

STATE OF MICHIGAN
IN THE SUPREME COURT

LINDITA PIRGU, Guardian and Conservator
of the Estate of FERIDON PIRGU, a Legally
Incapacitated Individual,

Supreme Court No. 150834

Plaintiff-Appellant,
vs.

Court of Appeals No. 314523

Lower Court: 2011-119378-NI

UNITED SERVICES AUTOMOBILE
ASSOCIATION,

Defendant- Appellee.

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**DEFENDANT-APPELLEE'S SUPPLEMENTAL RESPONSE IN
OPPOSITION TO APPLICATION FOR LEAVE TO APPEAL**

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

- I. DID THE COURT OF APPEALS CORRECTLY FIND THAT THE HOLDING IN *SMITH V KHOURI* DOES NOT APPLY TO ATTORNEY FEES AWARDED UNDER MCL 500.3148?**

The Court of Appeals would answer “Yes”

Appellant answers “Yes”

Appellee answers “No”

- II. DID THE COURT OF APPEALS CORRECTLY FIND THAT THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DETERMINING THE ATTORNEY FEE AWARDED TO PLAINTIFF?**

The Court of Appeals would answer “Yes”

Appellant answers “Yes”

Appellee answers “No”

ARGUMENT**I. THE HOLDING IN *SMITH V KHOURI* SHOULD NOT APPLY TO ATTORNEY FEES AWARDED UNDER MCL 500.3148**

The reasoning of *Smith v Khouri*, 481 Mich 519; 751 N.W. 2d 472 (2008) in developing a “new” rubric under which to assess the attorney fee component of case evaluation sanctions under MCR 2.403 should not be applied in the context of MCL 500.3148, the only attorney fee provision at issue in the case at bar. The two provisions differ in their express language and in their purpose. MCR 2.403 explicitly defines the parameters for fees as “(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.” (Emphasis added). In contrast, MCL 500.3148 states:

(1) An attorney is entitled to a reasonable fee for advising and representing a claimant in an action for personal or property protection insurance benefits which are overdue. The attorney’s fee shall be a charge against the insurer in addition to the benefits recovered, if the court finds that the insurer unreasonably refused to pay the claim or unreasonably delayed in making proper payment.

There is no reference in MCL 500.3148 to methods for determining a “reasonable fee” and certainly no requirement that such a fee be “based on a reasonable hourly or daily rate.” As this Court has held:

where a statute or court rule provides its own definition of a term, the term must be applied in conformity with that definition. *Western Michigan Univ Bd of Control*, supra at 539; *Tryc*, supra at 136.

McAuley v. GMC, 457 Mich 513, 524, 578 NW2d 282, 287 (1998).

The *Smith* factors listed in the lead opinion, though not joined by a majority of the Justices, eliminate consideration of whether the fee arrangement actually entered into by the

party was fixed or contingent.¹ For purposes of case evaluation sanctions, the issue is irrelevant because the Court Rule itself expressly requires that the trial court determine a “reasonable hourly or daily rate.” MCL 500.3148 has no such provision. Instead, the statute references only a “reasonable attorney fee”, not necessarily an hourly or daily rate. Given that the majority of plaintiffs’ attorneys in no fault PIP cases actually charge exclusively on a contingent fee basis, as even Judge Gleicher noted in her dissent below, the comments of Justice Corrigan in her concurrence in *Smith*, and the factors employed for the past 25 years in no fault cases including *Wood v DAIIE*, 413 Mich 573, 588; 321 NW2d 653 (1982), the question of whether the actual arrangement was contingent or fixed is a very relevant, though not an exclusive or definitive factor. The *Smith* analysis eliminates as a consideration, the very basis for the majority of no fault fee arrangements for plaintiffs’ attorneys thereby removing from consideration the question of any reasonably *expected* compensation not to mention the actual “rates” which most no fault plaintiffs’ attorneys are actually paid. Justice Taylor noted in the lead opinion that whether the actual fee arrangement was fixed or contingent “may be relevant in other situations” but not in the context of case evaluation sanctions.

The Court of Appeals, in *Universal Rehabilitation Alliance v Farm Bureau Gen. Ins. Co.*, 279 Mich App 691 (2008) lv denied 483 Mich 955 (2009) also noted that the elimination of

¹ Appellee is not certain whether this Court is asking for briefing on whether only the factors enumerated in the lead opinion in *Smith* should be applied to No Fault cases under MCL 500.3148 or only those factors on which a majority of the Justices agreed. Justices Corrigan, Weaver, Markman, Cavanaugh and Marilyn Kelly would all have included factors “3” and “8” from *Wood*, whether the fee arrangement was fixed or contingent and the results compared to what was sought by the prevailing party. The lead opinion eliminates those 2 factors. One reason not to apply *Smith* outside its own self-declared parameter, case evaluation sanctions, is the elimination of confusion caused by the plurality nature of *Smith* and which factors “must” be accounted for by trial judges. The Court of Appeals in *Augustine v Allstate Ins. Co*, 292 Mich App 408; 807 NW2d 77 (2011) seemed to have accepted that whether the actual fee arrangement was fixed or contingent should not be considered, lending credence to the position that the Augustine court, at least, applied only the factors listed in the lead opinion in *Smith*.

consideration of the nature of the actual fee arrangement is not desirable in the context of attorney fees awarded under MCL 500.3148.

Using a “market rate”, particularly one heavily reliant on the State Bar Economics of Law Practice survey, presupposes that “similar cases” and “similar lawyers” are compensated on an hourly basis. Indeed, the Survey reports *only* hourly rates, not actual earnings per case, the true basis of payment for most no fault plaintiffs’ attorneys. Further, the basis for the Survey results cannot be discerned regarding whether the voluntarily reported “rates” include submissions by attorneys paid on a contingency basis reduced to an average hourly rate or not. While the survey is undoubtedly useful when determining, as explicitly required by MCR 2.403, a ‘reasonable hourly or daily rate’ it may not be so effective in determining the reasonable rate customarily actually earned by no fault plaintiffs’ attorneys. There is no specific category for first party no fault cases in the “fields of practice” listed in the Survey further calling into questions the Survey’s relevance on this particular point.

Before *Smith*, the Court of Appeals in *Hartman v Associated Truck Lines*, 178 Mich App 426, 430-431; 444 NW2d 159 (1989) rejected ignoring the contingent fee arrangement in ruling that a plaintiff’s attorney was not “reasonably” compensated for no fault attorney fees as a result of the trial court’s failure to consider the “results achieved” and contingent fee factors:

Although not determinative, another important factor that the court did not consider was the contingent nature of the plaintiff’s fee agreement with his attorney. See *Butt v DAIIE*, 129 Mich App 211, 222-223; 341 NW2d 474 (1983). One consequence of a contingent fee agreement is the risk undertaken by the attorney and client that the attorney’s recovery of attorney fees is dependent on the client’s recovery. The attorney may recover nothing or the attorney may benefit from the arrangement by recovering a larger fee than would result from merely considering the skill, labor and time involved in the lawsuit. The client, in some circumstances, may be unable to proceed with the lawsuit without the availability of the contingent fee agreement. Once the client recovers, however, the client is obligated to pay the attorney fees under the terms of the contingent fee agreement, notwithstanding the amount which a trial court may determine to be reasonable.

Thus, in reviewing the reasonableness issue, it is important to keep in mind that it is the client who will ultimately pay the difference, if any, between a contingent fee agreement (the reasonableness of which is not contested in this case) and the attorney fees allowed by a trial court under MCL 500.3148(1); MSA 24.13148(1).

For these reasons, we conclude that the rigid hourly formula adopted by the trial court to compute the attorney fee that defendant is responsible for was unreasonable under the circumstances of this case. To the extent reasonable, we hold that a contingent fee arrangement is a significant part of the attorney-client relationship which must be considered in arriving at a reasonable attorney fee. Although the controlling criterion remains one of reasonableness, there is no precise formula for computing reasonableness and we reject the application of any rigid formula, whether based on a contingent fee arrangement or an hourly formula, that fails to take into account the totality of the special circumstances applicable to the case at hand.

The analysis set forth in *Smith* does not adequately address the fact that a “reasonable attorney fee” may have little relation to the “market rate” which is the cornerstone and pre-requisite finding to any analysis under *Smith*. The reasoning behind the method in *Smith* is simply inapposite to the context of attorney fees available under MCL 500.3148.

Furthermore, in *McCauley, supra* this Court recognized the distinction between the two attorney fee provisions, previously noted by the Court of Appeals in *Kondratek v Auto Club Ins. Co.*, 163 Mich App 634; 414 NW2d 903 (1987). The *Kondratek* court recognized that the two attorney fee provisions serve different purposes:

The award of attorney fees under the no-fault act serves a purpose separate and distinct from that served by awarding fees under the mediation court rule. The attorney fees awarded under the no-fault act represent a penalty for an insurer's unreasonable refusal or delay in making payments. It is clear that the purpose of the penalty provision is to insure that the injured party is promptly paid. *Darnell v Auto-Owners Ins Co*, 142 Mich App 1; 369 NW2d 243 (1985). In comparison, the policy behind MCR 2.403(O) is to place the burden of litigation costs upon the party who insists upon trial by rejecting a proposed mediation award. *Bien v Venticinque*, 151 Mich App 229; 390 NW2d 702 (1986).

163 Mich App at 639.

The *McCauley* Court also recognized the necessity of considering the results achieved and deducting portions of the plaintiff's legal expenses which were not directly attributable to his unsuccessful claims. 457 Mich at 525. Later, in *Moore v Secura Ins.*, 482 Mich 507, 526; 759 N.W.2d 833 (2008) this Court explicitly recognized that, unlike the case evaluation sanctions which require payment of *all* fees necessitated by the rejection of the case evaluation award (whether or not the fees were partially incurred in pursuing ultimately unsuccessful portions of a claim), the no fault act permits the award of attorney fees only on that portion of a judgment which was not only for overdue benefits but for which the failure to pay was also unreasonable.

The express holding of *Smith v Khouri*, 481 Mich 519 (2008) applies only to case evaluation sanctions imposed pursuant to MCR 2.403 which is designed to compensate a party who "accurately assessed the value" of a case for having to perform legal services after the opposing party rejected the "accurate" award. By definition, this rule presupposes that the accepting party has prevailed and has obtained an award at least equal to the case evaluation award. Moreover, the purpose is to compensate the accepting party for attorney fees "necessitated by the rejection of the" case evaluation award. That phrase presupposes that any trial, for example, and the *whole* trial, occurred as a direct result of the rejecting party's rejection.

Under the no fault scheme, however, attorney fees are only owed on that portion of any claimed benefits which is found to have been both overdue and unreasonably unpaid. Accordingly, as in the present case, the benefits claimed could far exceed the benefits awarded and benefits could be awarded on which no attorney fees would be due because the failure to pay was not unreasonable. Consequently, an entire trial may result in the award of little to no attorney fees under MCL 500.3148 even if the Plaintiff achieves a verdict in his/her favor. Such a result cannot occur under the rubric of MCR 2.403. Starting an analysis with a "market based"

hourly rate multiplied by the number of hours billed is putting the cart before the horse in the no fault setting where the focus is on the question of what attorney time was spent to recover only the overdue benefits the defendant unreasonably refused to pay.

In other words, the purpose of case evaluation sanctions is to compensate the prevailing party from having to try the case *at all*. If an accepting party tried a case on which it received an award of just the case evaluation amount but the verdict was based on only a small percentage of the damages claimed at trial or was based on only a few of many disparate claims, under MCR 2.403, it would not matter so long as the dollar value met or exceeded the case evaluation award. In that situation, it makes sense to consider only the market value for the post case evaluation attorney work because nothing done before the case evaluation rejection date is relevant to the fees 'necessitated by the rejection. Not so with the attorney fee provisions under MCL 500.3148 where the penalty is only to be applied to benefits which were unreasonably overdue, not to all issues which the parties submitted to a trial. From the plaintiff's perspective, the no fault attorney fees could be retrospective not just to before case evaluation but, in theory, before the suit was filed. The considerations are for prevention of undue delay in payment of benefits regardless of whether litigation ensues, not for punishment for litigation itself. On the other hand, plaintiffs should not obtain a windfall when, as here, the plaintiff forces litigation on hundreds of thousands of dollars in PIP benefits which were not deemed to have been due *at all*, let alone overdue.

For case evaluation purposes, many of the *Wood/ MRPC 1.5* factors have little relationship to the purpose of case evaluation sanctions which is simply compensation for the fees resulting from trial. The time limitations imposed on the attorney, the nature and length of the relationship with the client, whether the fee was fixed or contingent and, most importantly,

the amount sought and results obtained are after thoughts because MCR 2.403 has already deemed, as it were, that the prevailing party achieved a favorable result and it doesn't matter whether, *at trial*, the prevailing party sought far more than was awarded so long as he/she was awarded the case evaluation amount or more. No fault attorney fees are dependent entirely on whether the entire 'battle', from start to verdict, was valid, not simply on whether the parties failed to accept a particular amount to settle after litigation. The *Smith* analysis, however, by starting with a mandatory "market rate" for an hourly fee, places emphasis not on whether the entire case should have been prosecuted/defended but simply on what a fair price for the post-case evaluation legal services should be. It is a far more limited consideration under MCR 2.403 as Justice Taylor seems to have recognized in twice acknowledging that factors which might be relevant "in other situations" are not relevant to the determination of case evaluation sanctions.

Although the No Fault Act only permits an award of attorney fees on those benefits awarded which were both overdue and unreasonably denied, the *Smith* factors totally eliminate from the list of proper considerations, the result achieved compared to the result sought. Justice Taylor specifically stated that "factor 3" of the *Wood v DAIIE*, 413 Mich. 573, 588; 321 NW2d 653 (1982) list "may be relevant" in other situations but not in the context of case evaluation sanctions. The results achieved, for purposes of case evaluation sanctions, has already been "considered" by the rule in that, in order to even be entitled to case evaluation sanctions, the prevailing party has already "achieved" the requisite results. Moreover, the purpose of case evaluation sanctions is to provide payment for *any* activity necessitated by the rejection of the award, whereas the penalty provisions of the no fault act do not apply so broadly. In fact, one could easily envision a case in which a no fault plaintiff would be entitled to case evaluation sanctions but to no attorney fees under MCL 500.3148. In that sense, the *Smith* factors fail to

consider a very relevant question, that is, whether a prevailing plaintiff sought benefits which were not awarded and/or sought benefits which, though awarded were not deemed to have been unreasonably denied. The award of no fault attorney fees is one of the ‘situations’ in which Justice Taylor’s opinion may have recognized that the factors eliminated would be relevant.

In this case for example, Plaintiff’s attorney tried the case demanding that about \$370,000 be awarded to his clients. The jury found that only a little over \$62,000 should have been paid. If the case evaluation sanctions analysis were applied, Plaintiff would arguably be entitled to compensation for every hour he reasonably spent even though many of those hours did not result in any award of benefits as was the case in this suit. The No Fault Act, unlike MCR 2.403 does require such global penalties. It affords attorney fees to plaintiffs only on overdue benefits unreasonably denied, not, as does MCR 2.403 for, essentially all fees incurred from the rejection date of the award. The limited scope of No Fault attorney fees, therefore, is not comparable to that of case evaluation sanctions. MCL 500.3148 does not attempt to shift the entire cost of litigation onto a defending insurer as MCL 2.403 does after rejection of an “accurate” case evaluation award, particularly where, as here, only a small percentage of the benefits sought throughout the litigation were actually awarded.

The Court of Appeals in *Universal Rehabilitation* considered whether *Smith* should be applied in cases awarding fees under MCL 500.3148 and determined that it should not. Unlike MCL 500.3148, MCR 2.403 explicitly requires that the court determine a reasonable “hourly or daily” rate. No such limitation exists in the No Fault Act. In two other unpublished Court of Appeals decisions after *Smith*, the Court declined to apply *Smith* in determining a reasonable attorney fee under the Michigan Consumer Protection Act, a statute which permits the award of attorney fees for much the same reason the No Fault Act does...to encourage compliance with

the provisions and allow aggrieved parties who may not have suffered significant financial losses to engage attorneys. *McNeal v Blue Bird Corp.*, 2014 Mich App. Lexis 1082, 2014 WL 2619408 (Mich Ct App June 12, 2014, and *Stariha v. Chrysler Group*, 2012 Mich App LEXIS 1283 (Mich Ct App June 28, 2012).

Appellant is cognizant of the language in *Augustine v Allstate Ins. Co*, 292 Mich App 408; 807 NW2d 77 (2011) indicating that consideration of the fact that the actual fee agreement in that case was contingency was irrelevant because the plaintiff sought an hourly rate once the trial was over. Appellant asserts that changing horses midstream to suit the plaintiff at whichever calculation would yield the higher award is not only unfair but unreasonable. A ‘reasonable’ attorney fee consideration should not ignore what the attorney actually expected to receive when he/she took the case on at its inception. Rather, that approach violates the reasoning of the lead opinion in *Smith* itself which cautions that the calculation of a reasonable fee should not provide a windfall or “improve the financial lot of attorneys.” 481 Mich at 528. Moreover, as noted by the Court of Appeals’ majority decision in this case, the application of the “lead opinion” from *Smith* in *Augustine* was dicta, unnecessary to the determination of the case which turned on the application of the “law of the case” doctrine rather than on the question of whether *Smith* applied at all in No fault cases. In contrast, the Court of Appeals in *Universal* expressly considered and rejected the application of *Smith* to attorney fees awarded under MCL 500.3148 as a specific holding, not mere dicta as did courts considering attorney fee awards under the Michigan Consumer Protection Act. See *McNeal, supra* and *Stariha, supra*.

For all of these reasons, Appellant contends that *Smith v Khouri* should not be applied to No Fault cases in general but, more specifically, should not be applied in this case because, at the

time of the hearings on the attorney fee issues, the controlling case was *Universal Rehab* which held that the *Smith* requirements did not apply to No Fault cases.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DETERMINING THE ATTORNEY FEE AWARDED TO PLAINTIFF.

This case presents a somewhat unusual set of facts in that Plaintiff's counsel provided the trial court with very little evidence to support his demand for \$220,000 in no fault attorney fees. Plaintiff presented the trial court with only a scanty affidavit he signed himself, and a ledger of time allegedly spent by both him and his paralegal. Although Plaintiff's entire appeal is based on an argument that the reversible error committed by the trial court was failure to engage in discourse on each of the *Smith* factors and the *Smith* math, the affidavit omits entirely any information on 5 of the 8 MRPC 1.5 factors, including, most significantly, *any* information regarding the rates customarily charged for similar services by similar attorneys, the cornerstone and starting point for any analysis under *Smith*. Specifically, there is no information regarding whether the case precluded plaintiff's attorney from other employment (factor 2), whether the client or circumstances imposed any time limitations on the attorney (factor 5), any evidence of the attorney's reputation or ability other than to say that he'd been in practice as a personal injury attorney for 18 years (factor 7) and did not mention that his fee with this client was contingent although evidence was presented during trial that Plaintiff's attorney had taken 1/3 of every PIP benefit payments made on the claim from the date of inception resulting in pre-litigation payments of about \$80,000 to the attorney.

Most importantly, however, in light of Plaintiff's insistence that the *Smith* formula regarding a "reasonable hourly rate" based on market evidence was Plaintiff's total failure to provide the court with a single shred of evidence as to what the prevailing rates for his area of practice and experience level were. On appeal, Plaintiff argues that because *Defendant* attached

the State Bar Survey, the trial court was obligated to find out what portions of that survey would apply to Plaintiff's attorney, guess what Plaintiff's attorney thought would be a reasonable rate for his services and award fees based on that rate without any indication that Plaintiff's counsel deserved whatever rate the court guessed at.

Plaintiff's attorney presented no proof that he had ever been paid the \$350 per hour that he stated was his "normal" billing rate. Clearly, that was not the normal rate for this client who did not have an hourly fee arrangement with Mr. Shulman, or so we are left to assume since Mr. Shulman didn't tell the court whether the fee arrangement for trial work was fixed or contingent. Counsel presented the court with no evidence of his standing in the legal community, as required by the *Wood* factors, no evidence of his reputation in the legal community, no evidence at all of any amounts he had *ever* been paid by a client or awarded by a court. He told the court only that he had tried "numerous" cases and "investigated, litigated or settled *dozens*" of no fault cases. Even with the State Bar Survey as guidance, the trial court had insufficient information about Mr. Shulman to fit him into the charts in the Survey.

In spite of failing to provide the court with any information on most of the factors enumerated in *Smith*, Plaintiff's attorney now demands reversal of the trial court's award because the trial court did not address information it did not have. It is undisputed that the burden of proof in establishing a reasonable attorney fee is on the requesting party. *Petterman v. Haverhill Farms, Inc.*, 125 Mich App 30, 33, 335 N.W.2d 710, 712 (1983). See also *Adair v State (On Fourth Remand)*, 301 Mich App 547, 553; 836 NW2d 742 (2013). That requirement was reinforced in *Smith* upon which Plaintiff's entire appeals rests:

As all agree, the burden of proving the reasonableness of the requested fees rests with the party requesting them. *Petterman v Haverhill Farms, Inc*, 125 Mich App 30, 33; 335 NW2d 710 (1983). 13 In Michigan, the trial courts have been required

to consider the totality of special circumstances applicable to the case at hand. *Smolen v Dahlmann Apartments, Ltd*, 186 Mich App 292, 297; 463 NW2d 261 (1990); *Hartman v Associated Truck Lines*, 178 Mich App 426, 431; 444 N.W.2d 159; 444NW2d 159 (1989).

* * * * *

We emphasize that **"the burden is on the fee applicant to produce satisfactory evidence--in addition to the attorney's own affidavits--that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation."** *Blum v Stenson*, 465 US 886; 104 S Ct 1541; 79 L Ed 2d 891;895 n 11; 465 U.S. 886; 104 S Ct 1541; 79 L Ed 2d 891 (1984). The fees customarily charged in the locality for similar legal services can be established by testimony or [*532] empirical data found in surveys and other reliable reports.[***17] **But, we caution that the fee applicant must present something more than anecdotal statements to establish the customary fee for the locality.** (Emphasis added)

481 Mich at 530-532. Indeed, in *Smith*, the requesting attorney had supplied the trial court with far more information than Plaintiff herein did and, yet, this Court held that insufficient evidence was considered by the trial court. In *Smith*, the attorney had presented affidavits regarding actual fees he had been awarded and/or paid in other cases, including court orders awarding a particular hourly rate to the attorney in three prior cases. In this case, Plaintiff's attorney presented nowhere near the quantum of evidence supplied by plaintiff's counsel in *Smith*. Yet, Plaintiff's counsel seeks to force the trial court (or the defendant) to seek out information regarding the *Wood* and *Smith* factors, apply that information to the case at hand, and come up with a rate without Plaintiff's attorney having to lift a finger. Even under the *Smith* rubric, Plaintiff entirely failed to meet the burden of proof required to support his claim for attorney fees.

