RECEIVED by MSC 2/23/2015 5:22:03 PM

STATE OF MICHIGAN

IN THE SUPREME COURT

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

Plaintiff-Appellant,

vs.

UNITED SERVICES AUTOMOBILE ASSOCIATION,

Defendant- Appellee.

Supreme Court No. 150834

Court of Appeals No. 314523

Lower Court: 2011-119378-NI

/

RICHARD E. SHAW (P33521)
Attorney for Plaintiff-Appellant on Appeal
615 Griswold Street, Suite 1425
Detroit, Michigan 48226
(313) 963-1301

LAW OFFICES OF RICHARD M. SHULMAN
BY: RICHARD M. SHULMAN (P51931)
Attorney for Plaintiff-Appellant
39533 Woodward Avenue, Suite 170
Bloomfield Hills, Michigan 48304
(248) 203-7799

SCHWARTZ LAW FIRM, P.C.
BY: SUSAN LEIGH BROWN (P41128)
Attorney for Defendant-Appellee
37887 West Twelve Mile Road, Suite A
Farmington Hills, MI 48331
(248) 553-9400

/

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

RECEIVED by MSC 2/23/2015 5:22:03 PM

TABLE OF CONTENTS

Table of Authorities ii

Counter-Statement of Issues Presented iv

Counter-Statement Regarding Grounds For Leave v

Counter-Statement of Facts 1

Argument 4

I BECAUSE THE TRIAL COURT'S AWARD OF NO FAULT ATTORNEY FEES TO APPELLANT WAS REASONABLE, LEAVE TO APPEAL IS NEITHER NECESSARY NOR PRUDENT 4

Conclusion 13

Certificate of Service 14

RECEIVED by MSC 2/23/2015 5:22:03 PM

TABLE OF AUTHORITIES

Case Law:

Augustine v Allstate Ins Co, 292 Mich App 408; 807 N.W. 2d 77 (2011) 11

Auto Club Ins Ass'n v State Farm Ins Co, 221 Mich App 154, 167; 561 NW2d 445 (1997).....4

C&D Capital LLC v Colonial Title, 213 WL 2278127; Mich App 523 (2013) 12

Byers v. State Farm Mut. Auto. Ins. Co., 2009 Mich. App. LEXIS 2283, 2009 WL 3491619 (Mich. Ct. App. Oct. 29, 2009).....8

In re Attorney Fees & Costs, 233 Mich App 694, 705; 593 NW2d 589 (1999).....8

In re Estate of Wetsman, 2012 Mich. App. LEXIS 1803, 34, 2012 WL 4210413 (Mich. Ct. App. Sept. 20, 2012).....8

Goolsby v Detroit, 419 Mich 651;358 N.W. 2d 856 (1984).....6

John J Fannon Co v Fannon Prod LLC, 269 Mich App 162;712 N.W. 2d 731 (2005).....8, 11

Jordan v Transnational Motors Inc, 212 Mich App 94, 97; 537 NW2d 471 (1995).....4

McNeal v. Blue Bird Corp., 2014 Mich. App. LEXIS 1082, 2014 WL 2619408 (Mich. Ct. App. June 12, 2014).....10

Michigan DOT v. Randolph, 461 Mich. 757; 610 N.W.2d 893 (2000).....11

Moore v Secura Ins., 482 Mich 507;759 N.W. 2d 928 (2009), ...7

Petterman v. Haverhill Farms, Inc., 125 Mich. App. 30, 335 N.W.2d 710 (1983).....v

Prins v Michigan State Police, 299 Mich App 634; 831 N.W. 2d 867 (2013).....12, 13

Schellenberg v Rochester Lodge No 2225 of the Benevolent & Protective Order of Elks, 228 Mich App 20; 577 N.W.2d 163 (1998) 11

