

STATE OF MICHIGAN
IN THE SUPREME COURT

FRASER TREBILCOCK DAVIS & DUNLAP, P.C.

Plaintiff-Appellee

Case No. 148931

V

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

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

Midland County Circuit Court No.
09-006135-CZ

Defendant- Appellant

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**DEFENDANT-APPELLANTS' BRIEF IN OPPOSITION TO THE
PLAINTIFF/APPELLEE'S APPLICATION FOR LEAVE TO APPEAL AS CROSS
APPELLANT**

148931

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JURISDICTIONAL STATEMENT

The Defendants/Appellants agree that this Court has jurisdiction to consider the Plaintiff/Appellee's timely cross application for leave to appeal the Court of Appeals' February 6, 2014 opinion.

COUNTER STATEMENT OF QUESTION INVOLVED

- I. WHETHER THE COURT OF APPEALS CORRECTLY DETERMINED THAT PLAINTIFF WAS NOT ENTITLED TO CASE EVALUATION SANCTIONS FOR PROCEEDINGS TO RECOVER CASE EVALUATION WHERE SUCH FEES WERE SUBSTANTIALLY REDUCED BY THE TRIAL COURT AND WHERE THE DETERMINATION OF SUCH FEES INVOLVED AN UNSETTLED LEGAL QUESTION.

Defendants/Appellants answer "Yes"

Plaintiff/Appellee answers "No"

Plaintiff provided no evidence of payment of any attorney fees in support of its request. Plaintiff did not pay attorney fees to the attorneys who prosecuted the action. 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 and in Defendants application for leave to appeal. 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. 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).

Defendants timely appealed the orders of the circuit court to the Court of Appeals. In its decision, 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). These findings are the subject of the Defendants' application for leave to appeal to this Court.

The Court of Appeals further reversed the circuit court and found that the Plaintiff was not entitled to attorney fees incurred in seeking case evaluation sanctions. (Court of Appeals Majority Opinion at page 24). The Court reasoned that the seeking of case evaluation sanctions had an “insufficient causal nexus” with the rejection of the case evaluation award. The Court of Appeals was unanimous in its opinion on this point. In reaching this conclusion, the Court of Appeals pointed to the fact that the attorney fee request was significantly reduced and the fact that the entitlement of a law firm to sanctions was an unsettled issue.

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 deny the Plaintiff/Appellee’s cross application for leave to appeal and leave intact the unanimous finding of the Court of Appeals that Defendants may not recover attorney fees incurred in seeking case evaluation sanctions.

Argument

The Court of Appeals correctly determined that Plaintiff/Appellee was not entitled to Case Evaluation Sanctions incurred in seeking Case Evaluation Sanctions.

A. Standard of Review

The circuit court’s decision to award case evaluation sanctions is a question of law which the Court of Appeals reviews de novo. *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).

B. Legal Argument

The case evaluation court rule provides that where all parties accept an evaluation, judgment is to be entered in the amount of the evaluation unless the amount is paid within 28 days. *MCR 2.403(M)(1)*. Accordingly, a final judgment is the only thing a Plaintiff entitled to if case evaluation is accepted by both parties. Therefore, only fees incurred necessary to achieve a final judgment has a sufficient causal nexus to be recoverable.

A party that rejects case evaluation is liable for costs unless they improve their position at trial. The costs to be awarded are “actual costs” which are defined as:

- (a) Those costs taxable in any civil action; and
- (b) a reasonable attorney fee based on a reasonable hourly or daily rate as determined by the trial judge for services necessitated by the rejection of the case evaluation.

MCR 2.403(O)(6).

A request for costs must be “filed and served” within 28 days of entry of the final judgment or an order denying a new trial. *MCR 2.403(O)(8)*. There is no provision within the court rules allowing for any further requests for costs beyond the singular request made within the 28 day deadline. If the Court Rule had envisioned subsequent attorney fees, it would not limit the time for submitting a request to 28 days after the final judgment. The circuit court’s decision to allow post-judgment and supplemental costs was in error based on the plain language of the court rule and in applying relevant precedent.

The circuit court’s error was two-fold. First, it allowed costs which were not related to the obtaining of a final judgment. Costs unrelated to the obtaining of a final judgment lack the necessary causal nexus to the rejection of case evaluation. Second, the Court allowed the Plaintiff to recover costs incurred later in time than the final judgment. This violates the temporal nexus required as demarcated by the court rule provision requiring a request for costs to be made within 28 days of the entry of final judgment.