Where a Plaintiff fails to provide sufficient support for a claim of attorney fees, such fees may be denied in their entirety. *In re Ujlaky*, 2014 Mich App Lexis 2057 (August 12, 2015). "A party may not leave it to this Court to search for the factual basis to sustain or reject his

position.” *People v Traylor*, 245 Mich App 460, 464; 628 NW2d 120 (2001). Indeed, one of the cases relied upon by Plaintiff, albeit also unpublished, agrees:

To be sure, the fee applicant carries the burden of proving that the requested fees were incurred and that they are reasonable. *Smith*, 481 Mich at 528-529; *Reed*, 265 Mich App at 165-166. **It thus follows that if the applicant fails to meet that burden, the trial court must decline to award attorney fees.** (Emphasis added)

Tinman v. Blue Cross & Blue Shield of Mich., 2012 Mich App LEXIS 1712, *7, 2012 WL 3870643 (Mich Ct App Sept. 6, 2012).

In spite of the dearth of information provided by the Plaintiff, the trial court made an effort to apply the factors of *Wood* on which it had firsthand knowledge. Specifically, the fact that the jury failed to award 2/3 of what Plaintiff had demanded, that Plaintiff’s counsel was often unprepared, spent unnecessary time during trial and the trial depositions of experts, took “forever” to ask a question sometimes, and failed to meet his burden of proof by providing the court with proofs of a “normal hourly rate.” The court also considered the fact that the attorney had been paid 1/3 of every PIP benefit previously paid on the claim, and the complexity of the case. Most importantly, however, the Court clearly stated that the purpose of all the ‘factors’ was to arrive at a fee award that was *reasonable*.

Many courts have noted that the “results achieved” factor is a crucial consideration in determining a reasonable attorney fee:

Although neither *Crawley* nor *Wood* stated the magic words, "proportionate to success," it is clearly implied in the *Crawley* factors and in *Wood*'s adoption of this Court's suggestion to adjust the attorney fees in light of the decrease in the total judgment. Accordingly, in its determination of what is "reasonable," a trial court will consider the results achieved and has the discretion to "adjust" the award in proportion to ["in light of"] the results achieved ["the decrease in the total judgment"].

*

The Court addressed the factors set forth in *Wood*, which the trial court had considered. After further analysis of the accomplishments and efforts of the prevailing attorney, the Court held:

In *Hensley v Eckerhart*, 461 US 424; 103 S Ct 1933; 76 L Ed 2d 40 (1983), the Supreme Court held that the degree of plaintiff's success is a "crucial" factor in determining a proper award of attorney fees under 42 USC 1988. Although not binding, Michigan courts regard federal precedents in questions analogous to those present under the Michigan civil rights statutes as highly persuasive. *Robson v General Motors Corp*, 137 Mich App 650, 653; 357 NW2d 919 (1984), rev'd, 427 Mich 505; 398 NW2d 368 (1986). In light of the limited success plaintiff achieved, the award was not an abuse of discretion. [Callister, at 275 (emphasis added).]

Schellenberg v. Rochester Lodge No 2225 of the B.P.O.E, 228 Mich App 20, 45-47, 577 NW2d 163, (1998). See also *Sturgis Sav. & Loan Ass'n v. Italian Vill., Inc.*, 81 Mich App 577, 584, 265 NW2d 755, 758 (1978) and *Augustine* on which Plaintiff relies. Moreover, several courts have held that consideration of the actual fee arrangement, that is, whether fixed or contingent, is a proper factor for consideration. *Borgess Med. Ctr. v. Resto*, 273 Mich App 558, 581, 730 NW2d 738, 751 (2007), vac. on other grounds by 482 Mich 946, 754 NW2d 321 (2008). See also *Universal Rehab Alliance, supra* on which the sole basis for the award of no fault attorney fees to the plaintiff was the contingent fee he would have received. In contrast, mere submission of an itemized bill stating a fee is not sufficient to establish the reasonableness of the fee nor must a trial court "accept it on its face" as Plaintiff argues herein. *Petterman, supra* at 33 citing *Sturgis, supra* and *In re Eddy Estate*, 354 Mich 334, 348; 92 NW2d 458 (1958).

A circuit court's decision to award attorney fees is, in general, discretionary. *Wojas v Rosati*, 182 Mich App 477, 480; 452 NW2d 864 (1990). A court abuses that discretion "only when the result so violates fact and logic that it constitutes perversity of will, defiance of judgment or the exercise of passion or bias." [635] *Model Laundries & Dry Cleaners v Amoco Corp*, 216 Mich App 1, 4; 548 NW2d 242 (1996), quoting *Wojas, supra*, p 480. In short, an abuse of discretion may properly be found only where the court acts in a most injudicious fashion. *Model Laundries, supra*, p 5, n 3.

Shanafelt v. Allstate Ins. Co., 217 Mich App 625, 634-35, 552 NW2d 671, 675 (1996). See also *Spalding v Spalding*, 355 Mich 382, 384-385; 94 NW2d 810 (1959).

If an award of attorney fees is within the range of reasonable and principled outcomes” an abuse of discretion has not occurred. *Universal Rehab, supra*, 279 Mich App at 703-704. An abuse of discretion exists if an unprejudiced person, considering the facts upon which the trial court acted, would say there is no justification or excuse for the ruling. *Auto Club Ins Ass'n v State Farm Ins Cos*, 221 Mich App 154, 167; 561 NW2d 445 (1997). Trial courts are entrusted to determine the reasonableness of requested fees in part because of their unique exposure to the case and the attorneys. The Court of Appeals has noted that it is the trial court which is in the best position to assess an attorney’s performance and determine a reasonable fee. *Polen v. Melonakos*, 222 Mich App 20; 564 N.W. 2d 467 (1997).

In the case at bar, Judge McDonald worked with the few facts he had and awarded fees he expressly found to be reasonable under the totality of the circumstances. He could have refused to award any fees at all given the paucity of information provided by Plaintiff’s attorney. Even under *Smith*, the trial court did not abuse its discretion. There is no evidence that the trial court acted with prejudice or bias, that its decision was in “defiance of judgment” or in the “exercise of passion”. The trial court did not “violate” facts or logic in reaching its determination. In fact, the award rendered the Plaintiff herself whole in that the amount she would have owed to her attorney as a contingent fee was awarded in full as no fault attorney fees.

Should this Court determine that *Smith* is not applicable to this case or other cases seeking no fault attorney fees, the reasonableness of the trial court’s findings is further established. Outside of the *Smith* ruling, there has been no requirement that a trial court

numerically list and address every factor in the *Wood* or *MRPC* lists. See *Borgess, supra* at 581, *Byers v State Farm Mut. Auto. Ins. Co.*, 2009 Mich. App. LEXIS 2283; 2009 WL 3491619 (October 15, 2009) citing, *inter alia*, *Universal Rehab.*

Though Ehrlich takes issue with the trial court's failure to enunciate in detail how and why the fees and costs were reasonable under these factors, a trial court is not required to give detailed findings regarding each factor. In re Attorney Fees and Costs, 233 Mich App 694, 705; 593 NW2d 589 (1999).

John J. Fannon Co. v. Fannon Prods., LLC, 269 Mich App 162, 172, 712 NW2d 731 (2005).

Prior to *Smith*, it was also proper for a court to adjust fees in accordance with the results achieved and other factors not included in either the *Wood* or *Crawley* lists. *Head v. Phillips Camper Sales & Rental, Inc.*, 234 Mich App 94, 114, 593 NW2d 595, 604 (1999). Moreover, there was no encouragement, let alone mandate to begin every analysis with the determination of an hourly rate. Here, Plaintiff's primary argument appears to be that the trial court erred not because the award was unreasonable but simply because it did not check off the list each factor identified in *Smith* and start with an hourly rate. Such a position is, itself, violative of fact and logic where no information was even provided pertinent to several of the factors Plaintiff demands to be listed.

The fees awarded to Plaintiff's attorney below were not insubstantial. He was awarded the amount he would have been paid under his contingent fee agreement. Moreover, he succeeded on only 1/3 of his demand so the use of the "1/3" analysis was not without basis or logic. The court considered those factors for which it was provided, or, more accurately, had already experienced, the background information. That the court did not list findings on factors not argued or proven by Plaintiff could not be error where the court had nothing on which to base such findings. The trial court's analysis comports with pre-*Smith* case law and direction.



User Name: SUSAN.BROWN

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Document(1)

1. [McNeal v. Blue Bird Corp., 2014 Mich. App. LEXIS 1082](#)

Client/Matter: 0555-268

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As of: August 9, 2015 1:40 PM EDT

McNeal v. Blue Bird Corp.

Court of Appeals of Michigan

June 12, 2014, Decided

No. 308763

Reporter

2014 Mich. App. LEXIS 1082; 2014 WL 2619408

ANTHONY MCNEAL, Plaintiff-Appellee/Cross-Appellee/Cross-Appellant, and CHARLENE MCNEAL, Plaintiff, v BLUE BIRD CORPORATION and BLUE BIRD BODY COMPANY, Defendants-Appellants/Cross-Appellees, and HOLLAND MOTOR HOMES & BUS COMPANY and GEMB LENDING, INC., Defendants/Cross-Appellants, and PEACH HOLDING COMPANY, INC, BLUE BIRD COACHWORKS, LLC, COMPLETE COACHWORKS, CERBERUS CAPITAL MANAGEMENT, LP, COACHWORKS HOLDINGS, INC., and PEACH COUNTY HOLDINGS, INC., Defendants.

Notice: THIS IS AN UNPUBLISHED OPINION. IN ACCORDANCE WITH MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

Prior History: [*1] Ottawa Circuit Court. LC No. 08-062898-CK.

Core Terms

motor home, warranty, trial court, merchantability, damages, attorney's fees, express warranty, breach of implied warranty, implied warranty, repairs, factors, provides, defects, parties, argues, privity of contract, limited warranty, reasonable attorney's fees, plaintiffs', motorhome, delivery, buyer, misrepresentation, manufacturer, actual damage, circumstances, calculating, attorneys', prevailing, sanctions

Judges: Before: MURPHY, C.J., and O'CONNELL and K. F. KELLY, JJ.

Opinion

Per Curiam.

Defendants-appellants/cross-appellees, Blue Bird Corporation and Blue Bird Body Company (Blue Bird), appeal as of right from a final judgment in favor of plaintiff-appellee/cross-appellant, Anthony McNeal (plaintiff). Plaintiff cross appeals from the same order limiting his attorney fees to \$100,000. Defendants/cross-appellants, Holland Motor Homes and Bus Company (Holland)and GEMB Lending Inc., appeal from the trial court's order denying their request for mediation sanctions. Holland does not challenge the trial court's interpretation or application of [MCR 2.403\(O\)](#) and seeks relief only in the event this Court reverses the final judgment and declares that Blue Bird was entitled to judgment as a matter of law. Finding no errors warranting reversal, we affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

The parties agree that the facts of this case for purposes of this appeal are not reasonably in dispute. In October 2006, plaintiff purchased a \$838,483 luxury motor home from Holland — the 450 LXi. The motor home was manufactured by Blue Bird and plaintiff secured financing for the purchase [*2] from GEMB. In March 2008, Blue Bird announced a voluntary recall after learning that some of the motor homes exceeded permissible weight for the front suspension. Plaintiff took the motor home to Holland that month where the tires were changed. Holland advised plaintiff to take the motor home to Blue Bird's factory in Georgia so that the tie rods could be replaced. Plaintiff drove the vehicle to Blue Bird in April 2008.

Blue Bird advised plaintiff that, even after the adjustments were made, the front axle was still too heavy. Engineers suggested that the problem could be fixed by reconfiguring the storage bays and changing the location of a generator. Plaintiff, angered by the fact that Blue Bird sold a defective vehicle, refused the repair. Instead, plaintiff wanted to wait for a new suspension system that Blue Bird was hoping to develop. However, in August 2008, Blue Bird advised plaintiff that an 18,000 pound suspension system was no longer feasible and the only option was to move the generator to one of the storage bays.

Plaintiff refused to tender the motor home for the necessary repairs. Instead, plaintiff and his wife filed suit against the various defendants in Oakland County [*3] in August 2008. The parties stipulated to remove the matter to Ottawa Circuit Court in October 2008. Charlene McNeal was dismissed as a plaintiff in September 2009. Plaintiff ultimately tendered the motor home for repair in November 2009, at which time the generator was moved to one of the storage bays. Plaintiff's third amended complaint alleged, *inter alia*:

Count I: Breach of Express Warranty against Blue Bird

Count II: Breach of Implied Warranty against Blue Bird

Count III: Fraud/Misrepresentation against Blue Bird

Count IV: Innocent Misrepresentation against all defendants

Count V: Violation of Michigan's Consumer Protection Act (MCPA), [MCL 445.901 et seq.](#), against all defendants

Count VI: Violation of the Magnuson-Moss Warranty Act against Blue Bird

A jury trial was held from November 11, 2010 until November 18, 2010. Trial focused on whether Blue Bird knew that the motor home was defective at the time it was sold and whether the motor home remained defective even after the final repair. Plaintiff claimed that ample storage space was

one of the factors that caused him to purchase the motor home in the first place and that he lost much of this storage space when the generator was moved [*4] to one of the storage bays. Plaintiff also claimed that the turning radius and general ride was compromised after the tie rods and tires were changed. Plaintiff further argued, even with the generator moved from the front to the back of the motor home, the front axle was still too heavy.

Following its decision on a motion for directed verdict, the trial court made the following statement providing a synopsis of the case (which includes over 1,000 transcript pages and 19 lower court records):

And with the full knowledge of the risks associated with distilling the contents of a five-foot-long file and four days of trial into a few sentences, here it is in a nutshell. The motor home Plaintiff bought is not the same as the motor home he ended up with. The motor home that the Plaintiff bought was defective. Blue Bird claims to have fixed it, as was its obligation. But the fix did not give Plaintiff exactly what he originally ordered. The post-recall repaired vehicle was physically different than the vehicle Plaintiff purchased.

So here are the questions: Is the motor home substantially repaired? If not, what is the value of the motor home with the unrepaired defects compared to the value of [*5] the motor home without the defects; i.e., the motor home [Plaintiff] thought he was buying? Second, if the motor home has been substantially repaired, do the changes resulting from the warranty recall repair alter the value of the motor home? And if so, what is the value of the motor home after the recall repairs are completed compared to the value of the motor home that [Plaintiff] thought he was buying?

Third, if there are unrepaired defects and/or recall repairs that resulted in changes that permanently altered the usefulness and value of the motor home, are the changes to the usefulness of the motor home so substantial that the warranty has failed in its essential

purpose, entitling [Plaintiff] to a full refund of the purchase price?

There are collateral issues like whether Blue Bird's actions violate the Michigan Consumer Protection Act or the Magnuson-Moss Warranty Act, thereby entitling Plaintiff to an award of attorney fees. But for the contract and fraud claims, the question comes down to a simple analysis. What did the Plaintiff think he was buying? In the end, what did the Plaintiff get? Is he entitled to damages for the difference in value, if any? Or if damages cannot compensate [*6] him, is he entitled to his money back with interest? And that, in my judgment, is the case in a nutshell.

The jury found for plaintiff on Counts II (breach of implied warranty), III (fraud/misrepresentation), and V (MCPA). The jury found for Holland on all counts and for Blue Bird on Counts I (express warranty) and VI (Magnuson-Moss Warranty Act). A final judgment was entered on December 12, 2011. Plaintiff was awarded \$209,483 against Blue Bird, plus judgment interest. Plaintiff was also awarded \$100,000 in attorney fees under the MCPA, for a total judgment of \$346,266. This appeal follows.

Blue Bird argues that it was entitled to judgment as a matter of law on all claims. Holland appeals from an order denying its request for mediation sanctions. Holland does not take issue with the trial court's interpretation of the court rule and only seeks relief in the event this Court reverses judgment for plaintiff and enters judgment for Blue Bird. Finally, plaintiff appeals the trial court's award of \$100,000 in attorney fees under the MCPA, claiming that the amount was grossly inadequate.

II. BLUE BIRD'S APPEAL

Blue Bird argues that the trial court erred as a matter of law in denying summary [*7] disposition and not granting JNOV on plaintiff's claim for breach of implied warranty of merchantability. Blue Bird's argument is twofold: 1) there was no privity of contract between plaintiff and Blue Bird; and, 2) plaintiff's action was barred by the one-year

limitations period to which the parties agreed. We disagree on both counts.

A. STANDARDS OF REVIEW

A trial court's decision on a motion for summary disposition is reviewed de novo. *Johnson v Recca*, 492 Mich 169, 173; 821 NWd 520 (2012). This Court must review the record in the same manner as must the trial court to determine whether the movant was entitled to judgment as a matter of law. *Morales v Auto-Owners Ins.*, 458 Mich 288, 294; 582 NW2d 776 (1998).

A trial court's decision on a motion for JNOV is likewise reviewed de novo. *Sniecinski v BCBSM*, 469 Mich 124, 131; 666 NW2d 186 (2003). In reviewing the decision, this Court must view the evidence and all legitimate inferences from it in the light most favorable to the nonmoving party to determine whether a question of fact existed. *Sniecinski*, 469 Mich at 131; *Livonia Bldg Materials Co v Harrison Constr Co*, 276 Mich App 514, 517-518; 742 NW2d 140 (2007). If reasonable jurors could [*8] have honestly reached different conclusions, the jury verdict must stand. *Genna v Jackson*, 286 Mich App 413, 417; 781 NW2d 124 (2010). Only if the evidence failed to establish a claim as a matter of law was JNOV appropriate. *Sniecinski*, 469 Mich at 131.

To the extent these issues involve the interpretation of a statute, our review is de novo. *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 205; 815 NW2d 412 (2012).

Our primary goal when interpreting statutes is to discern the intent of the Legislature. To do so, we focus on the best indicator of that intent, the language of the statute itself. The words used by the Legislature are given their common and ordinary meaning. If the statutory language is unambiguous, we presume that the Legislature intended the meaning that it clearly expressed, and further construction is neither required nor permitted. [*Id.* at 205-206 (footnotes omitted).]

Finally, a trial court's award of attorney fees is reviewed for an abuse of discretion. *Moore v*

[Secura Ins, 482 Mich 507, 516; 759 NW2d 833 \(2008\)](#). "An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes." *Id.*

B. PRIVACY OF CONTRACT

Blue Bird [*9] argues that there was no privity of contract between the parties because plaintiff purchased the motor home from Holland and, absent privity of contract, plaintiff may not bring an action against Blue Bird for breach of implied warranty of merchantability for purely economic loss.

"In general, a warranty of merchantability is implied when the seller is a merchant of the goods sold and provides that the goods will be of average quality within the industry." [Gorman v American Honda Motor Co, Inc, 302 Mich App 113, 121; 839 NW2d 223 \(2013\)](#). [MCL 440.2314\(1\)](#) specifically provides, that "[u]nless excluded or modified [under [MCL 440.2316](#)], a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind." Very simply, a "seller" is defined as "a person who sells or contracts to sell goods," and a buyer is "a person who buys or contracts to buy goods." [MCL 440.2103](#). And "[a] 'sale' consists in the passing of title from the seller to the buyer for a price . . ." [MCL 440.2106](#).

We agree with plaintiff that there was contractual privity in this case and, therefore, we need not address whether privity of contract [*10] is necessary to maintain a cause of action for breach of implied warranty of merchantability for purely economic loss.

Blue Bird's limited warranty on its 450 LXi motor home provides, that "Blue Bird Coachworks, a division of the Blue Bird Body Company, warrants each 450 LXi to the original purchaser to be free from defects in material and workmanship under normal use and service within the limits described below . . ." The chassis body shell is warranted to be free from breaking or cracking for a period of five

years or 50,000. "All other components" other than those warranted by the manufacturers (diesel engines, automatic transmission, tires and batteries) are covered for a period of three years or 36,000 miles.

Regarding such express warranties, [MCL 440.2313](#) provides that an express warranty may be created " . . . by the *seller* to the *buyer*. . . ." [MCL 440.2313\(1\)\(a\)](#) (emphasis added). This Court has held that "[a]n express warranty may be created only between a seller and a buyer, and any such express warranty becomes a term of the contract itself." [Heritage Resources, Inc v Caterpillar Financial Services Corp, 284 Mich App 617, 634; 774 NW2d 332 \(2009\)](#). As such, "we are compelled [*11] to conclude that where there is no contract, and therefore no bargain, there can be no express warranty under [MCL 440.2313](#)." *Id.* at 342. "Indeed, because an express warranty is a term of the contract itself, . . . we conclude that privity of contract *is* necessary for a remote purchaser to enforce a manufacturer's express warranty." *Id.* at 638 n 12 (emphasis in original).¹

This sentiment was previously stated in [Great American Ins Co v Paty's, Inc, 154 Mich App 634; 397 NW2d 853 \(1986\)](#) where, as here, the remote manufacturer issued an express warranty to the first retail purchaser. *Id.* at 636-637. The express warranty covering defects in material and workmanship established a "contractual relationship" between the parties. *Id.* at 641. In explaining why the plaintiff's claim sounded in contract and not in tort, this Court noted:

Unlike *Auto-Owners [Ins Co v Chrysler Corp, 129 Mich App 38, 43; 341 NW2d 223 (1983)]* where the buyer [*12] and manufacturer had no contact whatsoever, the defendant here bound itself directly to the plaintiff's subrogor by offering an express warranty on the parts and workmanship of the combine to the first

¹ The plaintiff's claims for breach of express warranty failed in *Heritage* because there was no contractual privity between the plaintiff and the remote manufacturer. The plaintiff's allegations arose from alleged oral statements by the manufacturer's representative.

retail buyer. The warranty was obviously offered in an effort to induce the sale to buyers such as Mr. Douglas, and the costs associated with the warranty were presumably built into the price of the combine. If the fire which damaged the combine had occurred within the warranty's limitations period, Mr. Douglas could have insisted upon his rights under the warranty directly against the defendant and could have enforced those rights under the law. Under such circumstances, we must conclude that a "contractual relationship" existed directly between plaintiff's subrogor and the defendant. [[Great American Ins Co, 154 Mich App at 641](#)].²

There is no question that Blue Bird expressly warranted its 450 LXi to plaintiff. As such, there was contractual privity.³ It follows that plaintiff could bring an action for breach of implied warranty of merchantability against Blue Bird.

C. ONE-YEAR LIMITATION PERIOD

Blue Bird next argues that any breach of implied warranty accrued upon delivery of the motor home in October 2006 and, as such, plaintiff's claim was time-barred.

As previously stated, [MCL 440.2314\(1\)](#) provides that "[u]nless excluded or modified [under [MCL 440.2316](#)] a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind." Warranties may nevertheless [*14] be excluded or modified by agreement of the parties. [MCL 440.2316\(2\)](#) provides that "to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous . . ." The relevant portion of the limited warranty in this case provides as follows:

ANY IMPLIED WARRANTIES, INCLUDING THOSE OF MERCHANTABILITY OR FITNESS, ARE LIMITED TO THE WARRANTY PERIOD OF THIS WRITTEN WARRANTY. BLUE BIRD COACHWORKS SHALL NOT BE LIABLE FOR INCIDENTAL OR CONSEQUENTIAL DAMAGES RESULTING FROM BREACH OF THIS WRITTEN WARRANTY OR ANY IMPLIED WARRANTY. NO PERSON, INCLUDING SALESPERSONS, DEALERS, SERVICE CENTERS, OR FACTOR REPRESENTATIVES OF BLUE BIRD COACHWORKS, IS AUTHORIZED TO MAKE ANY REPRESENTATION OR WARRANTY CONCERNING COACHWORKS PRODUCTS EXCEPT TO REFER TO THIS LIMITED WARRANTY.