Schoensee v Bennett, 228 Mich App 305, 314-315; 577 NW2d 915 (1998).....4

Smith v Khouri, 481 Mich 519 (2008) ..... Passim

Stariha v. Chrysler Group, 2012 Mich. App. LEXIS 1283 (Mich. Ct. App. June 28, 2012).....10

Univ Rehab Alliance Inc v Farm Bureau Gen Ins Co, 279 Mich. App. 691;760 N.W. 2d 574 (2009) lv denied by 483 Mich 955; 763 N.W. 2d 908 (2009) 7, 9, 10

Wood v DAIIE, 413 Mich. 573; 321 N.W.2d 653 (1982) 5, 10,11

Statutes:

MCL 500.3148 ..... 9, 10, 11

Court Rules:

MCR 2.403 ..... 9, 10

RECEIVED by MSC 2/23/2015 5:22:03 PM

RECEIVED by MSC 2/23/2015 5:22:03 PM

COUNTER-STATEMENT OF ISSUES PRESENTED

I. WAS THE TRIAL COURT'S AWARD OF NO FAULT ATTORNEY FEES TO APPELLANT REASONABLE?

Appellant answers	"NO"
Appellee answers	"YES"
The trial court would answer	"YES"
The Court of Appeals answered	"YES"

RECEIVED by MSC 2/23/2015 5:22:03 PM

COUNTER-STATEMENT REGARDING GROUNDS FOR LEAVE

Defendant-Appellee contends that this case, particularly given its weak factual background, does not present an issue which involves legal principles of major significance to the state's jurisprudence. Rather, it presents a factual scenario which affects only this case. The single issue is the whether the trial court failed to enunciate its application of every factor listed in *Smith v Khouri*, 481 Mich 519; 751 N.W.2d 472 (2008) when it determined the amount of No Fault attorney fees it awarded to Plaintiff pursuant to MCL 500.3148. As is more fully explained below, not only does *Smith*, not apply in the legal context of this case, the lack of detailed analysis of Plaintiff's demand for attorney fees resulted, in large part, from Plaintiff's failure to provide the trial court with proofs sufficient to support the award of *any* attorney fee as required by the very case upon which Plaintiff's entire Application is based, *Smith,* 481 Mich at 531-532, as well as earlier cases not in the case evaluation sanctions arena such as *Petterman v. Haverhill Farms*, Inc., 125 Mich. App. 30, 335 N.W.2d 710 (1983). There is a plethora of existing case law regarding the award of attorney fees under MCL 500.3148. There is no unique legal or factual posture in this case, the resolution of which would impact Michigan jurisprudence, nor is there a lack of existing guidance to trial courts on the only issue presented, the determination of a reasonable attorney fee under MCL 500.3148. Plaintiff has not cited any other grounds justifying leave to appeal to this Court.

COUNTER-STATEMENT OF STANDARD OF REVIEW

Appellee concurs that the standard of review on the award of attorney fees to Appellant pursuant to MCL 500.3148 is abuse of discretion.

RECEIVED by MSC 2/23/2015 5:22:03 PM

COUNTER-STATEMENT OF FACTS

Plaintiff's counsel demanded over $220,000 in attorney fees compared to a verdict of $70,237.44. Plaintiff's attorney provided nothing more than his affidavit with a list of hours supposedly worked by him and his secretary. [See Exhibit 3 to Plaintiff's 11/27/12 Motion to Strike and for Attorney Fees]. The affidavit, which would not have been sufficient on its own even if it contained the requisite information, failed to provide the trial court with any information about the fees Plaintiff's counsel usually *receives*, any prior awards of attorney fees he has achieved in his "numerous" no fault trials, the likelihood that accepting the case would preclude him from taking on or handling other matters, or any information about his reputation or professional standing. He merely stated, in essence "$350 is a reasonable rate and my 615+ hours are reasonable on this case because it involved a lot of medical evidence, I had to take depositions of doctors and there were 10,000 pages of documents." [1] Although Plaintiff's attorney's affidavit implies that there were discovery depositions of the 11 doctors who testified at trial, in fact, there were no depositions other than the *de bene esse* depositions taken in the 3 weeks before the trial began, 5 of which were Defendant's expert witnesses. Moreover, as the trial judge noticed, Plaintiff's attorney was ill prepared for the depositions. He spent hours at each one reading medical records he had never seen. He billed 9 hours *to copy* the claim file of the predecessor insurer which he had never seen before the first day of trial and upon which he heavily relied in trying to prove that Defendant should have blindly paid PIP benefits as Citizens had done. Id.