The primary precedent governing the necessary causal nexus between the rejection of case evaluation and subsequent costs incurred is the Michigan Supreme Court case of *Haliw v Sterling Heights*, 471 Mich 700; 691 NW2d 753 (2005). There, the question before the Court was whether appellate attorney fees could be awarded to a Defendant who prevailed in an interlocutory appeal which led to a dismissal. The Court first noted that the proper analysis starts with the proposition that fees are only allowed if “expressly authorized” and rejected the Court of Appeals’ analysis that allowed the fees because they were not specifically excluded. *Id* at 706-707.¹

¹ While the *Haliw* Court based part of its decision to exclude appellate fees based on the organization of the court rules, this distinction was not determinative as the later *Young* decision (discussed *infra*) makes clear.

The Court concluded that in its reading of the court rule, the provision of costs are for those that are “trial-orientated.” *Id. at 711* In reaching this decision, the Court stated as follows in footnote 8:

Moreover, in support of our conclusion that MCR 2.403(O) is trial-oriented, we note that a request for case evaluation sanctions must be made within twenty-eight days after entry of the judgment, MCR 2.403(O)(8), generally a time before the bulk of appellate fees and costs have been incurred. In addition, MCR 2.403(O)(6)(b) allows recovery of attorney fees “necessitated by” the rejection of the case evaluation. While a causal nexus plainly exists between rejection and trial fees and costs, the same cannot be said with respect to rejection and the decision to bring an appeal. Rather, appellate attorney fees and costs are arguably “necessitated by” a perceived erroneous trial court ruling.

We are cognizant of prior decisions of the Court of Appeals that have construed the phrase “necessitated by the rejection” as a mere temporal demarcation. See, e.g., *Michigan Basic Prop. Ins. Ass'n v. Hackert Furniture Distributing Co., Inc.*, 194 Mich.App. 230, 235, 486 N.W.2d 68 (1992). On the basis of the language of MCR 2.403(O), however, we believe the better-reasoned approach goes beyond a temporal demarcation and requires a causal nexus between rejection and incurred expenses.

Haliw v. City of Sterling Heights, 471 Mich. 700, fn 8, 691 N.W.2d 753, 759 (2005). This required causal nexus holding has been subsequently cited with approval by multiple Michigan Courts.²

The *Haliw* court cited to the case of *Keiser v AllState Ins Co*, 195 Mich App 369, 371; 491 NW2d 581 (1992) and noted that in that case “[n]o costs or fees were awarded for any appellate or **post-trial activity**.” *Haliw* at 709 (*Emphasis Added*). The *Haliw* Court also cited the Court of Appeals opinion in *American Casualty Company v Costello*, 174 Mich App 1; 435 NW2d 760 (1989)³. That opinion stated that “[w]e believe that the mediation sanctions provided

² See, for example, *Allard v. State Farm Ins. Co.*, 271 Mich. App. 394, 402, 722 N.W.2d 268, 273 (2006); *Castillo v. Exclusive Builders, Inc.*, 273 Mich. App. 489, 493, 733 N.W.2d 62, 64 (2007)

³ The holding regarding the limitation on attorney fees was cited with approval by the court in *Giannetti Bros Constr v City of Pontiac*, 175 Mich App 442; 438 NW2d 313 (1989).

for in MCR 2.403(O) are **only intended to apply through final judgment at the trial court level.** *American Casualty* at 13 (*emphasis added*).

In *Old Republic Nat Title Holding Co v First Metropolitan Title*, 2010 WL 1056609 (Mich App 2010)⁴, the Court disallowed a claim for fees incurred during an interlocutory appeal. Again, the Court looked at the rule and noted that fees cannot be awarded unless they are expressly authorized.

At hearing on the fee request, Plaintiff sought to limit the application of *Haliw* to the singular proposition that appellate attorney fees are excluded from recovery under the case evaluation rule. And while the Defendants take issue with that position, it has been rendered moot by a subsequent decision of the Michigan Supreme Court.

In an order dated October 21, 2011, the Michigan Supreme Court in the case of *Young v Nandi*, 490 Mich 889, 804 NW2d 316 (2011) reversed the Court of Appeals judgment “finding that the plaintiff is entitled to attorney fees and costs for post-trial work that occurred in the Oakland County Circuit Court following the appellate process.” *Id.* Citing *Haliw*, the Supreme Court explained that “[t]here is not a sufficient causal nexus between the post-appeal proceedings and the defendants’ rejection of case evaluation.” Accordingly, the plaintiff could not recover for post-judgment work in the circuit court.

Thus, the distinction Plaintiff argued which differentiated *Haliw* from the present case was closed by *Young*. The “necessitated by” language in the case evaluation court rule applies both a temporal and a causal limitation. Fees which are not incurred in obtaining a final judgment in the trial court are not recoverable as case evaluation sanctions.