Blue Bird Coachworks reserves the right to make changes in design and changes or improvements upon its products without imposing any obligations upon itself to install the same option upon products theretofore manufactured. Defects shall be repaired promptly after discovery of the defect and within the warranty period as stated herein. All claims [*15] for warranty adjustments must be received by Blue Bird Coachworks not later than 30 days after the repair date, and shall be channeled through an authorized Blue Bird Coachworks dealer or factory representative. Any suit alleging a breach of this limited warranty or any other alleged warranty must be filed within one year of breach.

Blue Bird points to the language in the warranty that "[a]ny suit alleging a breach of this limited warranty or any other alleged warranty must be filed within one year of breach." It claims that the parties adjusted the statute of limitations, as permitted in [MCL 440.2725](#).

² See also [Pack v Damon Corp, 434 F3d 810 \(CA 6, 2006\)](#), wherein the court, after concluding that vertical privity was not required to bring a breach of implied warranty claim concluded "Alternatively, the express warranty extended from Damon to Pack could suffice to support the requisite contractual relationship to bring an implied-warranty claim, as the court [*13] found in [Great American, 397 N.W.2d at 857](#). The facts of the instant case are even stronger than the facts of *Great American* because here Damon made an express warranty directly to Pack, the original retail buyer." [Pack, 434 F3d at 820, n 12](#).

³ The fact that the jury specifically concluded that Blue Bird did not breach the express warranty does not change the fact that there was contractual privity. The underlying contract may not have been breached, but the contract nonetheless existed.

Blue Bird argues that the breach occurred on delivery because implied warranties never extend to future performance, citing *Bacco Constr Co v American Colloid Co*, 148 Mich App 397; 384 NW2d 427 (1986).

In *Bacco*, this Court noted:

The Uniform Commercial Code, in *MCL § 440.2725*; MSA § 19.2725, provides a four-year period of limitation on an action for breach of any contract for sale of goods. Under this section, a cause of action accrues when tender of delivery is made "except that where a warranty explicitly extends to future performance of the goods" the cause of action accrues when the [*16] breach is discovered.

We agree with plaintiff and defendants that the trial court erred in granting accelerated judgment on the express warranty claim, but hold that, since the implied warranty claim does not fall within the future performance exception of *MCL § 440.2725*; MSA § 19.2725, and the cause of action accrued more than four years before this action was commenced, the implied warranty claim is barred. [*Bacco*, 148 Mich App at 411-412.]

The Court provided no in depth analysis as to why it concluded that an implied warranty did not fall within the future performance exception and seems to have mentioned it in passing, finding that the matter was brought more than four years after the breach. Moreover, *Bacco* has limited precedential effect. *MCR 7.215(J)* ("A panel of the Court of Appeals must follow the rule of law established by a prior published decision of the Court of Appeals issued on or after November 1, 1990, that has not been reversed or modified by the Supreme Court, or by a special panel of the Court of Appeals as provided in this rule.")

Blue Bird also cites *Highway Sales, Inc v Blue Bird Corp*, 559 F3d (CA 8, 2009). In that case, the Eighth Circuit concluded:

Unlike express [*17] warranties, under Minnesota law, "[i]mplied warranties cannot, by their very nature, explicitly extend to future performance." . . . A breach of implied warranty

occurs, and the claim accrues, "when tender of delivery is made . . ." *Minn.Stat. § 336.2-725(2)*. Thus, the fact Blue Bird expressly warranted various components of the RV would be free from defects for specified periods of time after tender of delivery does not extend the accrual date for a breach of implied warranty claim. The parties agree tender of delivery of the RV occurred on July 31, 2003. Plaintiffs filed suit almost two years later, on July 15, 2005. Plaintiffs' breach of implied warranty claim is therefore untimely, unless Blue Bird is equitably estopped from asserting the statute of limitations defense. [*Highway Sales*, 559 F3d at 788-789.]

However, in a footnote the Court added: "Plaintiffs do not argue the implied warranty limitation is inconspicuous and do not assert implied warranties may extend to future performance under Minnesota law. Contrary to the dissent, we follow our general rule not to consider issues not raised by the parties or the district court, because such issues are waived." *Id. at 789 n 5*. Thus, [*18] once again, the analysis is less than complete.

We find the dissenting opinion in *Highway Sales* persuasive. After citing various provisions of Minnesota's UCC requiring that limitations on warranties be conspicuous, the dissent looked to the warranty at issue, which, as Blue Bird touts, is substantially similar to the warranty in the present case:

[T]he capitalized language dealt not with the lawsuit limitation period but rather created the overall length of the warranty period, including an implied warranty duration of two or three years, limited the nature of some recoverable damages, and specified which of Blue Bird's employees could make additional representations. It bears repeating that this capitalized portion of the contract did not at all deal with the period of time in which litigation could be commenced for breach of any of the warranties. Indeed, the statute of limitation reduction language is found in a wholly new paragraph presented in significantly smaller,

uncapitalized type. The new paragraph totally deals with a different subject than the capitalized portions. Blue Bird slips the limitation language into the fourth and last sentence of the new paragraph, which sentence [*19] reads, in isolation both as to location and subject matter, as follows: "[a]ny suit alleging a breach of this limited warranty or any other alleged warranty must be filed within one year of breach." There is no mention of either "implied warranty" or "merchantability" within or near this supposedly limiting language.

This crucial, purportedly limiting language violates Minn.Stat. Ann. § 336.1-201(b)(10)(A) and (B) of the UCC which, as earlier stated, requires capital letters equal or greater in size than the surrounding text or use of contrasting type, font or color or set-offs that call attention to the language. . . . As a matter of law, this limiting language relied upon by Blue Bird and the court is both inconspicuous and ambiguous. Accordingly, reviewing the matter de novo as we must, a four-year statute of limitations should apply. [[Highway Sales, 559 F3d 797-798.](#)]

The dissent then went on to address, for argument's sake, whether the claim was nevertheless barred by the one-year limitation. Again, the facts in *Highway Sales* are very similar to the one at issue in this appeal. The dissent noted:

Without argument, Blue Bird expressly warranted the RV to be free from defects in at [*20] least three ways. And, as conceded by both Blue Bird and the court, there is little doubt that the RV was "defective" when delivered and, according to the court, little doubt that the vehicle was never "merchantable" at any time relevant to this dispute, or, at least, a fact question not reachable through summary judgment exists on this issue.

In this regard, paragraph one of the "Limited Warranty" is of particular interest. It says "3. For a period of two (2) years from the date of delivery to the original purchaser [Blue Bird] warrants all other components installed by Blue Bird

and Wonderlodge." Then, in the third and sixth paragraphs of the "Limited Warranty," Blue Bird reserves for this two-year period the right to attempt to cure any defects and make the vehicle merchantable as required by the implied warranty. Accordingly, if you credit Blue Bird's one-year statute of limitation affirmative defense and attempt to square it with the court's conclusions in this appeal, the one-year lawsuit limitations period for the implied warranties "expired" well before Blue Bird gave up its right to cure the defects which would have made the RV comply with the requirements of the implied warranty. [*21] This result flies in the face of approximately fifty years of consumer equity policy imbedded within the enactment of the Uniform Commercial Code in, by now, all fifty states, some territories, and a commonwealth. Blue Bird's clever penmanship and paragraph positioning cannot be allowed to overrule the policy pronouncements of the Uniform Commercial Code. [[Id. at 798-799](#) (internal citations omitted).]

We agree. The express limited warranty in this case provided for five, three, or one year warranty periods and then specifically added that "ANY IMPLIED WARRANTIES, INCLUDING THOSE OF MERCHANTABILITY OR FITNESS, ARE LIMITED TO THE WARRANTY PERIOD OF THIS WRITTEN WARRANTY." Thus, the plain language of the limited warranty indicates that the implied warranty of merchantability is likewise subject to those periods. There is no reason to treat the limits on the express warranty differently from the limits on the implied warranty. Further, as the dissent in *Highway Sales* noted, allowing Blue Bird to avoid an implied warranty claim because of the one-year agreed upon limitation would have the absurd result of divesting plaintiff of the cause of action for breach of implied warranty well before [*22] Blue Bird even exercised its right to cure the defects in accordance with the express warranty. While neither the majority nor the dissent in *Highway Sales* has precedential value, we find the dissent's

more methodical approach to the issue persuasive. Blue Bird should not be allowed to limit the time to bring suit in a manner that is not conspicuous to the buyer. And, by its own terms, the implied warranty of merchantability remains in effect "LIMITED TO THE WARRANTY PERIOD OF THIS WRITTEN WARRANTY." The breach in this case should not be deemed to have occurred at the time the motor home was tendered, but at the time the defect was discovered. The recall was issued in March 2008 and plaintiff filed suit in August 2008.

D. PLAINTIFF'S FRAUD AND MCPA CLAIMS

Blue Bird argues that it was entitled to JNOV on plaintiff's fraud and MCPA claims because, although the jury found Blue Bird liable for fraud, it also found a complete absence of damages. The jury found no difference in the fair market value of the motor home as purchased compared with the fair market value of the motor home as represented — both were \$838,482.

With regard to fraud actions, our Supreme Court has explained:

Michigan's [*23] contract law recognizes several interrelated but distinct common-law doctrines—loosely aggregated under the rubric of "fraud"—that may entitle a party to a legal or equitable remedy if a contract is obtained as a result of fraud or misrepresentation. These doctrines include actionable fraud, also known as fraudulent misrepresentation; innocent misrepresentation; and silent fraud, also known as fraudulent concealment. Regarding actionable fraud,

[t]he general rule is that to constitute actionable fraud it must appear: (1) That defendant made a material representation; (2) that it was false; (3) that when he made it he knew that it was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) that he made it with the intention that it should be acted upon by plaintiff; (5) that plaintiff acted in reliance upon it; and (6) that he thereby suffered injury. Each of these facts

must be proved with a reasonable degree of certainty, and all of them must be found to exist; the absence of any one of them is fatal to a recovery.

Silent fraud has also long been recognized in Michigan. This doctrine holds that when there is a legal or equitable duty of disclosure, [*24] "[a] fraud arising from the suppression of the truth is as prejudicial as that which springs from the assertion of a falsehood, and courts have not hesitated to sustain recoveries where the truth has been suppressed with the intent to defraud." [Titan Ins Co v Hyten, 491 Mich 547, 555, 557; 817 NW2d 562 \(2012\)](#) (internal citation marks and footnotes omitted).]

"The law is clear in this state that for actionable fraud to exist the plaintiff must have suffered damage." [Mazzola v Vineyard Homes, Inc, 54 Mich App 608; 221 NW2d 406 \(1974\)](#). Moreover, "it is proper to construe the provisions of the MCPA 'with reference to the common-law tort of fraud.'" [Zine v Chrysler Corp, 236 Mich App 261, 283; 600 NW2d 384 \(1999\)](#) quoting [Mayhall v A H Pond Co, Inc, 129 Mich App 178, 182-183; 341 NW2d 268 \(1983\)](#). A person who suffers a loss under the MCPA is entitled to "actual damages or \$250.00, whichever is greater . . ." [MCL 445.911\(2\)](#).

Blue Bird does not contest the quantum of proof for the jury's decision. Instead, Blue Bird focuses entirely on the jury's problematic calculation of damages. Blue Bird argues that the jury found a complete absence of damages and, if there was no difference in the fair [*25] market value of the motor home as purchased compared with the fair market value of the motor home as represented, Blue Bird should have received a JNOV on plaintiff's fraud and MCPA claims.

Blue Bird cites [UAW v Dorsey, 268 Mich App 313, 708 NW2d 717 \(2005\)](#) rev'd in part on other grounds [474 Mich 1097 \(2006\)](#), to support its position. In *Dorsey*, a panel of this Court concluded that the defendants were entitled to a JNOV on the plaintiffs' fraud claim because there was no

evidence presented on the element of damages. This Court concluded: "A review of the trial transcripts reveals that at trial, neither plaintiffs' damages expert nor any other expert gave testimony indicating that plaintiffs suffered damages as a result of defendants' misrepresentations or that defendants were unjustly enriched by the misrepresentations. This absence of proof became apparent when the jury returned a verdict in favor of plaintiffs on these claims, but did not award any damages." *Id. at 333*. Because damages were an element of the plaintiffs' claims, "the claims could not have been proven absent damages" and the defendants were entitled to JNOV on the plaintiffs' fraud claims. *Id. at 334*. However, the present [*26] case is distinguishable because, unlike *Dorsey*, the jury was presented with evidence of plaintiff's damages. The jury clearly found that the motor home, in its repaired state, was worth substantially less than when it was originally delivered, as expressed in the jury's findings on plaintiff's claim for breach of implied warranty. Thus, the jury was likely focused on the difference between the fair market value of the motor home at the time plaintiff took delivery and the fair market value of the motor home following the completion of the recall repairs. In any event, as the trial court noted, the MPCA clearly provides that a plaintiff is entitled to actual damages or \$250, whichever is greater. The jury found that Blue Bird violated the MCPA and that plaintiff was harmed as a result. Thus, plaintiff was entitled to at least a nominal award of \$250.

E. ATTORNEY FEES

Finally, Blue Bird argues that, even if judgment for plaintiff is affirmed, plaintiff was not entitled to an award of attorneys' fees under the MCPA where the jury awarded zero damages for the claim and plaintiff could not be considered a prevailing party.

[MCL 445.911\(2\)](#) provides that "[e]xcept in a class action, a person [*27] who suffers loss as a result of a violation of this act may bring an action to recover actual damages or \$250.00, whichever is greater, together with reasonable attorneys' fees." In [Mikos v Chrysler Corp., 158 Mich App 781; 404 NW2d 783 \(1987\)](#), a panel of this Court concluded

that a breach of an implied warranty of merchantability in a transaction involving the sale of goods constituted a violation of the MCPA. *Id. at 782-783*. That is because an implied warranty was a benefit promised "by law" and, from the consumer's standpoint, was "just as much a promised benefit as if the merchant itself made the promise." *Id. at 784*. Accordingly, this Court concluded that a breach of an implied warranty constitutes a "failure to provide the promised benefits" under [MCL 445.903\(1\)\(y\)](#) and, thus, under the MCPA, "[a] plaintiff who establishes breach of an implied warranty of merchantability is therefore entitled to attorney fees under the Consumer Protection Act." *Id. at 784-785*.

Blue Bird argues that *Mikos* has no applicability because it dealt specifically with [MCL 445.903\(1\)\(y\)](#) (failure to provide a promised benefit) whereas the jury in the present case was asked specifically whether Blue Bird violated [*28] [MCL 445.903\(1\)\(q\)](#) (failure to provide prompt delivery), (s) (failure to reveal a material fact), or (bb) (misstatement of fact). However, Blue Bird reads *Mikos* too narrowly. "Breach of an implied warranty constitutes a 'failure to provide the promised benefits,' one of the definitions of an unfair, unconscionable or deceptive method, act or practice under the Michigan Consumer Protection Act." [Mikos, 158 Mich App at 785](#). The Court was not limiting its application to only those cases involving a failure to provide a promised benefit; that was merely one way of demonstrating "[u]nfair, unconscionable, or deceptive methods, acts, or practices in the conduct of trade or commerce are unlawful . . ." [MCL 445.903\(1\)](#). "A plaintiff who establishes breach of an implied warranty of merchantability is therefore entitled to attorney fees under the Consumer Protection Act." [Mikos, 158 Mich App at 785](#). It follows that, under *Mikos*, a breach of an express or implied warranty constitutes a violation of the MCPA, entitling a plaintiff to recover reasonable attorney fees.

Furthermore, given the plain language of [MCL 445.911\(2\)](#), which allows "a person who suffers loss as a result of a violation of this [*29] act may bring an action to recover actual damages or \$250.00, whichever is greater, together with

reasonable attorneys' fees," it is clear that, unlike the requirements for a breach of warranty claim, the MCPA does not require the same quantum of proof on the element of damages. The MCPA allows recovery of either actual damages or \$250, whichever is greater, if a jury concludes that a plaintiff suffered a loss when the defendant violated the MCPA. The jury in this case clearly concluded that plaintiff suffered damages under the MCPA. Thus, even if plaintiff failed to present sufficient evidence on the required element of damages under his breach of warranty claims, he was nevertheless entitled to \$250 and his reasonable attorney fees. Because the statute imposes a set minimum damages award of \$250, plaintiff was not required to prove actual damages.

III. HOLLAND'S APPEAL

As against Holland and GEMB, the case evaluation award was \$0. The jury ultimately found in their favor and no-caused plaintiff's claims against them. However, the trial court concluded that, pursuant to [MCR 2.403\(O\)](#), Holland was not entitled to any case evaluation sanctions because plaintiff improved his position as [*30] to Blue Bird. On appeal, Holland does not pursue a claim that the trial court erred in interpreting the court rule. Instead, Holland "files this appeal to preserve its ability to request case evaluation sanctions if and when Blue Bird prevails on appeal. If Blue Bird prevails on appeal, then the sole reason for the trial court's denial of case evaluation sanctions will be removed. Accordingly, Holland respectfully requests that, if this Court reverses the judgment against Blue Bird, this Honorable Court should also reverse the trial court's erroneous denial of case evaluation sanctions to Holland (and GEMB Lending)." Because we have declined to reverse the judgment against Blue Bird, we need not consider Holland's appeal.

IV. PLAINTIFF'S APPEAL

Relying on [Smith v Khouri, 481 Mich 519; 751 NW2d 472 \(2008\)](#), plaintiff argues that the trial court's \$100,000 award for attorney fees was grossly inadequate where plaintiff's attorneys expended 1,581.90 hours on this case with a

blended hourly rate of \$228.25 an hour. Plaintiff argues that, instead of awarding plaintiff \$361,078.50, the trial court punished plaintiff for failing to settle this dispute.

As previously stated, we review a trial court's [*31] award of attorney fees is reviewed for an abuse of discretion. [Moore, 482 Mich at 516](#). "An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes." *Id.* The findings of fact underlying an award of attorney fees are reviewed for clear error. [Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club, 283 Mich App 264, 296; 769 NW2d 234 \(2009\)](#). "A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire record is left with a definite and firm conviction that a mistake was made." *Id.* (internal quotation marks omitted). Any questions of law underlying an attorney fee award are reviewed de novo. [Id. at 297](#).

"[A]ttorney 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 NW2d 641 \(1998\)](#) (footnote omitted). [MCL 445.911\(2\)](#) provides that "[e]xcept in a class action, a person who suffers loss as a result of a violation of this act may bring an action to recover actual damages or \$250.00, whichever is greater, together with reasonable attorneys' fees."

Plaintiff [*32] contends that when determining a reasonable attorney fee under the MCPA, the trial court's failure to strictly adhere to the Court's opinion in *Smith* constituted an abuse of discretion. The Court in *Smith* first detailed what trial courts have been doing when calculating attorney fees, such as using the factors found in [Wood v Detroit Automobile Inter-Ins Exch, 413 Mich 573, 588; 321 NW2d 653 \(1982\)](#), that were derived from [Crawley v Schick, 48 Mich App 728, 737; 211 NW2d 217 \(1973\)](#). The factors are:

(1) the professional standing and experience of the attorney; (2) the skill, time and labor involved; (3) the amount in question and the results achieved; (4) the difficulty of the case; (5) the expenses incurred; and (6) the

nature and length of the professional relationship with the client. [Smith, 481 Mich at 529](#). The *Smith* Court also recognized that many trial courts had been consulting the eight factors found in [Rule 1.5\(a\) of the Michigan Rules of Professional Conduct](#), which are: (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (2) the likelihood, if apparent to the client, that the [*33] acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and (8) whether the fee is fixed or contingent. [Id. at 529-530](#). The Supreme Court further noted that trial courts have not limited themselves to only consulting the factors listed above. [Id. at 530](#).

Recognizing that "some fine-tuning" was required, the *Smith* Court instructed that when determining an attorney fee pursuant to [MCR 2.403](#), trial courts should first determine the "reasonable hourly rate [which] represents the fee customarily charged in the locality for similar legal services," and the trial court should rely on "reliable surveys or other credible evidence of the legal market." [Id. at 530-531](#). The Court emphasized that the burden is on the fee applicant to produce satisfactory evidence "that the requested rates are in line with [*34] those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation." [Id. at 531](#), quoting [Blum v Stenson, 465 U.S. 886, 895 n 11; 104 S Ct 1541; 79 L Ed 2d 891\(1984\)](#). The Court then instructed that trial courts should multiply that number by the "reasonable number of hours expended in the case." [Smith, 481 Mich at 531](#). The Court again emphasized that "[t]he fee applicant bears the burden of supporting its claimed hours with evidentiary support." [Id. at 532](#). After this initial baseline figure has been calculated, "[i]n order to aid appellate review, a trial court

should briefly discuss its view of the remaining [*Wood* and MRPC] factors" and whether such factors justify an upward or downward adjustment. [Id. at 531](#).

However, the issue confronted in *Smith* was reasonable attorney fees in the context of case evaluation situations pursuant to [MCR 2.403](#). [Smith, 481 Mich at 530](#). [MCR 2.403](#) is employed when "one party accepts the award and one rejects it . . . and the case proceeds to a verdict, the rejecting party must pay the opposing party's actual costs unless the verdict is, after several adjustments, more than 10 percent more favorable [*35] to the rejecting party than the case evaluation." *Id.* In terms of calculating the actual costs of the attorney fee, [MCR 2.403\(O\)\(6\)](#) specifically states that:

For the purpose of this rule, actual costs are

- (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.

As seen from the language of the court rule, there is a specific definition of a reasonable attorney fee, which initially depends upon a calculation of the hourly or daily rate.

In [University Rehabilitation Alliance, Inc v Farm Bureau General Ins Co of Michigan, 279 Mich App 691, 700 n 3; 760 NW2d 574 \(2008\)](#), this Court recognized the limited applicability of *Smith*. This Court was confronted with the issue of determining a reasonable attorney fee pursuant to the no-fault act, which provided that "an attorney is entitled to a reasonable fee for advising and representing a claimant in an action for personal or property protection insurance benefits which are overdue...." [MCL 500.3148](#). Ultimately, this Court held that the trial court's award of attorney fees based on a contingency [*36] fee agreement was reasonable. [University Rehabilitation Alliance, Inc, 279 Mich App at 702](#). Specifically, this Court held that the trial court's multi-factor analysis under *Wood* was sufficient and that:

Smith does not affect our analysis in this case of the question whether the trial court abused its discretion when determining a reasonable attorney fee under [MCL 500.3148\(1\)](#) [because] *Smith* addressed [MCR 2.403\(O\)\(6\)\(b\)](#), which explicitly requires that the reasonable-attorney-fee portion of actual costs be based on a reasonable hourly or daily rate as determined by the trial court.... [[id. at 700 n 3.](#)]

Likewise in this case, case evaluation sanctions are not at issue. Moreover, the MCPA does not refer to a rigid formula to be used when calculating reasonable attorney fees.