[1] 12/11/12 Defendant's Response to Plaintiff's Motion for Entry of Judgment

RECEIVED by MSC 2/23/2015 5:22:03 PM

Most critical, however, in light of Plaintiff's complaint that the trial court failed to begin its analysis of what would constitute a reasonable fee by multiplying the number of hours claimed by the hourly rate customarily charged in the locality for similar legal services, Plaintiff utterly failed to provide the trial court with *any* evidence of *any* customary rate either for attorneys in Oakland County, for no fault attorneys, for attorneys with his 18 years of experience or otherwise. He did not provide testimonials or affidavits from other attorneys who know of his professional abilities or who could attest to reasonable hourly rates for no fault trial lawyers in Oakland County. He did not provide a single case in which an Oakland County judge or this Court had approved any particular hourly rate for a no fault trial attorney. Based on the scant information provided by Plaintiff's attorney, the trial court could have declined to award any attorney fees at all as he had no basis from which to determine what a reasonable rate would have been.

Plaintiff had her chance, indeed two chances, to address the question of the reasonableness of the demand for $220,000 in attorney fees on a $62,000 verdict. In addition to the hearing conducted on December 19, 2012 regarding, *inter alia*, the demand for attorney fees, Plaintiff was permitted to re-argue the claim for attorney fees at a hearing on January 9, 2013 which was necessitated by the parties' inability to agree on the language of the final judgment.[2] Plaintiff took the opportunity of the hearing to re-open the topic of his attorney fees. The court noted that it was aware of the *Smith* case and, more cogent to this appeal, of the burden having been on Plaintiff to demonstrate what the normal hourly rate for like services in the community was. Tr. 1/9/13 p. 12.

---

[2] Plaintiff submitted a proposed judgment under "the 7 day rule" MCR 2.602 (B), on 12/26/12. Defendant filed Objections to the Proposed Judgment, its own proposed judgment and notice of hearing to settle the language of the judgment on 12/27/12.

RECEIVED by MSC 2/23/2015 5:22:03 PM

The trial court noted Plaintiff's failure to provide that information to which Plaintiff merely responded that he had provided his own affidavit and noted that the amount awarded by the court amounted to $38 per hour *if one assumed that all 615 hours* billed were reasonable. Tr. 1/9/13, p. 13. Plaintiff *still* did not provide *any* evidence supporting his demand or that the $350 per hour he requested was in line with the norm. The trial court considered the fact that Plaintiff's attorney had been taking a 1/3 contingent fee on every PIP benefit paid prior to suit (Tr. 1/9/13 p. 14. See also Tr. 10/29/12 p. 136-177) in which Lindita Pirgu testified that Mr. Shulman took 1/3 of each payment of replacement services and attendant care benefits amounting to approximately $42,000 per year to Mr. Shulman). The trial court also noted that Plaintiff's attorney wasted time noting "I sat through the trial, I watched the depositions, you fumbled around, forever, at times, took much longer than it had to take." Tr. 1/9/13 p. 15-16.

Accordingly, the trial court *did* consider the quality of Plaintiff's attorney's performance and the time he spent and/or wasted in conducting the trial and trial depositions. [3] The trial court also noted the lack of any proof by Plaintiff of what a reasonable rate in the community would be. He also noted that, in the 2 years Plaintiff's attorney had been representing Plaintiff on this matter before suit was filed, Plaintiff's attorney had been paid approximately $80,000 and was working on a contingent fee basis with Plaintiffs.