⁴ Attached as part of Appendix 1.

The bar against subsequent fees is confirmed by the language of the court rule requiring that a request for “costs” (including a reasonable attorney fee) be made within 28 days of judgment (or order denying new trial). *MCR 2.403(O)(8)*. The court rules make no provision for further requests for costs or for costs incurred after a final judgment is entered. Applying the clear rule from *Haliw* that a court must start with the proposition that no attorney fees are allowed unless expressly authorized, the failure to provide an avenue to request additional attorney fees and costs incurred after the entry of a final judgment requires the conclusion that such subsequent fees and costs may not be awarded.

Notwithstanding the binding precedent, the circuit court agreed with Plaintiff and also cited the unpublished decision in *Linden Investment Co v Frens*, 2005 WL 3077149 (Mich App 2005) and the decision in *Zdrojewski v Murphy*, 254 Mich App 50 (2002) as support for its finding. However, the circuit court erred by missing the distinction between “post-trial” matters involved in those matters and “post-judgment” matters and in failing to consider the effect of the *Haliw* decision. In both cases relied on by the circuit court, the attorney fees were incurred in motions related to the entry of a final judgment.

In *Linden*, the Court found that the trial court “did not err by allowing recovery for fees associated with the motion for reconsideration and evidentiary hearing.” *Linden Inv. Co. v. Frens*, 2005 WL 3077149 (Mich. Ct. App. Nov. 17, 2005). In *Zdrojewski*, the request for sanction was also for post-trial proceedings and not post-judgment proceedings. *Id* at 72.

Neither of the cases relied on by the circuit court stand for the proposition that a plaintiff can recover costs not associated with the entry of a final judgment. Moreover, the Supreme Court has made clear in its recent order in *Young* that the causal nexus is not just limited to appellate fees and also applies to subsequent circuit court proceedings.

It was error for the circuit court to award the Plaintiff attorney fees outside of those incurred in obtaining a final judgment because such fees lacked a causal nexus. The attorney fees must have been “necessitated” by the rejection of the case evaluation award. The only thing a party is entitled to if it accepts case evaluation is a final judgment. As such, only costs associated with activities that culminate in a final judgment are compensable via a causal nexus to the rejection. *MCR 2.403(6)*; *Haliw, supra*; *Young, supra*.

Haliw found that appellate attorney fees are “arguably necessitated by a perceived erroneous trial court ruling” *Haliw, supra* at note 8. So too, post final judgment attorney fees are necessitated by considerations other than receiving a final judgment. As the Court of Appeals implicitly found in this case, the additional attorney fees were necessitated by the Plaintiff’s request for excessive attorney fees and by the determination of an unsettled legal question.

In a case directly on point, the Court in *Blonde v Long*, 2014 WL 316478 (Mich App 2014) also rejected a request for further fees for seeking case evaluation sanctions. In that case, the Court found that there was a lack of casual nexus between the rejection and the fees as the focus of the hearing was a determination of what was a reasonable rate for counsel.⁵ This case is exactly on point and completely consistent with the decision of the Court of Appeals in the instant case.

Based on the clear holdings of *Haliw* and *Young*, along with the plain language of the court rule, post final judgment fees are not recoverable as case evaluation sanctions. In addition, the supplemental request for attorney fees, made well after the 28 day deadline, cannot be recovered.

⁵ Attached as part of Appendix 1.

In the Plaintiff's initial motion for case evaluation sanctions, it sought \$81,149.50 in attorney fees alleged to have been incurred prior to the January 10, 2011. Included within this request was a demand that Plaintiff be compensated 34.5 hours for a corporate representative to attend trial and 14 hours for an attorney to attend trial as a witness. Plaintiff further sought to be compensated for preparing a motion that was never filed and for travel time. And while the excessive request was subsequently reduced dramatically by the court, it was nonetheless requested and had to be defended.⁶

Defendants exercised their right to challenge the requested fees via an evidentiary hearing. This right is a right conferred by law. *Reed v. Reed*, 265 Mich.App. 131, 166, 693 N.W.2d 825 (2005). At the time the Court granted the request for an evidentiary hearing, it had already concluded that in its own mind, "the meter's still running." (Transcript, 2/5/11 at page 33) The circuit court had pre-determined that it would reward the Plaintiff for seeking its excessive request for case evaluation costs with further attorney fees.