Furthermore, while decided prior to *Smith*, this Court in [Smolen v Dahlmann Apartments, Ltd, 186 Mich App 292; 463 NW2d 261 \(1990\)](#), expressly confronted the issue of attorney fees and the MCPA. This Court specifically rejected "the application of any rigid formula, whether based on a contingent fee arrangement or an hourly formula, that fails to take into account the *totality of the special circumstances* applicable to [*37] the case at hand." [[id. at 296-297](#) (emphasis added)]. Citing [Crawley, 48 Mich App at 737](#), this Court concluded:

[t]here is no precise formula for computing the reasonableness of an attorney's fee. However, among the facts to be taken into consideration in determining the reasonableness of a fee include, but are not limited to, the following: (1) the professional standing and experience of the attorney; (2) the skill, time and labor involved; (3) the amount in question and the results achieved; (4) the difficulty of the case; (5) the expenses incurred; and (6) the nature and length of the professional relationship with the client. [[Smolen, 186 Mich App at 295-296](#), quoting [Crawley, 48 Mich App at 737.](#)]

This Court concluded that "[w]hile the trial court should consider the guidelines of *Crawley*, it is not limited to those factors in making its decision." [[Smolen, 186 Mich App at 296](#)]. Also on the issue of how to assess attorney fees in the context of the

MCPA, this Court in [Jordan v Transnational Motors, Inc, 212 Mich App 94, 97; 537 NW2d 471 \(1995\)](#), referenced the [MRPC 1.5\(a\)](#) factors, and stated that a trial court "is not limited to these factors." [[id. at 97.](#)]

Here, the trial court provided [*38] a lengthy explanation for its award of attorney fees:

The question then becomes whether attorney fees in the amount of \$361,078.50 are reasonable under the circumstances. They are not.

At least three factors combined to needlessly prolong this litigation. First, plaintiffs refused to promptly tender their motorhome to the Bluebird defendants for repairs, choosing instead to pursue a claim in rescission, which ultimately failed. Second, plaintiffs refused to acknowledge that the Bluebird defendants substantially repaired their motorhome, claiming erroneously that the motorhome was still unsafe and illegal to drive. Finally, plaintiffs' [sic] inflated their claim for damages by seeking well in excess on \$1,000,000.00, and by doggedly refusing to settle their dispute for a reasonable amount. In the end, the jury did exactly what it should have done. The jury calculated the difference between the value of the motorhome in its original condition and the value of the motorhome following the repairs performed by the Bluebird defendants.

The Court also considers the outcome achieved by plaintiffs' attorneys. Plaintiffs did not prevail on any of the claims against the Holland Motorhomes defendants. [*39] At least 25 percent of the hours expended on this case by plaintiffs' attorneys are attributable to plaintiffs' failed claims against the Holland Motorhomes defendants. Additionally, plaintiffs failed to prevail at trial on two of the counts in the complaint, and failed to prove any damages as to two other counts. In the end, the plaintiffs succeeded only in proving that the value of the motorhome following the repairs performed by the Bluebird defendants was \$209,483.00 less than the value of the motorhome in its original condition.

Under all of the circumstances, the Court finds that the plaintiffs are entitled to attorney fees in the amount of \$100,000.

The trial court's statement implies that it considered the most compelling factor was plaintiff's tactical maneuvering and its effect on the proceedings. This was not an abuse of discretion, because a trial court should consider the "totality of the special circumstances applicable to the case at hand" and "[w]hile the trial court should consider the guidelines of *Crawley*, it is not limited to those factors in making its decision." [Smolen, 186 Mich App at 292, 296](#); See also [Jordan, 212 Mich App at 97](#).

Nor did the trial court's award [*40] contravene the purposes of the attorney fee provisions in the MCPA, as plaintiff contends. Plaintiff is correct that the underlying purpose of the MCPA is to protect consumers, partly through awarding attorney fees to prevailing parties. [Jordan, 212 Mich App at 97-98](#) ("[o]ne of the purposes behind both the [MMWA] and the MCPA is to provide, via an award of attorney fees, a means for consumers to protect their rights and obtain judgments where otherwise

prohibited by monetary constraints.") Plaintiff has failed to illustrate that the attorney fee award in this case was unreasonable or contravened the purpose of allowing consumers to protect their rights. In *Jordan*, this Court held that a trial court's reduction of the attorney fee in a MCPA case solely based on the results obtained and the low value of the case undermined the remedial nature of the statutes. [Jordan, 212 Mich App at 98](#). In this case, however, the trial court did not reduce the fee award based solely on those factors. Moreover, this Court in *Jordan* reaffirmed that, "[b]y our holding, we do not mean to suggest that a court must, in a consumer protection case, award the full amount of a plaintiff's requested fees. Rather, [*41] we hold that after considering all of the usual factors, a court must also consider the special circumstances presented in this type of case." [Id. at 99](#).

Affirmed.

/s/ William B. Murphy

/s/ Peter D. O'Connell

/s/ Kirsten Frank Kelly



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1. [Stariha v. Chrysler Group, 2012 Mich. App. LEXIS 1283](#)

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[Stariha v. Chrysler Group](#)

Court of Appeals of Michigan

June 28, 2012, Decided

No. 301238

Reporter

2012 Mich. App. LEXIS 1283

DARLENE M. STARIHA, Plaintiff-Appellant, v I. BASIC FACTS
 CHRYSLER GROUP, L.L.C., f/k/a
 DAIMLERCHRYSLER CORPORATION, Defendant-
 Appellee.

Notice: THIS IS AN UNPUBLISHED OPINION. IN ACCORDANCE WITH MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

Prior History: [*1] Oakland Circuit court. LC No. 2008-094601 - NZ.

Core Terms

attorney's fees, trial court, initial offer, repurchase, settlement, evidentiary hearing, settlement offer, attorney-client, communications, factors, offset, reasonable attorney's fees, mileage, email, assessing, inform, costs, good faith, advising, convey, amount of attorney fee, lease payments, actual cost, circumstances, reimbursement, consumer, hourly, lease, terms

Judges: Before: WHITBECK, P.J., and JANSEN and K. F. KELLY, JJ. WHITBECK, P.J. (concurring in part and dissenting in part).

Opinion

Per Curiam.

Plaintiff, Darlene M. Stariha, appeals as of right from a trial court order assessing attorney fees against defendant, Chrysler Group, L.L.C., f/k/a DaimlerChrysler Corporation, in the amount of \$2,000. We affirm.

This action arises out of plaintiff's claim that a vehicle she leased from defendant was defective. On September 17, 2008, plaintiff brought an action against defendant under the Magnuson-Moss Warranty Act (MMWA), [15 USC 2301 et seq](#) and the Michigan Consumer Protection Act (MCPA), [MCL 445.901 et seq](#).

Plaintiff and defendant attempted to settle the case through a series of offers and rejections. On November 10, 2008, defendant sent a letter to plaintiff's counsel, Dani Liblang, stating that defendant was considering repurchasing the vehicle or offering a replacement. On December 3, 2008, defendant emailed Liblang with a formalized offer to repurchase the vehicle for \$19,842.31, which would go to Chrysler Financial to satisfy the remaining lease payments, and to reimburse plaintiff in the amount [*2] of \$4,776.17. The \$4,776.17 reflected 12 payments of \$302.06 (payments plaintiff had made on the lease), plus \$967 (the down payment plaintiff had paid), minus \$1,815.55 (mileage offset), plus \$2,000 (attorney fees). Approximately a month passed with no response from Liblang. Defendant sent an email on January 2, 2009, indicating that if plaintiff did not reply by January 6, 2008, the offer would be revoked. Defendant also stated that if litigation resulted, defendant would object to paying attorney fees accrued after December 3, 2008. On January 22, 2009, with still no reply, defendant sent a letter to Liblang, informing her that further silence would constitute a rejection of the offer, defendant would oppose any attorney fees after December 3, 2008, and if plaintiff ultimately received a settlement less favorable than the one offered, defendant would

seek attorney fees. Defendant also extended the closing date of the offer until January 23, 2009.

On January 23, 2009, Liblang sent an email to defendant, stating that while plaintiff was willing to accept the offer to repurchase the vehicle, the issue of attorney fees would prevent the issue from settling. Liblang claimed that when [*3] forced to file a lawsuit, her fees were \$3,500. She concluded the email by stating, "please do not misunderstand our intentions [as] Plaintiff will accept the portion of your offer regarding a repurchase of the vehicle[,] however, regarding the amount of attorney fees we cannot accept less than \$3,500" and if that defendant did not agree, "I suggest we continue with the repurchase part of the offer and permit the Court to decide the issues of Fees and Costs."

Defendant replied to Liblang's email, stating that partial acceptance of the offer would constitute a rejection of the offer. On February 2, 2009, defendant sent another email to Liblang, formally rejecting plaintiff's counteroffer to increase the attorney fee to \$3,500. Defendant stated that it was willing to increase the original offer of attorney fees to \$2,250. Plaintiff rejected this offer, due to the inadequacy of attorney fees.

On October 30, 2009, defendant sent another letter to Liblang, stating that defendant was still interested in settling the case. At this point, plaintiff had returned the vehicle because her lease had expired. Defendant's settlement offer was for \$11,745.56, representing the total lease payments plaintiff [*4] made, with no offset for use. Defendant also stated that it would not offer more than \$2,250 in attorney fees and that while the offer was "not contingent upon [the] acceptance of the attorney fee," if plaintiff filed a fee petition, defendant would defend against such an action and "move for an award of attorney fees for having to defend this case unnecessarily." On November 10, 2009, Liblang sent an email to defendant stating that the offer of \$11,745.56 was accepted, but that plaintiff intended to "submit the issue of statutory attorney fees and costs to the court for decision."

On January 26, 2010, plaintiff filed a motion to enforce the settlement agreement and to assess statutory costs and attorney fees pursuant to the MMWA and the MCPA. Defendant responded that the only reason defendant had not issued a settlement check was because the amount of attorney fees was unsettled. Defendant also alleged that Liblang purposely prolonged settlement negotiations in order to increase attorney fees.

On January 27, 2010, defendant filed a motion for attorney fees and sanctions pursuant to [MCR 2.114](#), arguing that Liblang had prolonged the case for the sole purpose of increasing attorney fees. [*5] Defendant claimed that since plaintiff unreasonably rejected the offer, discovery was needlessly conducted solely on the issue of attorney fees.

On February 3, 2010, the trial court denied defendant's motion for sanctions under [MCR 2.114\(d\)](#). The trial court also ordered that an evidentiary hearing be held regarding the issue of attorney fees.

Before the evidentiary hearing occurred, an issue arose concerning plaintiff testifying at the hearing. Plaintiff had testified at a deposition, stating that she had never seen defendant's initial offer. Plaintiff moved to quash the subpoena, claiming that the information defendant was seeking was confidential communications between Liblang and plaintiff, and thus, was protected by attorney-client privilege. The trial court denied plaintiff's motion, reasoning that it would be impossible to discern whether attorney fees were reasonable if the issue of whether Liblang informed plaintiff of the initial offer was not explored.

The evidentiary hearing took place over four different days from April to July 2010. Plaintiff testified that she was not aware of when the initial offer was made, but that she thought she became aware that a settlement offer [*6] had been made in January of 2009. Plaintiff did not remember if she knew whether the initial offer included two components, namely, the offer for the vehicle and the offer for attorney fees. Plaintiff did not know that the initial offer was rejected on the basis of

inadequate attorney fees; however, plaintiff knew about the initial offer and was satisfied that it was within her counsel's discretion to reject it.

Liblang testified that she "absolutely" conveyed all settlement offers to plaintiff, plaintiff rejected the initial offer, and that the ultimate settlement was better for plaintiff because there was no mileage offset. Extensive additional testimony was taken regarding the Liblang's reputation and expertise and the method for arriving at her fees.

The trial court assessed Liblang's attorney fees at \$2,000. The trial court stated:

To observe that this Evidentiary Hearing was exhaustive is an understatement of the first order. The parties raised a comprehensive array of perplexing issues, including the propriety of certain evidence with regard to the determination of the reasonable hourly fee, the propriety of a flat fee, the propriety of the paralegal fees, the propriety of the [*7] scope of work undertaken under the circumstances, the applicability of various attorney fee surveys, and a host of other matters. Yet, nearly all of these intriguing issues have been rendered moot by the Plaintiff's counsel's failure to appropriately inform her client of a good faith settlement offer made by the Defendant early in the proceedings. This failure to convey the offer appropriately led to rejection of the offer, which in turn, led to the needless incurring of substantial attorney fees in litigating the case. To allow the Plaintiff to recover attorney fees which would never have been incurred but for her failure to meet the basic obligations as counsel would be a grave injustice and turn the system of fee recoveries topsy-turvy. Such fees are anything but reasonable.

The finding of fact leading to this conclusion was that:

[Liblang] did not fully convey the terms of the offer to her client. [Liblang] did not share the offer letter with her client, and instead recommended against accepting the offer

solely on [Liblang's] belief that the attorney fees were insufficient. Despite that being the sole reason why she recommended against accepting the offer to her client, [Liblang] [*8] did not reveal or otherwise explain that reasoning to the client. Because the real reason for rejecting the offer was hidden from the client, the Plaintiff rejected the offer. In other words, the Plaintiff would have accepted the offer had she fully understood its terms but rejected it based solely on the advice of her counsel who concealed the real reason she was advising against its acceptance.

Plaintiff filed a motion for reconsideration, arguing that the trial court erroneously concluded that plaintiff was not fully informed of the initial offer. Plaintiff also attached her affidavit, stating that she was aware of the initial offer, was fully informed about the issue of attorney fees, and rejected the offer because \$2,000 would not cover her attorney's actual costs.

The trial court denied plaintiff's motion:

For all of its bluster, the 14 page brief misses the fundamental point of the Court's ruling: but for Liblang's misconduct, the client would have accepted a \$2000 attorney fee award. Accordingly, all attorney fees incurred thereafter were not reasonably incurred. None of the remedial purposes of the various state and federal statutes proffered by the Plaintiff require this Court [*9] to order the Defendant to pay for fees and expenses unreasonably incurred because of Liblang's failure to fully inform her client of the full terms of the settlement offer. That would be rewarding inappropriate behavior - indeed, creating windfalls and incentives for improper behavior. Remember, this is not a case in which the client is being deprived of fees - this is all about the lawyer trying to harvest fees that were improperly allowed to be planted and grown based on the lawyer's own failings. Can the Plaintiff really be arguing a lawyer is allowed to wrack [sic] up unreasonable attorney fees and then force her opponent to pay for it? This is

nothing short of pilfering the opposing party. This is not justice.

The trial court reiterated that credibility determinations were "at the heart of [the trial court's] authority." The trial court also held that plaintiff's affidavit was untimely, improper new evidence, and "simply a thinly veiled desperate attempt to undo the testimony at trial."

Plaintiff now appeals as of right.

II. ANALYSIS

A. APPLICABILITY OF SMITH V KHOURY

Plaintiff argues that the trial court abused its discretion in awarding attorney fees where the trial court failed [*10] to adhere to [Smith v Khouri, 481 Mich 519; 751 NW2d 472 \(2008\)](#). We disagree. A trial court's award of attorney fees is reviewed for an abuse of discretion. [Moore v Secura Ins, 482 Mich 507, 516; 759 NW2d 833 \(2008\)](#). An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes. *Id.* The findings of fact underlying an award of attorney fees are reviewed for clear error. [Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club, 283 Mich App 264, 296; 769 NW2d 234 \(2009\)](#). "A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire record is left with a definite and firm conviction that a mistake was made." *Id.* Any questions of law underlying an attorney fee award are reviewed de novo. [Id. at 297](#).

Generally, "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 NW2d 641 \(1998\)](#). In [MCL 445.911\(2\)](#) of the MCPA, "a person who suffers loss as a result of a violation of this act" may recover reasonable attorney fees. Also, the MMWA "allows [*11] recovery of attorney fees upon successful suit under a written or implied warranty under state law." [King v Taylor Chrysler-](#)

[Plymouth, Inc, 184 Mich App 204, 221; 457 NW2d 42 \(1990\); 15 USC 2310\(d\)](#). Thus, these two statutes authorize the possibility of attorney fees in this case.

The Court in *Smith* was confronted with the issue of determining attorney fees in the context of case evaluation situations. [Smith, 481 Mich at 530](#). The Court stated that the method being used needed "some fine tuning." *Id.* The Court stated that trial courts should first determine the "reasonable hourly rate [which] represents the fee customarily charged in the locality for similar legal services," relying on "reliable surveys or other credible evidence of the legal market." [Id. at 530-531](#). The Court then instructed that trial courts should multiply that number by the "reasonable number of hours expended in the case." [Id. at 531](#). The Court emphasized that the burden is on the fee applicant to produce satisfactory evidence of these factors. *Id.*

While this is a clear and concise method for determining attorney fees, the issue confronted in *Smith* was reasonable attorney fees in the context of case evaluations. [MCR 2.403](#) [*12] provides for attorney fees when "one party accepts the award and one rejects it...and the case proceeds to a verdict, the rejecting party must pay the opposing party's actual costs unless the verdict is, after several adjustments, more than 10 percent more favorable to the rejecting party than the case evaluation." In terms of calculating the actual costs of the attorney fee, [MCR 2.403\(O\)\(6\)](#) specifically states that:

For the purpose of this rule, actual costs are

- (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.

In [Univ Rehab Alliance, Inc v Farm Bureau Gen Ins Co of Mich, 279 Mich App 691, 700 n 3; 760 NW2d 574 \(2008\)](#), this Court recognized the limited applicability of *Smith*. This Court was confronted with the issue of determining a reasonable attorney

fee pursuant to the no-fault act, which provided that "an attorney is entitled to a reasonable fee for advising and representing a claimant in an action for personal or property protection insurance benefits which are overdue...." [MCL 500.3148](#). Ultimately, this Court [*13] held that the trial court did not abuse its discretion in awarding attorney fees based on a contingency fee agreement. [Univ Rehab Alliance, Inc., 279 Mich App at 702](#). Specifically, this Court held that:

Smith does not affect our analysis in this case of the question whether the trial court abused its discretion when determining a reasonable attorney fee under [MCL 500.3148\(1\)](#) [because] *Smith* addressed [MCR 2.403\(O\)\(6\)\(b\)](#), which explicitly requires that the reasonable-attorney-fee portion of actual costs be based on a reasonable hourly or daily rate as determined by the trial court.... [*Id* at 700 n 3, 701.]

Likewise in this case, the statute at issue is not [MCR 2.403](#). Moreover, the MCPA and the MMWA do not refer to any type of rigid formula to be used when calculating reasonable attorney fees. Additionally, plaintiff fails to cite any case where the specific method articulated in *Smith* has been applied to a MMWA or a MCPA claim.

Furthermore, while decided prior to *Smith*, this Court in [Smolen v Dahlmann Apartments, Ltd, 186 Mich App 292, 296-297; 463 NW2d 261 \(1990\)](#), expressly confronted the issue of attorney fees and the MCPA. This Court's opinion, which has not been overruled, specifically [*14] rejected "the application of any rigid formula, whether based on a contingent fee arrangement or an hourly formula, that fails to take into account the totality of the special circumstances applicable to the case at hand." *Id*. This Court went onto cite [Crawley v Schick, 48 Mich App 728, 737; 211 NW2d 217 \(1973\)](#), for the proposition that:

[t]here is no precise formula for computing the reasonableness of an attorney's fee. However,

among the facts to be taken into consideration in determining the reasonableness of a fee include, but are not limited to, the following: (1) the professional standing and experience of the attorney; (2) the skill, time and labor involved; (3) the amount in question and the results achieved; (4) the difficulty of the case; (5) the expenses incurred; and (6) the nature and length of the professional relationship with the client. [[Smolen, 186 Mich App at 295-296](#), quoting [Crawley, 48 Mich App at 737](#).]

This Court concluded that "[w]hile the trial court should consider the guidelines of *Crawley*, it is not limited to those factors in making its decision." [Smolen, 186 Mich App at 296](#). Also on the issue of how to assess attorney fees in the context of the MCPA and the [*15] MMWA, this Court in [Jordan v Transnational Motors, Inc, 212 Mich App 94, 97; 537 NW2d 471 \(1995\)](#), referenced the [Michigan Rules of Professional Conduct 1.5\(a\)](#) factors,¹ and stated that a trial court "is not limited to these factors." [Id. at 97](#).

In this case, significant evidence was presented at the evidentiary hearing regarding the various factors cited above. Plaintiff presented two witnesses who testified that plaintiff's counsel had great experience [*16] and skill in these types of cases. Plaintiff's counsel also submitted her resume to the court, and testified to her various accomplishments and awards. Evidence of the initial offer and the settlement were introduced at the evidentiary hearing as well. Plaintiff's counsel's billing statements were submitted to the court, along with defendant's arguments that this bill was inflated. Defendant presented evidence that the fee typically offered before discovery was \$2,000, while plaintiff's counsel testified that it was \$3,500.

The trial court referenced such evidence, but found that most of it was rendered moot due to Liblang's

¹ The factors are: (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and (8) whether the fee is fixed or contingent. [Smith, 481 Mich at 529-530](#).

failure to communicate the terms of the initial settlement offer to plaintiff. Thus, while the trial court did reflect on the evidence presented at the evidentiary hearing, the trial court considered that the most compelling factor was the failure of plaintiff's counsel to fully inform plaintiff about the initial offer. This did not constitute an abuse of discretion, because a trial court should consider the "totality of the special circumstances applicable to the case at hand" and "[w]hile the trial court should consider the guidelines of *Crawley*, it is not limited [*17] to those factors in making its decision." [Smolen, 186 Mich App at 292, 296](#); See also [Jordan, 212 Mich App at 97](#).

Contrary to plaintiff's contention, the trial court's award of a \$2,000 attorney fee did not contravene the purposes of the attorney fee provisions in the MMWA or the MCPA. This Court has specifically stated that "[o]ne of the purposes behind both the [MMWA] and the MCPA is to provide, via an award of attorney fees, a means for consumers to protect their rights and obtain judgments where otherwise prohibited by monetary constraints." [Jordan, 212 Mich App at 97-98](#). Plaintiff has failed to illustrate that the attorney fee in this case was unreasonable or that it contravened the purpose of consumer protection. Plaintiff's reliance on *Jordan* is also problematic. This Court held that a trial court's reduction of the attorney fee in a MMWA and MCPA case solely based on the results obtained and the low value of the case undermined the remedial nature of the statutes. [Jordan, 212 Mich App at 98](#). Yet, in this case, the trial court did not reduce the fee award because of such factors. Moreover, this Court in *Jordan* reaffirmed that, "[b]y our holding, we do not mean to suggest that [*18] a court must, in a consumer protection case, award the full amount of a plaintiff's requested fees. Rather, we hold that after considering all of the usual factors, a court must also consider the special circumstances presented in this type of case." [Id. at 99](#).

B. ATTORNEY CLIENT PRIVILEGE

Plaintiff next argues that the attorney-client privilege prevented disclosure of confidential

communications regarding the initial settlement offer. We disagree.

"The question whether the attorney-client privilege applies to a communication is a question of law that this Court reviews de novo." [Leibel v Gen Motors Corp, 250 Mich App 229, 236; 646 NW2d 179 \(2002\)](#).