---

[3] Appellee's counsel invites the panel to review any part of the trial transcripts to determine for itself whether Plaintiff's counsel was expert in his abilities or efficient and reasonable in the time taken to present his case and/or cross examinations of defense witnesses. For example, the hour wasted on the morning of October 26, 2012 when, after having examined Ms. Lingle, USAA's litigation manager, for 11 hours on October 23rd and 24th, Plaintiff recalled her to pursue a fruitless line of questions, outside the jury's presence which the trial court ruled was inadmissible. Ms. Lingle was not the decision maker on the payment of benefits, as she testified. Mary Ann Tavarez, who also testified for hours on October 24th, was the handling adjuster. Evidently, the court failed to record the afternoon session of October 24 during which Ms. Tavarez' testimony continued.

RECEIVED by MSC 2/23/2015 5:22:03 PM

At the initial hearing on the Motion for Attorney Fees, Plaintiff's attorney argued that he was entitled to $350 per hour for 615 hours of work. Defense counsel objected countering that Plaintiff had supplied no evidence supporting the hourly rate, that the jury had found against the Plaintiff on the majority of the claims decided[4] and that, although Plaintiff had sought over $372,000 in damages,[5] the jury awarded only $62,712 in damages—about 16% of the amount requested. The trial court noted "the jury also found that it was not unreasonable, you didn't get nearly what you asked for—you got less than what, one-third—" Tr. 12/19/12 p. 13.

ARGUMENT

I. THE TRIAL COURT'S AWARD OF NO FAULT ATTORNEY FEES TO APPELLANT WAS REASONABLE AND SHOULD BE AFFIRMED.

Standard of Review

> This Court will uphold a trial court's determination of the reasonableness of attorney fees absent an abuse of discretion. *Jordan v Transnational Motors Inc*, 212 Mich App 94, 97; 537 NW2d 471 (1995). 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 Co*, 221 Mich App 154, 167; 561 NW2d 445 (1997), or the result is so violative of fact and logic that it evidences a perversity of will or the exercise of passion or bias, *Schoensee v Bennett*, 228 Mich App 305, 314-315; 577 NW2d 915 (1998).

---

[4] Plaintiff sought reimbursement for 1) medical bills and prescription costs which the jury found were not owed 2) medical mileage which the jury found were not owed, 3) replacement services which the jury found were not owed, 4) case management costs which the jury found were not owed and 5) future allowable expenses which the jury found would not be owed. The jury found for the Plaintiff only on attendant care and wage loss and interest on those two awards. In fact, Plaintiff had requested an award of $13,770 in wage loss (Tr. 10/16/12 p. 118) but was awarded only $7,992. Plaintiff requested $341,760 in attendant care but was awarded less than 1/5 of that amount. See Verdict Form 11/2/12.

[5] Tr. 11/1/12 pp. 41-42 Plaintiff requested that the jury award $20 per hour, 24 hours per day attendant care benefits for 712 days and $7,140 for replacement services.. Plaintiff had requested $8,359.35 in conservator fees, Tr. 10/22/12 pp. 26-27, $5,446.30 in Case management fees (Tr. 10/29/12 pp. 155 and 164, and approximately $1,700 in medical bills and mileage. Tr. 10/29/12 pp. 86-95).

RECEIVED by MSC 2/23/2015 5:22:03 PM

Plaintiff complains that the trial court did not make exhaustive findings on the record applying each and every factor set forth by this Court's plurality opinion in *Smith v Khouri*, 481 Mich 519 (2008) and *Wood v DAIIE,* 413 Mich 573 (1982) in ruling that Plaintiff was entitled to an attorney fee equal to one third of the damages awarded by the jury. In essence, Plaintiff's only peeve is the Court's failure to enumerate each of the factors, rather than any substantive argument that such a verbal review would have resulted in a higher award or that the attorney fees actually awarded were unreasonable. If Plaintiff had been awarded the fees her attorney demanded, the fees would have been more than triple the verdict.[6] Setting aside for the moment the question of whether the *Smith* opinion, which involved not the No Fault Act's provision for attorney fees but the case evaluation sanctions rule applies, in deciding whether leave should be granted in this case, this Court may wish to review the facts of this case to determine whether it would present a good example for future jurisprudence and guidance to practitioners and trial court judges.