In holding that the Plaintiff was entitled to collect further attorney fees for pursuing case evaluation sanctions, the Court cited to the unpublished case of *Wilson v Riebschleger*, 2010 WL 1979290 (Mich App 2010). Plaintiff also cites *Wilson* as its basis for the application for leave to appeal.

The *Wilson* case is readily distinguishable and/or was wrongly decided. This case did not consider or discuss the *Haliw* ruling and predated the *Young* order. Further, there was no indication that the *Wilson* plaintiff had sought excessive fees which were subsequently reduced. There was no unsettled legal question as to whether fees that was present in the instant case

⁶ Plaintiff further filed two additional requests for supplementation – it asked for \$34,052.50 for the time period of January 6 – March 3rd, 2011 and asked for further fees which are beyond the scope of the appeal covered by this docket number.

which had to be decided. As such *Wilson* is not on point and otherwise cannot stand scrutiny. *Wilson* certainly does not stand for the proposition that a law firm may manufacture additional fee income by making an excessive attorney fee request as the Plaintiff has done here.

It is plain to see that other than obtaining a final judgment, the Plaintiff was not required to expend any further attorney time on the matter. At that point, Plaintiff had a choice on whether to move for case evaluation sanctions. It could have accepted the judgment and moved on to collection.

But instead, Plaintiff chose to seek case evaluation sanctions. As such, the causal nexus between the rejection of the case evaluation and further costs ceased to exist. The Plaintiff spent more attorney time and incurred more costs solely because it chose to seek case evaluation sanctions. Plaintiff was not required to seek sanctions. The Court rule requires a party to file a "request for costs" in order for such costs to be awarded. *MCR 2.403(8)*. It is not mandatory that a party request sanctions.

Moreover, the Plaintiff sought excessive sanctions which were discounted by over 30% by the trial court. Therefore, the proceedings were also necessitated by the fact that Plaintiff sought such excessive fees, including fees for the corporate representative to attend trial.

In awarding the Plaintiff costs for seeking case evaluation sanctions, the circuit court acted punitively in punishing the Defendants for exercising their rights under the law to require that the requested fees and costs be proven in an evidentiary hearing. Defendants had good reason to challenge the fees as the Court found the requested fees and costs to be excessive and discounted them by over 30%.

Upholding the ruling of the circuit court would place the parties in a no-win situation. The circuit court's ruling placed Defendants in the position of either (1) not challenging the

Plaintiff's excessive fee request; or (2) as a result of exercising their rights under the law to require proof via an evidentiary hearing, giving Plaintiff what amounted to a blank check to continue to bill Defendants for and profit from a dispute over their excessive fee request. It cannot be the law and is certainly not equitable for Defendants to have to choose to succumb to the Plaintiff's unreasonable request for fees or pay attorney fees for both their counsel and opposing counsel to resolve the request. It is abhorrent to the fundamental nature of justice and equity for Plaintiff to profit from billing for time spent preparing and trying to justify an excessive attorney fee request.

The circuit court rewarded Plaintiff for requesting excessive fees. If Plaintiff had requested a modest amount, there likely would not have been opposition. But instead, Plaintiff requested an extreme amount of sanctions which required Defendants to actively defend the request. And with the circuit court having already made up its mind that the meter was still running, Plaintiff was encouraged to create a large-scale battle over attorney fees with the promise of being awarded significant fees for a battle they initiated!

The circuit court, having already made up its mind, failed to consider the inherent and fundamental inequity in allowing a law firm to generate more fees simply by filing an excessive request for recovery of fees for time spent, but not billed, by its own employees.

Conclusion and Request for Relief

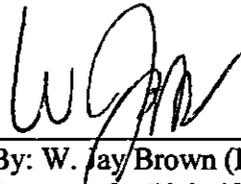
The Plaintiff's application for leave to appeal as cross-appellant should be denied. The Court of Appeals correctly determined that the Plaintiff's request lacked the sufficient nexus to the rejection of the case evaluation award. Defendants submit that under Michigan law, there are two relevant nexus points and does not meet either. There is a temporal nexus as established by the plain language of the court rule and by existing precedent which requires that only fees

incurred prior to the entry of a final judgment can be awarded. Further, there is a causal nexus which is also established by the plain language of the court rule and by existing precedent which holds that the fees must be incurred because of the rejection of case evaluation. This means that fees incurred because a party decides to seek case evaluation sanctions and/or to seek excessive case evaluation sanctions cannot be said to have such a causal nexus.

For the reasons stated above, Defendants request that this Court reject the Plaintiff's cross application for leave to appeal.

Dated: May 2, 2014

W. JAY BROWN PLC

A handwritten signature in black ink, appearing to read 'W. Jay Brown', is written over a horizontal line.

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