"[A]ttorney-client privilege attaches to direct communication between a client and his attorney as well as communications made through their respective agents." [Reed Dairy Farm v Consumers Power Co, 227 Mich App 614, 618; 576 NW2d 709 \(1998\)](#). "Confidential client communications, along with opinions, conclusions, and recommendations based on those communications, are protected by the attorney-client privilege because they 'are at the core of what is covered by the privilege.'" [McCartney v Attorney General, 231 Mich App 722, 735; 587 NW2d 824 \(1998\)](#), [*19] quoting [Hubka v Pennfield Twp, 197 Mich App 117, 122; 494 NW2d 800 \(1992\)](#), rev'd on other grounds [443 Mich 863 \(1993\)](#). Yet, "[t]he scope of the attorney-client privilege is narrow, attaching only to confidential communications by the client to his advisor that are made for the purpose of obtaining legal advice." [Reed Dairy Farm, 227 Mich App at 618-619](#). Thus, attorney-client privilege does not prevent disclosure of a client's knowledge of the underlying relevant facts simply because those facts were communicated to her attorney. [Upjohn Co v US, 449 U.S 383, 396; 101 S Ct 677; 66 L Ed 2d 584 \(1981\)](#).

In this case, plaintiff testified at the deposition that she never saw the initial offer. Plaintiff testified at the evidentiary hearing that she became aware of the initial offer in January of 2009, that she could not remember if she knew the offer had two components, and that she did not know the initial offer was rejected because of attorney fees. These questions and responses did not elicit information about any advice plaintiff's counsel gave to plaintiff or the content of their communication. Instead, the information related to plaintiff's knowledge that there was an initial offer and [*20] knowledge of the stated reasons for rejecting that offer. Since

such information goes to plaintiff's knowledge of the underlying facts of an event, and not the content of communications between plaintiff and counsel, attorney-client privilege does not protect this information. Thus, the trial court did not clearly err in holding that attorney-client privilege was inapplicable.

C. TERMS OF THE AGREEMENT

Furthermore, the trial court did not clearly err in finding that Liblang failed to fully convey the terms of the offer to plaintiff. While plaintiff testified that she eventually became aware of the offer, and authorized her counsel to reject it, plaintiff also could not remember when she was informed about the offer or whether she knew the offer contained the component of attorney fees. Liblang's billing statement did not include any reference to a discussion regarding the initial offer. Also, at the deposition, plaintiff testified that she never saw this initial offer.

Even more revealing was plaintiff's testimony that she did not know that the initial offer was rejected solely on the basis of inadequate attorney fees. Plaintiff claims that this testimony was taken out of context, because [*21] the initial settlement offer was rejected both because attorney fees were too low and because of the mileage offset. Yet, the evidence presented in the lower court directly contradicts such a conclusion. On January 23, 2009, plaintiff's counsel finally responded to defendant's initial offer and stated that:

We received your letter of January 22, 2009 lack of response to Defendant's settlement offer. Please allow this letter to confirm that Plaintiff will accept your offer to repurchase Plaintiff's vehicle regarding Plaintiff's damages only however, the issue regarding attorney fees (or this aspect of Plaintiff's damages) is not resolved and seems to be the reason the case did not settle....

While I needed to address some of the statements in your letter of January 22, 2009, please do not misunderstand our intentions. Plaintiff will accept the portion of your offer

regarding a repurchase of the vehicle however, regarding the amount of attorney fees we cannot accept less than \$3,500. If Defendant is agreeable to the \$3,500 which is what is usually agreed to in our other cases settled with the Sutter Firm, please send me a release and dismissal. If not, since it is early in the case and [*22] if Defendant is adamant on its position, I suggest we continue with the repurchase part of the offer and permit the Court to decide the issue of Fees and Costs.

Nowhere is there any mention of dissatisfaction with the mileage offset. In fact, plaintiff's counsel specifically indicates that plaintiff was willing to accept the offer but for the attorney fee issue. Yet, plaintiff clearly testified she did not know the offer was rejected because of attorney fees. Thus, it was not clearly erroneous to conclude that plaintiff's counsel did not fully convey the terms of the offer to plaintiff, since plaintiff's testimony indicates both a lack of knowledge about the content of the offer and the reasons for rejection.

D. PLAINTIFF'S PRESUMED ACCEPTANCE OF THE INITIAL OFFER

Next, plaintiff argues that the trial court clearly erred in finding that plaintiff would have accepted this initial offer if her counsel had fully informed and advised her. We disagree.

Plaintiff suggests that since the ultimate settlement was better than the initial offer, the trial court clearly erred in finding that the only reason plaintiff refused the initial offer was the failure of plaintiff's counsel to properly inform [*23] and advise plaintiff. However, such an argument is based on the flawed premise that the ultimate settlement was better than the initial offer. Defendant initially offered to repurchase the vehicle for \$19,842.31, a sum that would go to Chrysler Financial to satisfy the remaining lease payments. Defendant also offered a reimbursement of \$4,776.17 (\$2,000 attorney fees, a mileage offset of \$1,815.55, and reimbursement of \$4,591.72 for the down payment and lease payments plaintiff had already made). By the time of defendant's second offer on October

30, 2009, the vehicle had already been returned, so defendant offered plaintiff \$11,745.56 as reimbursement for the amount plaintiff paid on the lease, and not more than \$2,250 in attorney fees.

The most significant difference between the two offers is that the second offer did not include an offset for mileage. Initially, this seems to render the second offer an improvement. However, there were other unfavorable consequences resulting from a rejection of the initial offer. First, plaintiff was still obligated under her lease and had to continue to pay her lease payments since the matter had not been settled. Plaintiff also had to wait significantly [*24] longer to receive her reimbursement. This was a disadvantage for plaintiff, since the concept of the "time value of money" illustrates that, "a dollar received today is worth more than a dollar to be received in the future."

[ANR Pipeline Co v Dept of Treasury, 266 Mich App 190, 194 n 2; 699 NW2d 707 \(2005\)](#). Moreover, plaintiff alleged in her complaint that the vehicle could not be reasonably relied on "for the ordinary purpose of safe, comfortable, reliable and efficient transportation," and that plaintiff was suffering and would continue to suffer damages such as the cost of obtaining alternative transportation, wage loss, anxiety, embarrassment, anger, fear, frustration, disappointment, worry, aggravation, and inconvenience. Thus, plaintiff was forced to endure all of this for much longer by rejecting the initial offer.

Furthermore, plaintiff's argument, that the trial court clearly erred in not considering this mileage offset as a reasonable explanation for plaintiff's rejection of the initial offer, is also flawed because there is no evidence that plaintiff rejected the initial offer because of the mileage offset. As discussed above, the evidence actually indicates that the only [*25] basis for rejecting the initial offer was inadequate attorney fees. Plaintiff's counsel was clear in her email on January 23, 2009, stating, "please do not misunderstand our intentions[,] [p]laintiff will accept the portion of your offer regarding a repurchase of the vehicle" but for the issue of "the amount of attorney fees[,] we cannot accept less than \$3,500."

Moreover, the fact that the initial offer was rejected only because of inadequate attorney fees was strong

evidence that, but for the failure of plaintiff's counsel to inform and advise plaintiff, plaintiff would have accepted the offer. At the evidentiary hearing, plaintiff's counsel stated that in this case, her fee was only derived either from what she negotiated in a settlement or was awarded by the court. Hence, since plaintiff would not be responsible for any additional attorney costs, the amount of attorney fees achieved through negotiation or a court award had no effect on plaintiff. The only person who had something to gain by rejecting the initial offer on the basis of attorney fees was plaintiff's counsel. Thus, it was not clearly erroneous for the trial court to conclude that plaintiff would have accepted the initial [*26] offer "had she fully understood its terms" and had plaintiff's counsel not "concealed the real reason [plaintiff's counsel] was advising against its acceptance."

E. DEFENDANT'S GOOD FAITH OFFER

Plaintiff next argues that the trial court improperly considered defendant's good faith when assessing attorney fees. We disagree.

While the opinion and order assessing attorney fees does refer to defendant's initial offer as one made in good faith, the trial court did not actually indicate that defendant's good faith played any role in the assessment of the attorney fees. Instead, the trial court very clearly stated that it was the failure of plaintiff's counsel to fully inform plaintiff about the initial offer that rendered any fees over \$2,000 unreasonable. Thus, there is no evidence that the trial court relied on defendant's good faith when assessing reasonable attorney fees.

Affirmed. As the prevailing party, defendant may tax costs. [MCR 7.219](#).

/s/ Kathleen Jansen

/s/ Kirsten Frank Kelly

Concur by: WHITBECK (In Part)

Dissent by: WHITBECK (In Part)

Dissent

Whitbeck, P.J. (*concurring in part and dissenting in part*).

I agree with the majority that the trial court did not abuse its discretion in awarding plaintiff's counsel a \$2,000 [*27] attorney fee. I also agree that the trial court did not clearly err in holding that attorney-client privilege was inapplicable. And I agree that there is no evidence that the trial court relied on defendant's good faith when assessing reasonable attorney fees. Further, on the basis of the record, I am also not left with a definite and firm conviction¹ that that the trial court erred in concluding that plaintiff's counsel did not fully convey the terms of the offer to plaintiff, since her testimony indicated both a lack of knowledge about the content of the offer and the reasons for rejection. Similarly, on the basis of the record, I am also not left

with a definite and firm conviction that the trial court erred in concluding that plaintiff would have accepted the initial offer "had she fully understood its terms."

With that said, I write separately because I disagree with the majority's acceptance of the trial court's statement that plaintiff's counsel "*concealed* the real reason she was advising against its acceptance."² Although plaintiff's testimony did indicate a lack of knowledge about the content of the offer and [*28] the reasons for rejection, on the basis of my review of the record, I believe that the record is completely lacking in evidentiary support³ for the trial court's finding that plaintiff's counsel actively concealed information from her client regarding the reason for rejecting the initial settlement offer. Absent clear evidence on the record, I am not willing to impute such misconduct to plaintiff's counsel.

/s/ William C. Whitbeck

¹ [Peters v Gunnell, Inc., 253 Mich App 211, 221; 655 NW2d 582 \(2002\)](#).

² Emphasis added.

³ [Hill v City of Warren, 276 Mich App 299, 308; 740 NW2d 706 \(2007\)](#).



User Name: SUSAN.BROWN

Date and Time: Aug 11, 2015 2:34 p.m. EDT

Job Number: 22679287

Document(1)

1. [*In re Ujlaky, 2014 Mich. App. LEXIS 2057*](#)

Client/Matter: 0555-268

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A Neutral

As of: August 11, 2015 2:34 PM EDT

In re Ujlaky

Court of Appeals of Michigan

October 23, 2014, Decided

No. 316494, No. 316809

Reporter

2014 Mich. App. LEXIS 2057

In re Attorney Fees of JOHN W. UJLAKY. PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v SHAWN DOUGLAS SIMPSON, Defendant, and JOHN W. UJLAKY, Appellant. PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v GILBERTO DELAROSA, Defendant, and JOHN W. UJLAKY, Appellant.

Notice: THIS IS AN UNPUBLISHED OPINION. IN ACCORDANCE WITH MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

Subsequent History: Motion granted by [Ujlaky v. Simpson \(In re Ujlaky\), 2015 Mich. LEXIS 261 \(Mich., Feb. 10, 2015\)](#)

Prior History: [*1] Kent Circuit Court. LC No. 11-002833-FC. Kent Circuit Court. LC No. 05-011853-FH.

Core Terms

circuit court, extraordinary fees, appointed, services, restitution, fee schedule, habitual offender, compensated, sentence, appeals, pay restitution, FELONY, issues, appellate counsel, services rendered, trial court, per hour, imprisonment, argues, billed, flat

Judges: Before: METER, P.J., and WHITBECK and RIORDAN, JJ.

Opinion

PER CURIAM.

In Docket No. 316494, attorney John W. Ujlaky appeals by leave granted an April 16, 2013, order that denied Ujlaky's request for an award of extraordinary fees incurred during the appointed appellate representation of defendant Shawn Douglas Simpson. In Docket No. 316809, Ujlaky appeals by leave granted a May 14, 2013, order that denied Ujlaky's request for an award of extraordinary fees incurred during the appointed appellate representation of defendant Gilberto Delarosa. In both cases, the circuit court limited Ujlaky to recovering the flat rate allowed under a fee schedule used by Kent County to compensate appointed counsel. We affirm.

BASIC FACTS IN DOCKET NO. 316494

On March 12, 2012, Simpson pleaded guilty to first-degree criminal sexual conduct (CSC). In exchange for Simpson's plea, the prosecutor agreed to dismiss a charge of second-degree CSC, to dismiss the fourth-offense habitual offender and second-time CSC-offender sentence enhancements and the charges in another circuit-court case. Additionally, the plea was conditioned on Simpson's [*2] being allowed to challenge on appeal rulings by the circuit court that denied Simpson's motion to suppress inculpatory statements made by Simpson during an interview with police and to suppress other-acts evidence. Finally, the prosecutor agreed to not file any additional charges arising from acts committed with the two alleged victims. The circuit court sentenced Simpson on April 5, 2012, to 25 to 65 years' imprisonment.

Simpson requested appointed appellate counsel. The circuit court appointed Ujlaky to represent

Simpson on appeal, and on September 13, 2012, Ujlaky filed in this Court a 31-page delayed application for leave to appeal on Simpson's behalf. He raised the following two issues:

I. DID THE TRIAL COURT ERR BY DENYING MR. SIMPSON'S MOTION *IN LIMINE* RE: SUPPRESSION OF OTHER ACTS EVIDENCE?

II. DID THE TRIAL COURT ERR BY DENYING MR. SIMPSON'S MOTION TO SUPPRESS HIS INCULPATORY STATEMENTS?

This Court denied the delayed application for lack of merit in the grounds presented. *People v Simpson*, unpublished order of the Court of Appeals, issued October 24, 2012 (Docket No. 312343). The Michigan Supreme Court denied leave to appeal. *People v Simpson*, 493 Mich 955; 828 NW2d 364 (2013).

On October 26, 2012, Ujlaky submitted a Michigan Appellate [*3] Assigned Counsel System (MAACS) Statement of Service and Order for Payment of Court Appointed Counsel to the Kent Circuit Court, pursuant to which he requested attorney fees in the amount of \$2,150.05 (39.1 hours x \$55, the hourly rate set by the Kent Circuit Court) and out-of-pocket expenses of \$335.03. He checked the box on the form to indicate that he was moving for an award of extraordinary fees and attached to the form an itemized listing of the services performed and the time spent performing those services.

Kent County pays appointed appellate counsel pursuant to the terms of a fee schedule. According to the fee schedule, the County compensates appointed counsel at a rate of \$55 an hour, but caps the total fee at \$660 for guilty-plea appeals. Additionally, the schedule allows for the reimbursement of actual costs incurred as long as those expenses are itemized. Finally, the schedule allows for "[e]xtra fees with written justification & approval."

On November 14, 2012, Kent County issued a check to Ujlaky in the amount of \$995.03, which

reflects payment of the flat fee of \$660 and reimbursement for actual costs incurred. Thereafter, Ujlaky moved for payment of extraordinary professional [*4] fees and requested additional payment in the amount of \$1,550.05, which reflected the unpaid balance of his original request for extraordinary fees, or in some other reasonable amount. Ujlaky emphasized the time he spent on the case and the typical rates for criminal and appellate attorneys. At the motion hearing, when asked by the court what characteristics of the case supported the request for extraordinary fees, Ujlaky responded:

Well, nothing particularly, you know. It's just a matter of having to review the record. There were substantial transcripts of 94 pages which involved an extensive evidentiary hearing that had to be reviewed and prepared as part of the application for leave to appeal, and certainly services exceeded the base minimum.

The circuit court denied the motion by opinion and order entered on April 16, 2013. The court opined:

Defendant's attorney seeks extraordinary fees arguing that the Court must review the appropriateness of his bills according to the usual factors used to determine whether the fees were reasonable.

The pertinent facts are these. The County paid a total of \$995.03 accounting for \$335.03 in out of pocket expenses and \$600.00 [sic, \$660.00] for professional [*5] services. The movant, Mr. John Ujlaky, argues these payments are insufficient to cover his services. Mr. Ujlaky billed a total of \$2,150.05. Mr. Ujlaky argues that the money paid to him equates to an hourly rate that is smaller than his usual hourly rate of \$180 per hour or than the average rates billed by similarly situated attorneys.

Mr. Ujlaky's argument is not persuasive because "[r]easonable compensation" . . . does not mean [the] amount privately retained counsel would earn for providing similar services for members of the general public as [the] purpose underlying [the] statute was not

to provide full compensation but, rather, to relieve members of bar of at least some of their professional obligation to provide free legal services to indigent [sic].

Mr. Ujlaky had accepted the Court's fee schedule. By doing so, we acknowledge that he has honored part of his professional obligations assumed upon admission to practice law in this state. Consequently, the motion for extraordinary fees is DENIED. [Citations and quotation marks omitted.]

Ujlaky then moved for reconsideration and advanced the following arguments:

8. Although the \$55.00 per hour rate for legal services is not completely unreasonable, [*6] counsel did agree to accept the Court Appointment under the belief that he would be **justly compensated** under the rate of pay for Appointed Appellate Counsel as established by the 17th Judicial Circuit Court, which provides [for] "EXTRA FEES WITH WRITTEN JUSTIFICATION & APPROVAL[.]"

...

12. Reconsideration is being sought because the trial court clearly erred in its Opinion and Order dated April 16, 2013, to wit:

A) counsel **never** sought compensation in the amount of \$180.00 per hour;

B) counsel **never** sought compensation [at] "the average rates billed by similarly situated attorneys.";

C) counsel **never claimed** that he was seeking payment at a rate earned for providing similar services to the general public;

D) counsel was paid the meager amount of \$15.3453 per hour for the 39.1 hours of professional services required and rendered [sic];

E) counsel sought a "reasonable" amount [of] compensation based upon the court's rate schedule of \$55.00 per hour;

F) while counsel "accepted the Court's fee schedule", counsel did so under the belief that

he would be **justly compensated** under the rate of pay for Appointed Appellate Counsel as established by the 17th Judicial Circuit Court, which provides [for] [*7] "EXTRA FEES WITH WRITTEN JUSTIFICATION & APPROVAL". [Bolding in original.]

The circuit court denied reconsideration by order dated May 7, 2013, for the reason that Ujlaky failed to demonstrate palpable error.

BASIC FACTS IN DOCKET NO. 316809

On August 20, 2007, Delarosa pleaded nolo contendere to felonious assault and acknowledged his status as a fourth-offense habitual offender. In exchange for his plea, the prosecutor agreed to recommend that Delarosa's sentence not exceed 12 months in the county jail. To establish his status as an habitual offender, Delarosa admitted that he had been convicted of two charges of operating a motor vehicle while under the influence of intoxicating liquor, third offense, in Michigan, and attempted possession of marijuana in Texas.

The circuit court sentenced Delarosa on October 4, 2007, to three years' probation, with the first ten months to be served in the county jail. The court also ordered Delarosa to pay restitution in an amount to be determined. On December 17, 2007, the court entered an amended judgment of sentence that directed Delarosa to pay restitution in the amount of \$30,368.13.

The prosecutor subsequently charged Delarosa with violating the [*8] terms of his probation by failing to pay restitution. Delarosa pleaded guilty to the charge at a hearing held on November 3, 2010. The circuit court then delayed sentencing for one year, extended Delarosa's probation for one year, suspended the payment of costs, ordered Delarosa to pay \$60 a week in restitution, and gave Delarosa one year to show progress.

The circuit court sentenced Delarosa on September 22, 2011, to 3 to 15 years' imprisonment and ordered him to pay restitution in the amount of \$30,368.13.

The court appointed attorney Ujlaky to represent Delarosa. Delarosa moved to withdraw his plea or,

in the alternative, for resentencing. He argued that he had been improperly charged as a four-time habitual offender because his Texas conviction for attempted marijuana possession was a misdemeanor offense. Delarosa also asserted that the circuit court erroneously ordered him to pay restitution and to pay restitution in an amount unsubstantiated by the record. Delarosa further argued that he had been improperly imprisoned for failure to pay restitution.

The circuit court heard arguments on the motion on April 13, 2012. The court rejected Delarosa's assertion that he was incorrectly [*9] charged as a fourth-offense habitual offender because the presentence report characterized the Texas conviction as a felony. The court rejected Delarosa's arguments regarding restitution by noting that the victim's injuries were severe.

Ujlaky then filed a 25-page delayed application for leave to appeal on Delarosa's behalf on April 25, 2012, in which he raised the following three issues:

I. IS MR. DELAROSA ENTITLED TO WITHDRAW HIS NO CONTEST PLEA BECAUSE HE WAS IMPROPERLY CHARGED AS A 4TH FELONY HABITUAL OFFENDER WHEN HE ONLY HAD TWO PRIOR FELONY OR FELONY LIKE CONVICTIONS?

II. WAS RESTITUTION IMPROPERLY ENTERED AND WAS IT ENTERED IN AN IMPROPER AMOUNT?

III. WAS MR. DELAROSA IMPROPERLY IMPRISONED FOR NON PAYMENT OF RESTITUTION?

This Court remanded the matter to the circuit court

. . . with instructions that the prosecutor establish that the facts of defendant's Texas conviction would support a felony conviction in Michigan, or, in the alternative, proceed under a different habitual offender statute. [People v Quintanilla, 225 Mich App 477, 479; 571 NW2d 228 \(1997\)](#).

In addition, the case is remanded for an evidentiary hearing on the issue of restitution. The prosecution must prove the amount of the victim's allowable loss by a preponderance of the evidence. [*10] [MCL 780.767\(4\)](#). [*People v Delarosa*, unpublished order of the Court of Appeals, issued November 21, 2012 (Docket No. 309934).]

Following remand, the circuit court conducted an evidentiary hearing on March 7, 2013. The prosecutor conceded that the Texas conviction should not be used for purposes of Delarosa's status as an habitual offender. The court then heard the testimony of two witnesses regarding the amount of restitution. The court set Delarosa's resentencing as a third-offense habitual offender for a later date and advised the parties that additional evidence on the issue of restitution could be introduced at that hearing. The court also directed the parties to brief, if they wished, the issues regarding whether lost wages and college tuition could be awarded as restitution. Ultimately, the court resentenced Delarosa to 3 to 15 years' imprisonment and ordered him to pay restitution in the amount of \$27,257.13.

On May 13, 2013, Ujlaky submitted a MAACS Statement of Service and Order for Payment of Court Appointed Counsel to the Kent Circuit Court, pursuant to which he requested attorney fees in the amount of \$4,207.50 (76.5 hours x \$55) and out-of-pocket expenses of \$789.57. He checked the box [*11] on the form to indicate that he was moving for an award of extraordinary fees and attached to the form an itemized listing of the services performed and the time spent performing those services.

On May 14, 2013, the circuit court ordered Kent County to pay Ujlaky \$1,449.57, which reflects payment of the flat fee of \$660 and reimbursement for actual costs incurred. On June 3, 2013, Kent County issued a check to Ujlaky in the amount ordered by the court.

