.

<sup>70</sup> *Haliw, supra*, 471 Mich at 711, n. 8.

<sup>71</sup> *Young v Nandi, supra*, 490 Mich at 888-889.

<sup>72</sup> 2010 WL 1979290, at \*6. Those post-trial motions included a motion for case evaluation sanctions.

The instant Court of Appeals' decision is contrary to *Wilson* and is based upon an erroneous analysis and application of the causal nexus principle.<sup>73</sup>

**4. Awarding Attorney Fees for the Time Spent During the Case Evaluation Sanctions Process is Consistent with and Serves the Purpose of the "Fee-Shifting" Mechanism of MCR 2.403(O)(6).**

This Court has recognized that the purpose of MCR 2.403(O)(6)'s:

"...fee-shifting provision is to encourage the parties to seriously consider the evaluation and provide financial penalties to the party that, as it develops 'should' have accepted but did not. This encouragement of settlements is traditional in our jurisprudence, as it deters protracted litigation with all its costs and also shifts the financial burden of trial onto the party who imprudently rejected the case evaluation."<sup>74</sup>

Awarding attorney fees for the time spent during the case evaluation sanctions process is consistent with and serves the purpose of the "fee-shifting" mechanism of MCR 2.403(O)(6).

It is inimical to the purpose of MCR 2.403(O)(6) to place the financial burden of the case evaluation sanction proceedings upon the party which accepted the case evaluation and is entitled to sanctions under MCR 2.403(O)(6).

This Court applies the legal principles which govern the construction and application of statutes when construing a court rule.<sup>75</sup> When the Court construes a statute, it "... should avoid any construction that would render any part of the statute surplusage or nugatory."<sup>76</sup> Disallowing the recovery of attorney fees for the time spent during the case evaluation sanctions process would effectively render the fee-shifting provision nugatory where, as in the instant matter, the opposing party/case evaluation rejector vigorously opposed and objected to the request for case evaluation sanctions. Awarding a reasonable attorney fee for the time

<sup>73</sup> The Plaintiff acknowledges that *Wilson, supra*, an unpublished opinion, is not binding precedent. MCR 7.215(C)(1).

<sup>74</sup> *Smith, supra*, 481 Mich at 527-528.

<sup>75</sup> See generally, *Markethos v American Employers Ins Co.*, 465 Mich 407, 413; 633 NW2d 371 (2001) and authority cited therein.

<sup>76</sup> *People v Borchard-Ruhland*, 460 Mich 278, 285; 597 NW2d 1 (1999) (citation omitted).

spent during the case evaluation sanctions process renders MCR 2.403(O)(6) effective and is consistent with the rule's purpose.

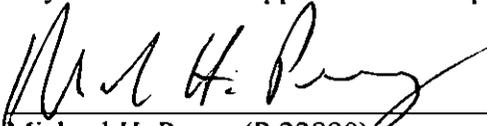
**RELIEF REQUESTED**

The Plaintiff requests the Court to grant this Application for Leave to Appeal, find that the proceedings to obtain the award of case evaluation sanctions were necessitated by the Defendants' rejection of the case evaluation and reverse the Court of Appeals' decision.<sup>77</sup>

Respectfully submitted,

**FRASER TREBILCOCK DAVIS & DUNLAP, P.C.**  
Attorneys for Plaintiff-Appellee/Cross-Appellant

Dated: April 14, 2014

By: 

Michael H. Perry (P 22890)  
124 W. Allegan, Suite 1000  
Lansing, Michigan 48933  
(517) 482-5800



---

<sup>77</sup> Appendix 1, p. 24.