ANALYSES

Ujlaky argues that the circuit court abused its discretion when it refused to award Ujlaky

extraordinary fees and, thus, to compensate counsel for the fair value of his services. He argues that the extraordinary fees requested were reasonable and well below the fees paid to public defenders in this state and to retained appellate counsel. Moreover, he contends, the time expended during the appeals was reasonable. He argues that the circuit court appears to be slavishly adhering to Kent County's fee schedule without considering whether justification exists to award extraordinary fees.

An appointed appellate attorney is entitled to reasonable compensation for representing an indigent criminal defendant on appeal. See [People v Edgley, 187 Mich App 211, 213; 466 NW2d 296 \(1991\)](#). Ujlaky, as [*12] the party requesting the extraordinary fees, bore the burden of proving the entitlement to those fees. [Adair v Michigan \(On Fourth Remand\), 301 Mich App 547, 552; 836 NW2d 742 \(2013\)](#). This Court reviews for an abuse of discretion a lower court's determination regarding the reasonableness of the compensation awarded for services rendered by a court-appointed attorney. [In re Attorney Fees of Mullkoff, 176 Mich App 82, 85; 438 NW2d 878 \(1989\)](#).

Kent County compensates an appointed appellate attorney pursuant to a fee schedule. By agreeing to accept an appointment to represent an indigent criminal defendant on appeal from a criminal conviction in Kent County, Ujlaky necessarily and implicitly agreed to be compensated under the terms of the fee schedule. The fees schedule caps the fee at \$660 for appeals from plea-based convictions. The fee schedule does allow for the payment of extra fees "with written justification & approval," however. These fees are referred to as "extraordinary" on the MAACS form. Random House Webster's College Dictionary (1997) defines the term "extraordinary" as "being beyond what is usual, regular, or established[.]" With this definition in mind, extraordinary fees must be fees incurred for services rendered that are beyond those usually required.

In Docket No. 316494, Ujlaky initially submitted a request for fees [*13] totaling \$2,150.05. He

submitted the request on a MAACS form. He placed an "x" on the form next to Line 35, which provides: "Motion for extraordinary fees (attach copy)." Ujlaky attached no copy of a motion for extraordinary fees. Rather, he attached a statement of the hours expended and the services provided. Kent County paid Ujlaky the flat fee from the schedule. Ujlaky then filed a formal motion for extraordinary fees. We note that the circuit court failed to explicitly address whether the fees sought were both extraordinary and reasonable. Nevertheless, Ujlaky bore the burden of proving the extraordinary nature of the services rendered and the reasonableness of the fees sought. A review of his motion reveals that Ujlaky failed to explain how the services rendered in the appeal in Docket No. 312494 were of a character and an amount beyond those normally required in a guilty-plea appeal. Ujlaky filed a 22-page appellate analysis that addressed the two issues preserved by Simpson in his conditional plea. Those issues were the subject of briefing by the parties in the trial court, an evidentiary hearing, and a ruling by the trial court. Under such circumstances, Ujlaky would not have [*14] to have done a great deal of original analysis to present those issues on appeal. As noted, when asked by the court what characteristics of the case supported the request for extraordinary fees, Ujlaky responded: "Well, nothing particularly, you know." Under the circumstances, we cannot find that Ujlaky carried his burden, and appellate relief is unwarranted.

In Docket No. 316809, Ujlaky submitted a request for attorney fees in the amount of \$4,207.50 on a MAACS form. Again, he placed an "x" on the form next to Line 35, which provides: "Motion for extraordinary fees (attach copy)." Ujlaky attached no copy of a motion for extraordinary fees. Rather, he attached a statement of the hours expended and the services provided. The circuit court signed the form order that is part of the second page of the MAACS form and, by so doing, authorized the payment of the flat fee. Although the circumstances of this case suggest that an award of extraordinary fees might have been in order, Ujlaky *did not attach a motion* to the MAACS form as required and, thus, never offered any explanation, beyond

a recitation of his proposed billing, to the court regarding the apparent extraordinary nature of the services [*15] rendered and the reasonableness of the fees sought. Thus, again, Ujlaky failed to carry his burden. Appellate relief is unwarranted.

/s/ Patrick M. Meter

/s/ William C. Whitbeck

/s/ Michael J. Riordan

Affirmed.

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[Tinman v. Blue Cross & Blue Shield of Mich.](#)

Court of Appeals of Michigan

September 6, 2012, Decided

No. 298036

Reporter

2012 Mich. App. LEXIS 1712; 2012 WL 3870643

ILENE TINMAN and MICHAEL TINMAN, as next friends of TZVIH TINMAN, Plaintiffs-Appellees, v BLUE CROSS AND BLUE SHIELD OF MICHIGAN, Defendant-Appellant.

Notice: THIS IS AN UNPUBLISHED OPINION. IN ACCORDANCE WITH MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

Prior History: [*1] Wayne Circuit Court. LC No. 99-932051-CK.

Core Terms

trial court, attorney's fees, attorneys, defense counsel, locality, billing, evidentiary hearing, individual claim, legal services, cross-examine, plaintiffs', expended, customarily, factors, merits, number of hours, hourly rate, awarding, monetary damages, preparation, customary, witnesses, services, argues, spent, reasonable attorney's fees, specific finding, bona-fide-error, attorney-fee, baseline

Judges: Before: GLEICHER, P.J., and METER and DONOFRIO, JJ.

Opinion

Per Curiam.

Defendant appeals as of right from an opinion and order awarding \$655,000 in attorney fees and \$2,440 in costs to plaintiffs. We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

Defendant first argues that the trial court erred in concluding that the doctrine of merger barred consideration of defendant's defense, under [MCL 550.1402\(11\)](#), that its failure to pay the emergency medical expenses of plaintiffs' son, Tzvih Tinman (Tzvih), was the result of a "bona fide error." We disagree. Whether the doctrine of merger bars defendant's assertion of the bona-fide-error defense is a question of law. We review questions of law de novo. [Solution Source, Inc v LPR Assoc Ltd Partnership, 252 Mich App 368, 377; 652 NW2d 474 \(2002\)](#).

[MCL 550.1402\(11\)](#) provides:

In addition to other remedies provided by law, an aggrieved member may bring an action for actual monetary damages sustained as a result of a violation of this section. If successful on the merits, the member shall be awarded actual monetary damages or \$200.00, whichever is greater, together with [*2] reasonable attorneys' fees. If the health care corporation shows by a preponderance of the evidence that a violation of this section resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid the error, the amount of recovery shall be limited to actual monetary damages.

The trial court concluded that the doctrine of merger barred defendant's assertion of the bona-fide-error defense in [MCL 550.1402\(11\)](#) because an earlier order, on November 10, 2005, constituted a final judgment to which the doctrine applied. "When a cause of action is reduced to a final judgment, merger serves to bar a subsequent

suit based on the same cause of action between the same parties." [Solution Source, 252 Mich App at 376](#). See also [Union Guardian Trust Co v Rood, 308 Mich 168; 13 NW2d 24 \(1944\)](#) (a plaintiff's original claim is merged into a final judgment and any subsequent litigation is based on the judgment itself).

The November 10, 2005, order stated that it "disposes of the last pending claim and closes the case, except as set forth herein." It stated that "this order and/or any appeal of this Order shall not affect Plaintiff's [sic] continuing right and/or ability [*3] to have this Court consider the proper amount of attorneys' fees and costs to be awarded Plaintiff [sic] pursuant to [MCL 550.1402\(11\)](#) as set forth in this Court's July 11, 2005 Order, or otherwise." (Emphasis added.) The July 11, 2005, order referenced in the November 10, 2005, order, stated: "It is further ordered that, for the reasons stated on the record, the Court will consider the proper amount of attorneys' fees and costs to be awarded Plaintiff [sic] pursuant to [MCL 550.1402\(11\)](#) pursuant to a motion to be filed by Plaintiff [sic] for an award of such attorneys' fees and costs, a response to such motion by Defendant, and an appropriate hearing, evidentiary hearing, or trial as determined by the Court." (Emphasis added.) At the April 28, 2005, hearing preceding the July 11, 2005, order, the parties clearly argued the applicability of the bona-fide-error defense. After listening to arguments pertaining to this defense, the trial court stated, on the record, that plaintiffs were entitled to an award of fees, and it then entered the order indicating that the amount of fees would be determined at a later date. The written order specifically referred to the record of the hearing. Clearly, [*4] then, considering the context and explicit language of the July 11 and November 10 orders, there was a final judgment indicating that attorney fees were appropriate; only the amount was left to be determined after November 10, 2005. Accordingly, the trial court did not err in applying the doctrine of merger to prevent defendant from relitigating the bona-fide-error issue.¹

Defendant next argues that the trial court erred in refusing to deny in its entirety plaintiffs' request for attorney fees on the ground that the amount initially requested was excessive. We disagree. This Court reviews for an abuse of discretion a trial court's award of attorney fees and its determination of the reasonableness of the fees. [Smith v Khouri, 481 Mich 519, 526; 751 NW2d 472 \(2008\)](#); [Augustine v Allstate Ins Co, 292 Mich App 408, 424; 807 NW2d 77 \(2011\)](#). "An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled [*5] outcomes." [Smith, 481 Mich at 526](#). "Any findings of fact on which the trial court bases an award of attorney fees are reviewed for clear error, but questions of law are reviewed de novo." [Reed v Reed, 265 Mich App 131, 164; 693 NW2d 825 \(2005\)](#) (citations omitted). The determination regarding whether a trial court may deny a request for attorney fees in its entirety on the ground that the requested fees are excessive requires this Court to interpret [MCL 550.1402\(11\)](#). We review questions of statutory interpretation de novo. [Detroit Leasing Co v Detroit, 269 Mich App 233, 235; 713 NW2d 269 \(2005\)](#).

In [Sun Valley Foods Co v Ward, 460 Mich 230, 236; 596 NW2d 119 \(1999\)](#), the Michigan Supreme Court explicated the following principles of statutory interpretation:

The rules of statutory construction are well established. The foremost rule, and our primary task in construing a statute, is to discern and give effect to the intent of the Legislature. This task begins by examining the language of the statute itself. The words of a statute provide the most reliable evidence of its intent If the language of the statute is unambiguous, the Legislature must have intended the meaning clearly expressed, [*6] and the statute must be enforced as written. No further judicial construction is required or permitted. Only

¹ Defendant suggests, tangentially, that the July 11, 2005, order was erroneous, but this issue was not included in the statement of questions presented for appeal, and we do not consider it. [Busch v Holmes, 256 Mich App 4, 12; 662 NW2 64 \(2003\)](#).

where the statutory language is ambiguous may a court properly go beyond the words of the statute to ascertain legislative intent. [Internal citations and quotation marks omitted.]

In short, this Court must discern the legislative intent that may reasonably be inferred from the words used in the statute. *Mich State Employees Ass'n (MSEA) v Dep't of Corrections*, 275 Mich App 474, 478; 737 NW2d 835 (2007). "The wisdom of a statute is for the determination of the Legislature and the law must be enforced as written." *Detroit Leasing Co.*, 269 Mich App at 239.

The plain language of *MCL 550.1402(11)* provides that a plaintiff who prevails on the merits "shall be awarded . . . reasonable attorneys' fees." (Emphasis added.) The use of the term "shall" indicates a mandatory provision. *MSEA*, 275 Mich App at 480. The only statutory exception is that no attorney fees are to be awarded if the defendant shows by a preponderance of the evidence that the statutory violation resulted from a bona fide error despite the maintenance of procedures reasonably adapted to avoid the error. *MCL 550.1402(11)*. [*7] The Legislature did not provide an exception for plaintiffs whose initial fee requests were excessive.

To be sure, the fee applicant carries the burden of proving that the requested fees were incurred and that they are reasonable. *Smith*, 481 Mich at 528-529; *Reed*, 265 Mich App at 165-166. It thus follows that if the applicant fails to meet that burden, the trial court must decline to award attorney fees. Moreover, to avoid encouraging excessive fee requests, a trial court should carefully endeavor to limit any award to a reasonable amount by adhering to the analysis in *Smith*, 481 Mich at 530-534, rather than attempt to "split the difference" such as by awarding a certain percentage of the requested amount. Further, the excessive nature of an initial request may be relevant in determining whether the plaintiff has established the reasonableness of any purported fees. Fee-shifting

provisions are "not designed to provide a form of economic relief to improve the financial lot of attorneys or to produce windfalls." See, generally, *id.* at 528. If, however, the fee applicant can satisfy his or her burden of establishing reasonable attorney fees that were incurred, the trial court may not deny [*8] a fee request in its entirety merely because the initially requested amount exceeded what was later determined to be reasonable. The federal case law cited by defendant is inapt in light of the mandatory nature of the attorney-fee language in *MCL 550.1402(11)*.² Therefore, the trial court did not err in implicitly rejecting defendant's argument on this issue.

Defendant next argues that the trial court abused its discretion in refusing to complete the evidentiary hearing regarding attorney fees. We agree. Generally, a trial court's decision regarding whether to hold an evidentiary hearing is reviewed for an abuse of discretion. *Kernen v Homestead Dev Co.*, 252 Mich App 689, 691; 653 NW2d 634 (2002).

"The party requesting attorney fees bears the burden of proving they were incurred, and that they are reasonable. When requested attorney fees are contested, it is incumbent on the trial court to conduct a hearing to determine what services were actually rendered, and the reasonableness of those services." *Reed*, 265 Mich App at 165-166 [*9] (citations omitted). "If a factual dispute exists over the reasonableness of the hours billed or hourly rate claimed by the fee applicant, the party opposing the fee request is entitled to an evidentiary hearing to challenge the applicant's evidence and to present any countervailing evidence." *Smith*, 481 Mich at 532.

Here, the trial court held an evidentiary hearing over four days.³ The only witness to testify at the hearing was plaintiffs' attorney Elwood S. Simon, and his testimony was not completed at the end of the fourth day. Plaintiffs did not present the testimony of any of the eight other attorneys for whose services plaintiffs sought to collect fees.

² "Moreover, lower federal court decisions are not binding precedent in this Court." *Allen v Bloomfield Hills Sch Dist*, 281 Mich App 49, 59; 760 NW2d 811 (2008).

³ The predecessor trial judge presided over the evidentiary hearing.

Throughout the evidentiary hearing, plaintiffs' counsel indicated that other witnesses would testify regarding their hours billed. For example, on the second day of the hearing, when the trial court questioned a particular billing entry, plaintiffs' counsel Stuart Lebenbom stated, "Your Honor, I trust you're a fair man. You're not going to prejudge this case *without providing an opportunity to bring witnesses. We're just starting, Judge. We're just starting.*" (Emphasis added.) Later, Lebenbom told the court, "To a degree there [*10] are things which require judgment calls and the witnesses are going to testify as to how they made their calls, and that's it." (Emphasis added.) On the third day of the hearing, Lebenbom told the court, "So what I've done is we've created some summaries and we've gone over this stuff individually, all of our efforts individually, and Mr. [John P.] Zuccarini, an attorney in Simon's firm, *who I'll be calling next*, has done some compilations of the total time." (Emphasis added.) At a later point, Lebenbom assured the court that "Mr. Zuccarini can testify" regarding an apparent discrepancy in a billing entry. Lebenbom also suggested that other witnesses would be available for defense counsel to cross-examine when he stated that it was "defense counsel's job after [plaintiffs] make that prima facie showing to then go through the individual ones and say how did you determine that this or that or this or that goes to this or that."

During his testimony, Simon suggested that Zuccarini would testify regarding the preparation of documents supporting the fee application. Simon testified, "Mr. Zuccarini was primarily involved [*11] in that preparation, *and when he testifies I'm sure he can tell you exactly what he did to come to the description and why.*" (Emphasis added.) Simon also testified that the billing summaries "were done by Mr. Zuccarini. He can tell you how the process worked. We've explained that to [defense counsel] a number of times." On cross-examination by defense counsel, Simon testified that Zuccarini "can tell you why the description [on a time slip] was changed from the original entry." Simon further testified:

Q. So if we want some understanding of [plaintiffs' attorney] Mr. [Michael G.]

Wassmann's [billing] judgment and discretion we should ask him?

A. Or Mr. Zuccarini. He had conversations with him.

Further, the trial court during the evidentiary hearing indicated at various points that witnesses other than Simon would be available for defense counsel to cross-examine. For example, the court indicated to defense counsel that "[y]ou may get up on cross-examination in reference to any fee that they ask you may challenge it [sic]." Later, the court stated, "Mr. [Lance C.] Young and Mr. Wassmann [two of the attorneys for whose services plaintiffs sought to collect fees], somebody's got to show [*12] all that they did in connection with this matter to justify whatever hours they're charging. So if Mr. Simon says I did this, we'll listen to him. If he says this was done by one of the other attorneys, *then we'll skip on by it and see what the other attorneys have to say.*" (Emphasis added.) The trial court stated that defense counsel "can go down every entry and say what did you do and why did you do it and how does it relate to this." Later, the court stated, "I will allow the defense to go through each and every [billing entry] that they may challenge. If they think, for instance, they want to challenge a conference that was held on 6-30-20 [sic] with [Zuccarini] and then read case strategy, then fine. They can challenge that." When defense counsel indicated that he wished to challenge billing entries by different attorneys for "conferences that don't seem to match up," the trial court stated, "I'll let you get into that in cross-examination."

Also, on the first day of the hearing, the trial court suggested that defense counsel could cross-examine Wassmann, who did the most work on behalf of the Simon firm:

If you're putting me to the task of reading this whole big book [of exhibits], [*13] I'm not going to do it because—I can't do it because then I look at it and I don't know if Mr. Wassmann is—It's Michael G. Wassmann. He said he spent 1,223 hours and three-quarters of an hour at \$435 an hour for a half a million dollars worth of fees on this one question.

Huh? For what? What did you [sic]? You were not the lead attorney or anything that I saw necessarily. What did you do and when did you do it? *I gather [defense counsel] has a right to ask him what did you do? When did you do it and how did you do it.* [Emphasis added.]

The trial court stated that defense counsel had a right to cross-examine the attorneys:

The fact that you—Listen, you could say we had a conference of five hours discussing this and that and the other and each of you charge whatever hourly fee you want. But the defense would have a right to ask, well, what did you do, Mr. Lebenbom? What did you do, Mr. Simon? What did you do, Mr. Wassmann, what anybody did [sic]?

He has a right. I don't see where you can just say, well, Judge, here. Here's a big, old fat book with a lot of hours in it which we say we spent on this one issue and so pay us, and it amounts to a million dollars.

The trial court stated that "I [*14] need to have every one of these persons, whoever they were, come in here and tell me what they did and why [they] did it and how it relates to this issue." The court further stated, "*I'm going to let [defense counsel] have an opportunity to question every lawyer as to what they did for the hours that they did it.*" (Emphasis added.)

In addition, defense counsel indicated before the hearing began that he "anticipate[d] a protracted cross-examination of plaintiff's [sic] attorneys to determine just how many hours were truly related to individual claim issues, in addition to the tedious inquiry necessary to clarify issues such as duplicative effort, inefficiency, and reasonable rates." Defense counsel also explained during the evidentiary hearing various ways in which he planned to challenge the reasonableness of the requested fees. For example, defense counsel explained how he would cross-examine Wassmann:

Your Honor, let me give you an example or two.

I have the right to ask Mr. Wassmann what did the hundreds and hundreds of hours that you and Mr. Young spent trying to set aside Your Honor's protective order and the Federal Court's protective order, what did that have to do with whether [*15] Mr. Tinman has signs and symptoms of an emergency when he went o [sic] Beaumont?

I'm going to ask Mr. Wassmann why do you have two time entries the same date, September 10th, 2001? In one entry you say you spent 9.75 hours— That's a pretty long day—when he also spent another seven hours on the same day. I want to know how is this superman working so hard on this \$811 case.

Defense counsel also suggested he would challenge the generic and block nature of various billing entries. Near the end of the fourth day of the evidentiary hearing, defense counsel explained another proposed line of cross-examination of Wassmann:

MR. WALSH [defense counsel]: But again, your Honor, that doesn't explain at all why [a billing entry] relates to Mr. Tinman's individual claim. And, you know we started on this topic with hundreds and hundreds of hours by Mr. Wassmann claimed in Exhibit 1. And nobody is in a position to tell us—

THE COURT: He was.

MR. WALSH: —Mr. Wassmann perhaps. 'Cause I would love to ask him how he could spend a tremendous amount of time, day in day out. And, you know spending literally two full weeks preparing for an argument that last [sic] a half an hour.

On this record, we conclude that [*16] the trial court abused its discretion in refusing to complete the evidentiary hearing. At the end of the fourth day of the hearing, only one of the nine attorneys for whose services plaintiffs were seeking nearly \$1 million in fees had testified, and his testimony was not completed. As discussed, the trial court and plaintiffs' counsel indicated during the hearing that other witnesses would be available for

cross-examination, and defense counsel articulated specific grounds on which he would cross-examine the attorneys regarding the reasonableness or accuracy of the hours billed. Further, defendant was not afforded an opportunity to present any countervailing evidence. Although this case has been pending for many years, the protracted nature of the attorney-fee dispute is due in part to the stay occasioned by plaintiffs' unsuccessful appeal of the class-certification issue. Further, the length of the hearing may be explained by the significant number of hours billed for nine attorneys and the sizable amount of fees plaintiffs are seeking. It is thus reasonable to allow the hearing to continue so that defendant can have an opportunity to cross-examine the attorneys regarding the reasonableness [*17] of the hours billed and their hourly rates. To the extent that the bona-fide-error defense remains viable, defendant should also be permitted to present evidence on that issue during the hearing. Defendant was entitled to have the evidentiary hearing completed.

Defendant next argues that the trial court's analysis was insufficient to justify the imposition of \$655,000 in attorney fees for a claim of \$811. We agree. We conclude that the trial court abused its discretion in awarding attorney fees without making adequate findings regarding the customary fee in the locality for each attorney, the number of hours reasonably expended by each attorney on plaintiffs' individual claim as opposed to their unsuccessful class-action claim, and the use of more than one attorney on the same general tasks.

As discussed, the party requesting attorney fees bears the burden of proving that the fees are reasonable. Smith, 481 Mich at 528-529. "In Michigan, the trial courts have been required to consider the totality of special circumstances applicable to the case at hand." Id. at 529. In Wood v Detroit Auto Inter-Ins Exch, 413 Mich 573, 588; 321 NW2d 653 (1982), mod by Smith, 481 Mich at 522, the Michigan [*18] Supreme Court listed six factors relevant to computing reasonable attorney fees:

(1) the professional standing and experience of the attorney; (2) the skill, time and labor

involved; (3) the amount in question and the results achieved; (4) the difficulty of the case; (5) the expenses incurred; and (6) the nature and length of the professional relationship with the client. [Internal citation and quotation marks omitted.]

The *Smith* Court noted that the eight factors listed in MRPC 1.5(a), which overlap the Wood factors, have also been used to determine reasonable attorney fees:

"(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

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

(7) the experience, reputation, and ability of the lawyer or [*19] lawyers performing the services; and

(8) whether the fee is fixed or contingent." [Smith, 481 Mich at 530, quoting MRPC 1.5(a).]

"In determining 'the fee customarily charged in the locality for similar legal services,' the trial courts have routinely relied on data contained in surveys such as the Economics of the Law Practice Surveys that are published by the State Bar of Michigan." Smith, 481 Mich at 530.

The *Smith* Court held that some fine-tuning of the multifactor approach was needed:

We hold that a trial court should begin its analysis by determining the fee customarily

charged in the locality for similar legal services, i.e., factor 3 under [MRPC 1.5\(a\)](#). In determining this number, the court should use reliable surveys or other credible evidence of the legal market. This number should be multiplied by the reasonable number of hours expended in the case (factor 1 under [MRPC 1.5\(a\)](#) and factor 2 under *Wood*). The number produced by this calculation should serve as the starting point for calculating a reasonable attorney fee. We believe that having the trial court consider these two factors first will lead to greater consistency in awards. Thereafter, the court should consider the remaining [*20] *Wood*/MRPC factors to determine whether an up or down adjustment is appropriate. And, in order to aid appellate review, a trial court should briefly discuss its view of the remaining factors. [[Smith, 481 Mich at 530-531.](#)]

The *Smith* Court emphasized that the fee applicant bears the burden to produce satisfactory evidence that the requested rates are reasonable, and it explained the types of proofs needed to establish that the rates comport with those prevailing in the locality for similar legal services. [[Id. at 531-532.](#)]

The fees customarily charged in the locality for similar legal services can be established by testimony or empirical data found in surveys and other reliable reports. But we caution that the fee applicant must present something more than anecdotal statements to establish the customary fee for the locality. Both the parties and the trial courts of this state should avail themselves of the most relevant available data. For example, as noted earlier, in this case defendant submitted an article from the Michigan Bar Journal regarding the economic status of attorneys in Michigan. By recognizing the importance of such data, we note that the State Bar of Michigan, as well as other [*21] private entities, can provide a valuable service by regularly publishing studies on the prevailing market rates for legal services in this state. We also note that the benefit of such studies would be magnified by more specific data relevant to variations in locality, experience, and practice area. [[Id. at 531-532.](#)]

"[R]easonable fees are different from the fees paid to the top lawyers by the most well-to-do clients." [[Id. at 533.](#)]

Next, the *Smith* Court explained that the "court must determine the reasonable number of hours expended by each attorney." [[Smith, 481 Mich at 532.](#)] The fee applicant is required to "submit detailed billing records, which the court must examine and opposing parties may contest for reasonableness. The fee applicant bears the burden of supporting its claimed hours with evidentiary support." *Id.* The reasonable hourly rate must be multiplied by the reasonable hours billed to produce a baseline figure. [[Id. at 533.](#)] The court should then "consider the other factors and determine whether they support an increase or decrease in the base number." *Id.* If multiple attorneys expended hours on a case, the trial court "should be careful to perform a separate analysis with reference [*22] to [each attorney] . . . , considering both the hourly rates and the number of hours reasonably expended" [[Id. at 534.](#)] A court should also consider whether it was reasonable to have multiple lawyers "on the clock" during the case. *Id.*

In [Augustine, 292 Mich App at 413, 439](#), this Court vacated an award of attorney fees and remanded for rehearing and redetermination because, among other reasons, the trial court did not properly apply *Smith*. The trial court "did not comply with the first step in the *Smith* analysis, which is to determine the fee customarily charged in the locality for similar legal services. Though the trial court discussed the evidence presented regarding the fee customarily charged in the locality for similar legal services, it did not conclude that \$500 an hour was the fee customarily charged." [[Id. at 426.](#)] "[T]he trial court apparently failed to credit the Michigan Bar Journal in its calculus of the appropriate hourly rate. The Michigan Bar Journal article not only ranks fees by percentile, it differentiates fee rates based on locality, years of practice, and fields of practice." [[Id. at 427.](#)] Although the trial court in *Augustine* found that \$500 was a reasonable [*23] fee, it "did not find that \$500 per hour was the fee customarily charged in the locality for similar legal services." [[Id. at 427-428](#) (emphasis in original)]. Further, after

multiplying the \$500-an-hour rate by the number of hours reasonably expended, the trial court failed to determine "whether an upward or downward adjustment was appropriate on the basis of the Wood and [MRPC 1.5\(a\)](#) factors as our Supreme Court discussed in *Smith*" [Augustine, 292 Mich App at 428](#).

In addition, the *Augustine* Court concluded that "[n]ot only did the trial court fail to make specific findings consistent with *Smith* generally, but it also failed to make findings regarding each attorney whose fees plaintiff sought to recover." [Id. at 428](#). This Court "direct[ed] the trial court to make specific findings, consistent with *Smith*, for each attorney whose fees plaintiff sought to recover." [Id. at 439](#). This Court also found deficiencies in the trial court's finding regarding the number of hours expended, because of the meager state of the record. [Id. at 434](#).

Here, the trial court failed to make adequate findings to aid appellate review, as required by *Smith* and *Augustine*. The trial court listed the *Wood* factors [*24] and then correctly cited *Smith* for the proposition that "[t]he first determination to be made is what the customarily charge [sic] fee is in the locality for similar legal services." However, as in *Augustine*, the trial court failed to state any findings regarding the customarily charged fee in the locality for similar legal services. Instead, the court merely stated, in conclusory fashion: "After considering all of the evidence in this case, a reasonable fee for attorneys Simon, Zuccarini, Wassmann and Young is \$400 per hour. The remaining attorneys shall be entitled to the fees requested." The trial court did not state any findings regarding the fees customarily charged in the community for similar legal services or indicate that the fees awarded represented the customary fees. The trial court also failed to cite any evidence to establish the customary fee for the locality, such as "testimony or empirical data found in surveys and other reliable reports." [Smith, 481 Mich at 531-532](#). Mere anecdotal statements are insufficient. [Id. at 532](#). In addition, the trial court did not explain why it was awarding the same hourly rate of \$400 for Simon and three of the attorneys in

his firm, given [*25] their differing levels of experience. We direct the trial court on remand to make specific findings consistent with *Smith* and *Augustine* regarding the customary fee in the locality for each attorney whose fees plaintiffs seek to recover.

The trial court's analysis regarding the number of hours expended was also insufficient to aid appellate review. The trial court stated:

BCBSM argues that Plaintiff's request includes time spent pursuing the class action. Plaintiff has already reduced the request for attorney fees by the number of hours attributable to the [unsuccessful] class action lawsuit. It is difficult for the attorneys and the court to allocate the remainder of the fees to either the individual claim or the class action claim. For example, because BCBSM utilized an automated procedure for handling all emergency claims, the discovery sought by Plaintiff related to both BCBSM's handling of Plaintiff's individual emergency claims and BCBSM's handling of all other claims. The fact that the evidence necessary to prove Plaintiff's individual claims was the same evidence necessary to prove other claims does not change the fact that the discovery Plaintiff conducted supported Plaintiff's [*26] individual claim. For that reason, where the attorney fees can reasonably be associated with the individual claim, they will be awarded.

The trial court further indicated that it had reduced plaintiffs' requested fee by 309 hours for excessive time on various tasks, including attendance at and preparation for motions, drafting pleadings and orders, preparation of a trial outline, book, and exhibits when no trial was scheduled, and attorney conferences. The court also stated that Lebenbom's fee request was "significantly reduced" because of a lack of detail in his request, but the court offered no further explanation regarding the reduction. The court then stated that plaintiffs were awarded \$655,000 in attorney fees but did not explain precisely how it reached that figure.

We conclude that the trial court did not explain adequately how the hours for which it was awarding a fee were reasonably expended in pursuit of plaintiffs' individual claim. Again, "[th]e fee applicant bears the burden of supporting its claimed hours with evidentiary support." [Smith, 481 Mich at 532](#). Defendant was entitled to contest the reasonableness of the hours submitted. *Id.* As discussed above, defendant was [*27] deprived of a fair opportunity to contest the hours expended because the trial court erroneously refused to complete the evidentiary hearing. Further, the trial court did not explain why the substantial time devoted to discovery efforts in federal court were reasonably necessary to establish plaintiffs' individual claim as opposed to the unsuccessful class-action claim. Given that plaintiffs bore the burden of providing evidentiary support for their claimed hours, it was not sufficient for the trial court to state that plaintiffs had already reduced the request by the number of hours attributable to the class-action effort or to state that it was "difficult for the attorneys and the court to allocate the remainder of the fees to either the individual claim or the class action claim." Although the trial court later indicated that it had awarded fees where they were "reasonably associated with the individual claim," and that the evidence necessary to prove the individual claims was necessary to prove other claims, the court's explanation for this conclusion did not suffice to aid meaningful appellate review.

Finally, the trial court failed to explain adequately why it was reasonable for [*28] plaintiffs to have multiple lawyers "on the clock" in this case. The court stated that the use of more than one lawyer on the same general task is not necessarily excessive, that effective preparation often involves collaboration, and that "[i]n several instances, the court deems reasonable the use of more than one attorney in this case." The court stated that it

reduced the number of hours to a more reasonable figure when deemed excessive. The court offered no specific findings explaining on what grounds it had concluded that multiple attorneys were required to perform specific tasks. The trial court should address this issue more fully on remand.

Accordingly, we direct the trial court to make more specific findings, consistent with *Smith* and *Augustine*, regarding the customary fee in the locality for each attorney whose fees plaintiffs seek to recover, the reasonable number of hours expended by each attorney, and the reasonableness of having multiple attorneys working on the same general task. The trial court should make its findings following a completed evidentiary hearing on remand.

Finally, defendant argues that the trial court improperly relied on a so-called "catalyst" theory [*29] (involving an analysis regarding whether defendant changed its conduct favorably as a result of the litigation) to support its fee award. We agree. In assessing whether plaintiffs' baseline attorney fees were excessive in light of the size of the monetary judgment, the trial court abused its discretion in considering defendant's voluntary changes to its emergency-claims procedures.

As discussed, after a trial court determines a baseline attorney-fee award on the basis of the reasonable hourly rate multiplied by the reasonable hours expended, the court should then "consider the other factors and determine whether they support an increase or decrease in the base number." *Id. at 533*. "The trial court may in its discretion adjust fees upward or downward." [Augustine, 292 Mich App at 437](#). Among the other factors that should be considered are "the amount involved and the results obtained." [Smith, 481 Mich at 530](#), quoting [MRPC 1.5\(a\)](#); [Wood, 413](#)

Mich at 588.⁴ "In its discussion of *Wood* factor 3 ('the amount in question and the results achieved'), in assessing attorney fees, this Court has stated that a reasonable fee is proportionate to the results achieved." Augustine, 292 Mich App at 436-437. [*30] The trial court must evaluate "the results obtained in the context of the claim presented." Id. at 437 (emphasis added). Moreover, the statutory provision at issue, MCL 550.1402(11), states: "If successful on the merits, the member shall be awarded actual monetary damages or \$200.00, whichever is greater, together with reasonable attorneys' fees." (Emphasis added.) The statutory reference to "the merits" suggests that it is the judicially-sanctioned result achieved in the case itself, rather than any collateral or indirect effects of the litigation, that should be considered in determining a reasonable fee.

A somewhat analogous conclusion was reached by the United States Supreme Court in Buckhannon Bd and Care Home, Inc v West Virginia Dept of Health and Human Resources, 532 U.S. 598; 121 S Ct 1835; 149 L Ed 2d 855 (2001). In that case, the Court held that a plaintiff was not a "prevailing party" for the purposes of federal attorney-fee provisions where it failed to secure a judgment on the merits but the lawsuit brought about a voluntary change in the defendant's conduct. Id. at 600. The Court reasoned that an enforceable judgment on the merits or a court-ordered consent decree was necessary to create the material alteration of the legal relationship of the parties necessary to award attorney fees. Id. at 604. "A defendant's voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial imprimatur on the change." Id. at 605 (emphasis in original). The Court stated that it had never "awarded attorney's [*32] fees for a nonjudicial

alteration of actual circumstances." Id. at 606 (internal quotation marks omitted). The Court also noted that adoption of a so-called "catalyst" theory for awarding attorney fees could create a disincentive for a defendant to voluntarily change its conduct because "the possibility of being assessed attorney's fees may well deter a defendant from altering its conduct." Id. at 608. Finally, a "catalyst" theory would require a highly fact-intensive inquiry regarding the defendant's subjective motivation for changing its conduct, contravening the goal of avoiding a second major litigation regarding attorney fees. Id. at 609.

Plaintiffs are correct that *Buckhannon* is not directly controlling because plaintiffs here obtained a judgment on the merits. However, we find the reasoning in *Buckhannon* convincing. It lends further support to our conclusion, on the basis of *Augustine* and MCL 550.1402(11), that the results achieved should be considered in the context of the claim presented, i.e., the substantive merits of the case, rather than a change in the defendant's conduct that the trial court did not order.

Defendant voluntarily changed its emergency-claims procedures. [*33] The trial court did not order defendant to make the change. Indeed, plaintiffs acknowledge that defendant effectuated the change in 2001, i.e., years before the trial court granted summary disposition to plaintiffs on the merits of their individual claim in 2005. Thus, defendant's voluntary change in its conduct was not a judicially-sanctioned result obtained in this litigation. Accordingly, in assessing whether the amount in question or the results achieved warrant an upward or downward adjustment of the baseline fee, the trial court on remand shall confine its analysis to the trial court's judgment on the merits.

⁴ The lead opinion in *Smith* concluded that "the amount in question and the results achieved" should not be considered in determining a reasonable attorney fee for case-evaluation sanctions. Smith, 481 Mich at 534 n 20. The lead opinion noted that the purpose of such sanctions was to encourage serious consideration of case-evaluation awards and to penalize a party that rejected an evaluation. *Id.* The lead opinion concluded that it would be inconsistent with that purpose to reduce attorney fees on the basis of the amount in question or the results achieved. *Id.* We conclude that this [*31] aspect of the lead opinion's analysis is limited to the context of case-evaluation sanctions and does not apply here. Moreover, we note that a majority of justices did not concur with this aspect of the lead opinion.

We do not suggest, however, that the fee awarded must necessarily be less than the monetary damages. Indeed, defendant acknowledges that "[s]tatutory fees make it possible to pursue small claims and in some cases a fee award might be several times the actual damages recovered." Moreover, the text of [MCL 550.1402\(11\)](#) suggests that the purpose of the attorney-fee provision is to allow recovery of small claims. By stating that a plaintiff may recover as little as \$200 *and* an attorney fee, the statutory language plainly reflects that an attorney fee may in some cases exceed the [*34] amount of the monetary recovery. Nonetheless, in applying the results-

obtained factor, the degree or ratio by which the attorney fee exceeds the monetary damages in a particular case may be a relevant consideration in determining whether an adjustment of the baseline fee is warranted.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher

/s/ Patrick M. Meter

/s/ Pat M. Donofrio

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[Byers v. State Farm Mut. Auto. Ins. Co.](#)

Court of Appeals of Michigan

October 29, 2009, Decided

No. 285755

Reporter

2009 Mich. App. LEXIS 2283; 2009 WL 3491619

WOODROW ALLEN BYERS, Plaintiff-Appellee/Cross-Appellant, v STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant-Appellant/Cross-Appellee.

Plaintiff cross appeals the court's order awarding attorney fees under [MCR 2.403](#) and [MCL 500.3148\(1\)](#). To the extent attorney fees were awarded under [MCR 2.403](#), we reverse, but in all other respects we affirm the lower court.

Notice: THIS IS AN UNPUBLISHED OPINION. IN ACCORDANCE WITH MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

I. Background

This case arises out of no-fault benefit claims for injuries plaintiff sustained when the vehicle defendant's insured was driving struck plaintiff's motorcycle on June 10, 2005. At the time of the accident, plaintiff worked as an apprehension officer, more commonly known as a bounty hunter, for AA Bail Bonds. (An apprehension officer re-arrests individuals who fail to appear in court in violation of their bond agreement.) Doreen Byers, plaintiff's wife, owns and runs AA Bail Bonds and also works as the primary bond writer; plaintiff has no ownership interest in the company. AA Bail Bonds was formed in 2004.

Prior History: [*1] Kent Circuit Court. LC No. 06-0056644-CK.

Following [*2] the accident, plaintiff began receiving benefit payments from defendant for wage loss and replacement services. Although plaintiff was entitled to a maximum replacement services benefit of \$ 140 per week, plaintiff and defendant agreed to reduce this payment to \$ 80 per week so that plaintiff and Doreen would not have to fill out the replacement benefit forms. A dispute later arose concerning the duration of this alleged oral agreement, with plaintiff and Doreen claiming the payment would extend through the statutory three-year period following the accident and defendant's claim representative, Patricia Griffin, asserting that the agreement was only valid for 60 to 90 days. Plaintiff sporadically submitted replacement benefit forms until June 23, 2006.

Core Terms

benefits, attorney's fees, overdue, no-fault, summary disposition, services, Bonds, trial court, apprehension, expenses, insurer, damages, billed, future benefits, replacement, declaratory judgment, medical bills, sanctions, financial records, deposition, answers, wage loss, per hour, Rehabilitation, probable, records, motion in limine, medical benefit, knee surgery, interrogatories

Judges: Before: Murray, P.J., and Markey and Borrello, JJ.

Opinion

PER CURIAM.

Defendant appeals as of right the trial court's orders granting plaintiff's motion for partial summary disposition and motion in limine as well as the jury's award of future benefits to plaintiff under the Michigan no-fault act, [MCL 500.3101 et seq.](#)

Defendant only paid a portion of the claims submitted. Regarding plaintiff's wage loss benefits, defendant obtained wage records from AA Bail Bonds and determined plaintiff's daily wage loss benefit to be \$ 95.19 per day. Notably, since the accident, plaintiff's injuries have precluded him from working as an apprehension officer. However, plaintiff occasionally wrote bonds before the accident and has written a "handful" since the accident. [*3] Additionally, plaintiff has routinely accompanied his wife since the accident during the course of her job. Because of this, a dispute arose regarding whether plaintiff was entitled to work loss benefit payments, with defendant asserting that plaintiff was able to return to work as a bondsman, but with Doreen explaining that plaintiff was only employed as an apprehension officer and that his apprehension work was subcontracted to another officer.

On June 8, 2006, plaintiff filed suit alleging that defendant had failed to pay expenses for wage loss, replacement services, and any other allowable expense under the Michigan no-fault act, [MCL 500.3101 et seq.](#) Plaintiff also requested attorney fees under [MCL 500.3148](#). Nearly five months later, on November 28, 2006, plaintiff underwent knee surgery. Plaintiff submitted a \$ 9,459.87 bill for the surgery, for which defendant made partial payments of \$ 1,176.27 and \$ 3,025.77 on March 12, 2007, and November 15, 2007, respectively, before paying the balance of the bill sometime in late November 2007.

On November 30, 2007, the last business day before trial, plaintiff moved for summary disposition, seeking penalty interest of 12 percent for defendant's [*4] "overdue" payments for his knee surgery under [MCL 500.3142\(2\)](#) and (3) ¹ as well as attorney fees under [MCL 500.3148\(1\)](#).

According to plaintiff, defendant waited until "the eve of trial" to pay the balance of these and nearly all other medical expenses on account of the pending litigation. ² Additionally, plaintiff filed a motion in limine on January 2, 2008, ³ to preclude defendant from presenting evidence: (1) that plaintiff owns or runs AA Bail Bonds; (2) of Doreen Byers or AA Bail Bonds's tax records; (3) of any business records or argument that AA Bail Bonds business has improved since plaintiff's accident; (4) that plaintiff can perform other work for AA Bail Bonds; or (5) that subcontract labor has anything to do with the payment of plaintiff's lost wages because such evidence would be irrelevant to the issue of wage loss.

The court heard oral argument on both motions on January 11, 2008. Regarding the motion in limine, the court granted plaintiff's request in its entirety on relevancy grounds with the exception of category (4) pertaining to whether plaintiff could perform other work for AA Bail Bonds. The court also granted the motion for summary disposition because defendant was "disingenuous" in paying overdue benefits just before trial. As the court explained in its opinion and order:

This [c]ourt finds that it is disingenuous on behalf of the Defendant insurance company State Farm Mutual to be involved in litigation regarding No-Fault benefits and then pay "overdue" benefits just prior to trial. It appears to the Court that this is clearly a move by the Defendant insurance company to avoid paying attorney fees and to position themselves better at the trial of [*6] this matter.

If this matter was tried and the unpaid medical bills were not raised as elements of damage by the Plaintiff in the trial of this case, the [c]ourt is certain that later when those same bills after

¹ [MCL 500.3142\(2\)](#) provides in part that "benefits are overdue if not paid within 30 days after an insurer receives reasonable proof of the fact and of the amount of loss sustained." [MCL 500.3142\(3\)](#) provides for a simple interest penalty of 12 percent per annum for "overdue" payments.

² According to defendant, the balance of the bill was not paid until November [*5] 15, 2007, due to investigations to determine whether the knee injury was related to the accident. In any event, defendant noted that plaintiff's medical bills, up to this point, were not part of the litigation as plaintiff had previously admitted in his answers to interrogatories and deposition.

³ The court adjourned trial to February 18, 2008.

trial would be submitted to the insurance company, the insurance company would deny and argue that they should have been raised at the trial.

Pursuant to the court's order, plaintiff submitted a proposed order for \$ 61,000 in attorney fees for "overdue" medical expenses. Defendant objected to the proposed order and another hearing was held. During the hearing, the court clarified that defendant was not ordered "to pay every single thing that was submitted to them" and reiterated that plaintiff was entitled to attorney fees on the amounts defendant had already paid. At the conclusion of the hearing, the court directed the parties to "sit down in a conference room out there and talk" and to return if they were unable to reach an agreement. The record provides no information regarding any subsequent agreements or pre-trial orders on this matter.

The case proceeded to trial, and the jury returned a verdict in favor of plaintiff. The verdict form permitted a damages award for the full [*7] three years following the accident although only two and half years had elapsed, but did not delineate past and future damages. In sum, the jury awarded \$ 62,246.96, which included damages for work loss (\$ 52,162.55), replacement services (\$ 4,300), and interest owed on "overdue" benefits (\$ 5,784.91).

Plaintiff subsequently submitted a proposed judgment including, *inter alia*, an award of nearly \$ 150,000 in attorney fees under [MCL 500.3148\(1\)](#) and case evaluation sanctions. ⁴ Defendant challenged the proposed judgment arguing that: (1) neither the pleadings nor the jury's verdict specified which benefits that were "overdue" or when reasonable proof was supplied to defendant; (2) there was an issue of fact concerning whether any denial of benefits was unreasonable; and (3) it was impossible to award future "overdue" benefits where the verdict did not delineate past or future benefits. Defendant also contended that an award of case evaluation sanctions would unfairly punish defendant for going to trial because the court's

ruling on plaintiff's motion for summary disposition, motion in limine, and the jury's award of future benefits changed the complexion of the case. The court rejected [*8] defendant's arguments, but noted that it would not allow "double dipping" for awards under both [MCL 500.3148\(1\)](#) and case evaluation sanctions, which would be addressed at an evidentiary hearing. The court subsequently entered judgment on the verdict noting that the issue of prejudgment and postjudgment interest was preserved.

At the evidentiary hearing on attorney fees, the court found that defendant's denial of benefits was unreasonable. Notable to the court was that Griffin misunderstood plaintiff's occupation as an apprehension officer and defendant did not obtain an independent medical examination. Regarding the reasonableness of the requested fees, the court reduced the requested award to \$ 70,300, taking into account the complexity of the trial and the experience of the attorneys. The instant appeals ensued.

III. Analysis

A. Partial Summary Disposition

Defendant first challenges the trial court's granting of partial summary disposition to plaintiff, resulting in the awarding of payments for "overdue" medical benefits and attorney fees. This argument is without merit.

This Court reviews de novo an [*9] appeal from an order granting a motion for summary disposition. [Dressel v Ameribank, 468 Mich 557, 561; 664 NW2d 151 \(2003\)](#). A motion for summary disposition pursuant to [MCR 2.116\(C\)\(10\)](#) should be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. [Maiden v Rozwood, 461 Mich 109, 120; 597 NW2d 817 \(1999\)](#). A genuine issue of material fact exists when reasonable minds could differ after drawing reasonable inferences from the record. [West v Gen Motors Corp, 469 Mich 177, 183; 665 NW2d](#)

⁴ Defendant rejected the case evaluation award of \$ 40,000 to plaintiff on May 17, 2007.

[468 \(2003\)](#). In reviewing this issue, the Court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence and construe them in the light most favorable to the nonmoving party. [Corley v Detroit Bd of Ed, 470 Mich 274, 278; 681 NW2d 342 \(2004\)](#). The nonmoving party must present more than mere allegations to establish a genuine issue of material fact for resolution at trial. [Rice v Auto Club Ins Ass'n, 252 Mich App 25, 31; 651 NW2d 188 \(2002\)](#). Additionally, an award of attorney fees under the no-fault act presents a mixed question of law and fact. [Univ Rehabilitation Alliance v Farm Bureau Gen Ins Co, 279 Mich App 691, 693; 760 NW2d 574 \(2008\)](#). [*10] What constitutes reasonableness is a question of law reviewed de novo, however, the unreasonable denial of benefits under the particular facts of a case is a question of fact reviewed for clear error. *Id.* "A decision is clearly erroneous when the reviewing court is left with a definite and firm conviction that a mistake has been made." [Ross v Auto Club Group, 481 Mich 1, 7; 748 NW2d 552 \(2008\)](#) (quotation marks and citation omitted).

Under the Michigan no-fault act, if an insurer fails to pay personal protection insurance (PIP) benefits within 30 days after receiving reasonable proof of the fact and of the amount of the loss sustained, the benefits are "overdue" and the insurer must pay a penalty of 12 percent simple interest per annum. [MCL 500.3142\(2\)](#) and [\(3\)](#). The no-fault act also allows reasonable attorney fees for overdue benefits "in addition to the benefits recovered, if the court finds that the insurer unreasonably refused to pay the claim or unreasonably delayed in making proper payment." [Attard v Citizens Ins Co, 237 Mich App 311, 317; 602 NW2d 633 \(1999\)](#), quoting [MCL 500.3148\(1\)](#). "When an insurer refuses to make or delays in making payment, a rebuttable presumption arises [*11] that places the burden on the insurer to justify the refusal or delay." *Id.* The relevant inquiry "is not whether coverage is ultimately determined to exist, but whether the insurer's initial refusal to pay was reasonable." [Shanafelt v Allstate Ins Co, 217 Mich App 625,](#)

[635; 552 NW2d 671 \(1996\)](#). An insured's refusal to pay is not unreasonable if it is based on factual uncertainty. [Univ Rehabilitation Alliance, supra at 694.](#)

Here, according to defendant's "Explanation and Review" of benefits, medical bills relating primarily to plaintiff's knee surgery were submitted to defendant on November 28, 2006. As these bills were not paid until November 2007, they were "overdue." While defendant points out that certain portions of these bills were in dispute given that they did not surface until more than a year after the motorcycle accident and it was unclear whether the knee injury was in fact related to the accident, defendant has failed to present any evidence supporting that assertion, thus [*12] failing to sustain their burden in opposing a motion for summary disposition. [Rice, supra at 31; Maiden, supra at 121.](#) Thus, defendant failed to show that factual uncertainty justified the delay in payments. [Attard, supra at 317.](#)

Defendant also contends that summary disposition was improper because for two reasons it was not on notice that medical expenses were part of the litigation: (1) plaintiff's complaint sought *only* work loss and replacement services benefits and (2) plaintiff indicated in both his interrogatory answers and deposition that medical benefits were not part of the lawsuit.

Regarding the sufficiency of the complaint, "the primary function of a pleading in Michigan is to give notice of the nature of the claim or defense sufficient to permit the opposite party to take a responsive position." [Stanke v State Farm Mut Automobile Ins Co, 200 Mich App 307, 317; 503 NW2d 758 \(1993\)](#), citing 1 Martin, Dean & Webster, Michigan Court Rules Practice, p 186. As such, a complaint must contain "[a] statement of facts . . . with the specific allegations necessary reasonably to inform the adverse party of the nature of the claims the adverse party is called on to defend . . ." [MCR 2.111\(B\)\(1\)](#). [*13] Thus, because a complaint need only cite "the nature of the claims,"

⁵ The Michigan no-fault act permits PIP benefits for accidental injury arising from, *inter alia*, the operation of motor vehicle. [MCL 500.3105\(4\)](#). The applicability of the no-fault act is not in dispute.

a new theory of liability need only fit "within the scope of the general factual allegations previously pleaded in support of another claim" to meet the pleading requirements of [MCR 2.111\(B\)\(1\)](#). [Smith v Stolberg, 231 Mich App 256, 259-260; 586 NW2d 103 \(1998\)](#) (internal quotation marks omitted) (allegations in the complaint that the defendant intentionally pushed the plaintiff were sufficient to maintain an action for assault and battery even though the complaint only claimed negligence).

In this case, the complaint alleges that plaintiff suffered injuries in a motorcycle accident and sought damages for benefits under the no-fault act. Although the complaint specifically requests payment for wage loss and substituted service, the complaint expressly indicates that plaintiff's expenses are not limited to wage loss and substituted service, but also include "[a]ny other allowable expenses under the Michigan No-Fault Act." The complaint also seeks penalty interest and attorney fees for "overdue" benefits. Notably, [MCL 500.3107](#) provides as allowable PIP benefits "all reasonable charges incurred for reasonably necessary products, [*14] services and accommodations for an injured person's care, recovery, or rehabilitation." In light of this, we conclude that the complaint sufficiently gave defendant notice of the nature of the claims such that seeking penalty interest and attorney fees for "overdue" medical benefits was appropriate.

With respect to plaintiff's interrogatory answers and deposition, plaintiff notes that his assertions that medical bills were not a part of this lawsuit were true at the time they were answered. And indeed, while plaintiff's knee surgery occurred November 18, 2006, defendant's "Explanation[s] of Review" of the claims were dated from March 12, 2007, to November 15, 2007. This is significant as plaintiff had already answered his interrogatories on September 26, 2006, and was not deposed until February 7, 2007. Thus, plaintiff's

answers during discovery -- made long before medical bill payments were overdue -- provide no refuge of ignorance for defendant.

Defendant counters that under [MCR 2.302\(E\)](#), plaintiff had a duty to seasonably amend his answers to his interrogatories and deposition regarding medical bills. However, that rule requires a party to amend a prior response if the party obtains [*15] information on the basis of which the party knows that "the response, though correct when made, is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment." [MCR 2.302\(E\)\(1\)\(b\)\(iii\)](#). The circumstances of this case do not point to plaintiff's knowing concealment. Certainly, plaintiff's complaint broadly indicated that he sought "any" benefits under [MCL 500.3107](#) as well as attorney fees and penalty interest, and importantly, defendant was well aware that plaintiff sought medical benefits pertaining to his knee surgery. For defendant to argue now that it was unaware medical benefits were part of the suit even though it had declined to pay these benefits until shortly before trial was scheduled is, as the trial court observed, disingenuous. Summary disposition was appropriate.

⁶

B. Motion in Limine

Defendant next argues that the trial court erred in excluding evidence of plaintiff's financial records on relevancy grounds. We conclude that the trial court either did not abuse its discretion in its evidentiary rulings or, if it did so, that it was harmless error. This Court reviews the trial court's decision to grant a motion in limine for an abuse of discretion. [Bartlett v Sinai Hosp of Detroit, 149 Mich App 412, 418; 385 NW2d 801 \(1986\)](#). A trial court abuses its discretion when its decision is outside the range of reasonable and principled outcomes. [Maldonado v Ford Motor Co, 476 Mich 372, 388; 719 NW2d 809 \(2006\)](#).

⁶ Plaintiff argues that summary disposition was appropriate because plaintiff and defendant had an oral agreement regarding replacement services and also because the verdict was more favorable than case evaluation. These arguments are irrelevant, however, as the trial court did not award case evaluation sanctions in granting summary disposition, which [*16] pertained to "overdue" medical bill payments and not replacement services. Further, as the jury did not consider the issue of "overdue" medical bill payments, the issue is not moot as plaintiff contends. Regardless, summary disposition was appropriate.

Generally, evidence is admissible if it is relevant and inadmissible if it is not. MRE 402; Roulston v Tendercare, Inc., 239 Mich App 270, 282; 608 NW2d 525 (2000). "As defined in MRE 401, 'relevant evidence' is 'evidence having any tendency to make the existence of any fact that is of consequence to [*17] the determination of the action more probable or less probable than it would be without the evidence.'" Dep't of Transportation v Haggerty Corridor Partners Ltd Partnership, 473 Mich 124, 165 n 62; 700 NW2d 380 (2005). A fact of consequence is a fact that is material. Morales v State Farm Mut Auto Ins Co, 279 Mich App 720, 731; 761 NW2d 454 (2008). "Materiality looks to the relation between the propositions for which the evidence is offered and the issues in the case. If the evidence is offered to help prove a proposition which is not a matter in issue, the evidence is immaterial." People v Mills, 450 Mich 61, 67; 537 NW2d 909 (1995), quoting 1 McCormick, Evidence (4th ed), § 185, p 773.

In granting the motion in limine, the trial court excluded: (1) evidence that plaintiff owns or runs AA Bail Bonds; (2) Doreen Byers's or AA Bail Bonds's tax records; (3) business records or argument that AA Bail Bonds business has improved since plaintiff's accident; and (4) evidence or argument that subcontract labor has anything to do with the payment of plaintiff's lost wages. According to defendant, this evidence was material to its theory of the case concerning whether plaintiff could have or [*18] actually did return to work.

Regarding the issue of ownership, defendant does not dispute that "on paper," Doreen is the sole shareholder for AA Bail Bonds. Regardless, even if plaintiff owned or ran AA Bail Bonds, such evidence would not, *ipso facto*, make it more probable that plaintiff returned or could return to work. The exclusion of this evidence was not an abuse of discretion.

With respect to the financial records, defendant asserts that because corporate tax returns and business records show that both corporate income and Doreen's income increased in 2005 (the year

of the accident), such evidence would render it more probable that plaintiff had been working since the accident. However, increases in income could occur for a variety of reasons, and as such, the records do not make it *more* probable that plaintiff was working. Regardless, evidence was presented at trial that plaintiff was physically unable to perform apprehension work due to the injuries he sustained in the accident. This evidence was undisputed. Thus, even if the financial records and tax returns were admissible, any error in their exclusion was harmless. MCR 2.613(A).

Defendant notes that because plaintiff testified [*19] at his deposition that AA Bail Bonds's income had gone down since his accident, the financial records indicating the contrary were relevant as they undercut his credibility. "The credibility of witnesses is a material issue and evidence that shows bias or prejudice of a witness is always relevant." Lewis v LeGrow, 258 Mich App 175, 211; 670 NW2d 675 (2003). In this instance, though, the portion of plaintiff's deposition in context shows that plaintiff admitted his misunderstanding of the question regarding gross corporate income. The decision to exclude this evidence did not fall outside the range of reasonable and principled outcomes.

Concerning subcontract labor, defendant points out that financial records indicate that payments to Larry Byrd, the apprehension subcontractor, decreased from \$ 5,440 to \$ 5,037 between 2004 and 2005. A plausible explanation for this, defendant argues, is that plaintiff continued to perform apprehension work after the accident. Admittedly, on these facts alone, defendant's inference--though weak--is sustainable and the financial records would make such an inference more probable. However, as previously noted, plaintiff was unable to perform apprehension [*20] work after the accident. Thus, even if this exclusion constituted error, such was harmless.

Finally, defendant contends that evidence of Byrd's compensation was relevant to the determination of whether plaintiff sufficiently mitigated damages. "[MCL 500.3107(b)] requires defendant to pay

plaintiff for work [he] 'would have performed' in the three years after the accident." [Bak v Citizens Ins Co, 199 Mich App 730, 739; 503 NW2d 94 \(1993\)](#) (emphasis in original). As such, a plaintiff has a duty to mitigate work loss damages by seeking alternative work. *Id.* Here, Dr. Michael Jabara, plaintiff's doctor, Doreen Byers and plaintiff admitted that plaintiff was able to perform sedentary labor, which included working as a bondsman. However, notwithstanding that plaintiff was employed as an apprehension agent rather than bondsman and therefore bond writing was not part of his employment, evidence relevant to the mitigation of damages would not be Byrd's compensation, but the compensation plaintiff would have received as a bondsman. Consequently, the court did not abuse its discretion in excluding plaintiff's financial records or evidence pertaining to subcontract labor.

C. Future Benefits

This brings [*21] us to defendant's argument that the court erred in permitting the jury to consider and to award damages for future benefits. We disagree.⁷ Our review of the applicability of a court rule, such as [MCR 2.605](#) governing declaratory judgments, is de novo. [ISB Sales Co v Dave's Cakes, 258 Mich App 520, 526; 672 NW2d 181 \(2003\)](#); [Kernan v Homestead Dev Co, 252 Mich App 689, 692; 653 NW2d 634 \(2002\)](#). Similarly,

[w]e review claims of instructional error de novo. Jury instructions should include all the elements of the plaintiff's claims and should not omit material issues, defenses, or theories if the evidence supports them. Instructional error warrants reversal if the error resulted in such unfair prejudice to the complaining party that the failure to vacate the jury verdict would be inconsistent with substantial justice. [Cox v Flint Bd of Hosp Managers, 467 Mich 1, 8; 651 NW2d 356 \(2002\)](#) (quotation marks and citations omitted).]

Initially, defendant maintains that because plaintiff failed to request [*22] declaratory relief, the court

was precluded from making any determination regarding future benefits. This argument misapprehends this case and the applicable law. In a declaratory judgment action, a party seeks to have the court determine the rights and duties of the parties. [MCR 2.605](#). The underlying purpose of the declaratory judgment rule is to "provide a broad, flexible remedy to increase access to the court. In the usual case, an actual controversy exists where a declaratory judgment is necessary to guide a litigant's future conduct in order to preserve his legal rights." [United States Aviox Co v Travelers Ins Co, 125 Mich App 579, 585; 336 NW2d 838 \(1983\)](#).

Plaintiff, in this case, filed an action for breach of contract and interest and fees under the no-fault act. He did not seek a court's guidance to preserve legal rights, and it was not the court that made a determination regarding future benefits. It was the jury. As such, it was unnecessary for plaintiff to request a declaratory judgment. Moreover, because issues of fact existed regarding whether PIP benefits--including future benefits--were even reasonable and necessary, presentation of this issue to the jury was appropriate. [*23] [Rose v State Farm Mut Auto Ins Co, 274 Mich App 291, 296-297; 550 NW2d 580 \(1996\)](#). Indeed, even in declaratory actions, juries may determine future PIP benefits. *Id.*

Defendant's reliance on [Manley v Detroit Automobile Inter-Ins Exchange, 425 Mich 140, 150-151; 388 NW2d 216 \(1986\)](#), and [Rose, supra](#), for the proposition that future benefits may only be awarded by a declaratory judgment is unfounded. At issue in *Manley* was whether a trial court could enter a declaratory judgment requiring future benefit payments even though such costs had yet to be incurred. [Manley, supra at 157](#). In answering in the affirmative, the Supreme Court explained that requiring future PIP benefit payments does not require an insurer to pay costs until such costs are actually incurred. *Id.* In *Rose*, this Court reversed the trial court's declaratory judgment awarding future PIP benefits because the jury only

⁷ We reject plaintiff's argument that this issue is waived. On the contrary, defendant argued at length regarding the propriety of awarding damages in absence of a request for declaratory relief.

determined that the plaintiff was entitled to future care without determining if the care was reasonable and necessary. [Rose, supra at 296-297](#). As no declaratory judgment was entered in the instant case, neither *Manley* nor *Rose* supports the position defendant asserts.

Defendant also contends that the court erred [*24] in permitting the jury to award damages for the full three year period following the accident without requiring the jury to delineate between past and future benefits. *Manley's* holding that future expenses may be awarded before they are incurred, however, stands contrary to this position. [Manley, supra at 157](#). However, given *Manley's* explanation that an insurer is not liable for future expenses until they are incurred, the verdict form was improper because it failed to distinguish between past and future expenses rendering it impossible to determine when defendant's payment was due at the time the verdict was reached. *Id.* Regardless, the three years following the accident for which defendant was liable for payments have now elapsed, and all benefits awarded have come due. Consequently, this issue is moot. [Michigan Chiropractic Council v Comm'r of the Office of Financial & Ins Services, 475 Mich 363, 371 n 15; 716 NW2d 561 \(2006\)](#). Allowing the verdict to stand at this point is not inconsistent with substantial justice. [Cox, supra at 8](#).

D. Attorney Fees

Plaintiff raises the last issue in this case, cross-appealing the trial court's attorney fee award on the grounds that the court erred [*25] in calculating his attorneys' hours billed and fee rates. The court awarded attorney fees under both [MCR 2.403\(O\)](#) as a case-evaluation sanction and under [MCL 500.3148\(1\)](#) of the no-fault act. We review a trial court's decision regarding the amount of

attorney fees awarded as case-evaluation sanctions, as well as a court's award of attorney fees under the no-fault act for an unreasonable delay in payment, for an abuse of discretion. [Elia v Hazen, 242 Mich App 374, 376-377; 619 NW2d 1 \(2000\)](#); [Shanafelt v Allstate Ins Co, 217 Mich App 625, 634-635; 552 NW2d 671 \(1996\)](#). Underlying findings of fact, however, are reviewed for clear error. [In re Temple, 278 Mich App 122, 128; 748 NW2d 265 \(2008\)](#).

"[A] party who rejects a case-evaluation award is generally subject to sanctions if he fails to improve his position at trial." ⁸ [Campbell v Sullins, 257 Mich App 179, 198; 667 NW2d 887 \(2003\)](#). Under [MCR 2.403\(O\)\(6\)\(b\)](#), case-evaluation sanctions include "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." Similarly, the no-fault act also permits "a reasonable [attorney] fee" in actions [*26] where PIP benefits are "overdue." ⁹ [MCL 500.3148\(1\)](#).

As a preliminary matter, we acknowledge that our Supreme Court held in [Smith v Khouri, 481 Mich 519, 522, 537; 751 NW2d 472 \(2008\)](#) (opinion by Taylor, C.J.), that a trial court must, in determining attorney fees under [MCR 2.403\(O\)](#), determine a "baseline" fee ¹⁰ and briefly indicate its view of each of the factors enunciated in [Wood v Detroit Automobile Inter-Ins Exch, 413 Mich 573, 588; 321 NW2d 653 \(1982\)](#) and [Rule 1.5\(a\) of the Michigan Rules of Professional Conduct](#). Here, although the trial court indicated its fee and hourly calculations on the record, it did not expressly indicate that the rates were those customarily charged in the locality for similar legal services, nor did it briefly indicate its view of each of the *Wood* and MRPC factors. However, notwithstanding this error, because the court's award was also made in accordance with the requirements of the no-fault [*27] act, we may

⁸ As the verdict in this case was more than ten percent favorable to plaintiff than the case evaluation award, which defendant rejected, defendant was subject to sanctions. [MCR 2.403\(O\)\(3\)](#).

⁹ There is no dispute on appeal that the benefit payments at issue were "overdue."

¹⁰ The "baseline" fee is calculated by multiplying the reasonable hourly rate, "i.e., the reasonable hourly or daily rate customarily charged in the locality for similar legal services[.]" by the reasonable number of hours expended. [Smith, supra at 522](#).

review the propriety of the award under that standard. [Univ Rehabilitation Alliance, Inc, supra at 700 n 3.](#) award fell outside the range of reasonable and principled outcomes.

The evaluation of the reasonableness of an attorney fee award under the no-fault act, [MCL 500.3148\(1\)](#), involves consideration of the non-exclusive list of factors enunciated in *Wood* and patterned after the Michigan Rules of Professional Conduct. [Michigan Tax Mgt Services Co v Warren, 437 Mich 506, 509-510; 473 NW2d 263 \(1991\); Univ Rehabilitation Alliance, Inc, supra at 699-700.](#) Under *Wood*, a court should consider:

"(1) the professional standing and experience of the attorney; (2) the skill, time and labor involved; (3) the amount in question and the results achieved; (4) the difficulty of the case; (5) the expenses incurred; and (6) the nature and length of the professional relationship with the client." [[Wood, supra at 588](#), quoting [Crawley v Schick, 48 Mich App 728, 737; 211 NW2d 217 \(1973\)](#) (citations omitted).]

Further, [*28] in making its evaluation under [MCL 500.3148\(1\)](#), a court need not detail its findings regarding each specific factor; rather, a court ultimately determines a reasonable attorney fee by considering the totality of the circumstances. [Warren, supra at 510](#); [Univ Rehabilitation Alliance, Inc, supra at 700.](#)

In the instant case, plaintiff  requested \$ 149,572 in attorney fees. This request included the billable hours and rates of the attorneys as follows: Mr. Nolan billed 248 hours at \$ 350 per hour; Mr. Villas billed 124 hours at \$ 350 per hour; and Mr. Graham billed 113.5 hours at \$ 165 per hour. The trial court, however, awarded Nolan 248 hours at \$ 250 per hour; Villas 13.9 hours at \$ 150 per hour; and Graham 61.4 hours at \$ 100 per hour, for a total award of \$ 70,300. It cannot be said that this

Indeed, the trial court not only expressly stated on the record that it considered each of the *Wood* factors, but the court's comments clearly indicate that these factors guided its calculus in determining a reasonable amount of fees. Specifically, the court observed that the case was not complex in light of the number of witnesses [*29] and the small amount of discovery and could have been tried in one or two days by one attorney. The court also acknowledged the experience of plaintiff's lead attorney, but noted that in light of that experience, he should have paid for the other attorneys out of his own fee. Regarding the expenses incurred, the court elaborated that particular bills submitted caused "concern" and were "questionable," including the billing before the retainer agreement was signed, billing plaintiff for multiple attorneys for conferences, and charging \$ 10,625 for three and a half hours of trial and \$ 455 for 1.3 hours to draft letters. It was after this explanation that the court reduced the hourly rates and rendered its detailed review of the specific hours for which no fees would be awarded. In light of the trial court's thoughtful and careful explanations, we find no abuse of discretion.

We reverse the attorney fee award only insofar as it was based on [MCR 2.403](#), but affirm the lower court in all other respects.

/s/ Christopher M. Murray

/s/ Jane E. Markey

/s/ Stephen L. Borrello

USER ANNOTATIONS