In this case, Plaintiff Appellant utterly failed to present *evidence* of what a reasonable hourly rate would have been or the reasonableness of the hours billed, or, actually *any* of the factors which she now complains that the trial court failed to contemplate. In short, the trial court was not provided with the information from which to make the calculation Plaintff claims was required by *Smith*. This Court "emphasized" in *Smith, supra* 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.'[Citation omitted] 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**

[6] Plaintiff's counsel demanded over $220,000 in attorney fees compared to a verdict of $70,237.44 of which only about $62,000 was for actual PIP benefits, the remainder having been interest.

> **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 531-532.

Despite the warnings above, Plaintiff's attorney provided nothing more than his affidavit with a list of hours supposedly worked by he and his secretary. [See Counter Statement of Facts and record citations therein.]

Based on the scant information provided by Plaintiff's attorney, the trial court could have declined to award any attorney fees at all as he had no basis from which to determine what a reasonable rate would have been. Having failed to do his job, Plaintiff's counsel is now seeking relief from this Court for the results of his failures. As this Court noted *Goolsby v Detroit,* 419 Mich 651, 655; 358 N.W. 2d 856 (1984):

> It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position. The appellant himself must first adequately prime the pump; only then does the appellate well begin to flow.

There is no reason to allow a litigant to force a trial court to search for factual or legal support for a position simply announced at the trial court level either. Yet, Plaintiff asks this Court to determine that the trial court abused its discretion in failing to consider information not provided to it by the party bearing the burden of proof. Plaintiff asserts that this case presents an issue of law of major significance to the jurisprudence of Michigan. However, if one considers the effect of reversal of both the Court of Appeals and the trial court's opinions, the result would be to reward a Plaintiff failed to establish that the $220,000+ in attorney fees which she demanded from the trial court was "reasonable" having presented nothing from which the trial court could have determined even what a reasonable hourly rate would have been. In short,

RECEIVED by MSC 2/23/2015 5:22:03 PM

RECEIVED by MSC 2/23/2015 5:22:03 PM

reversal would not accomplish the goal requested by Plaintiff. On the contrary, it would force the trial court to consider factors for which it was provided no supporting evidence.

As this Court noted in *Moore v Secura Ins.,* 482 Mich 507; 759 N.W. 2d 928 (2009), no fault attorney fees can be assessed only for the benefits which the insurer *unreasonably refused to pay*. Moreover, the proportion of the amount sought which is actually awarded is one of the factors to be considered in determining the reasonableness of the fees requested as is the nature of the actual fee arrangement with the client. Indeed, the dissent in *Smith* noted that both of those long-standing factors should continue to be considered. Here, the fee agreement was a 1/3 contingent fee. The amount demanded by Plaintiff for attorney fees was $220,000+ which is more than 1/3 of the total amount of damages demanded and nearly three times the total amount of damages awarded by the jury.[7] The court decided to award one third of the amount the jury had awarded in attorney fees. The trial court never stated that it based that award on what a contingent fee would have been although that would have been a permissible consideration. *Smith, supra* 481 Mich at 519; *Univ Rehab Alliance Inc v Farm Bureau Gen Ins Co*, 279 Mich. App. 691; 760 N.W. 2d 574 (2009) lv denied by 483 Mich 955; 763 N.W. 2d 908 (2009). Rather, the only other "one third" consideration noted by the trial court was the fact that Plaintiff had been awarded less than 1/3 of the damages requested.

Although the trial court did not make a list of factors and then make specific findings on each factor, it was not required to do so. Plaintiff relies on *Smith v Khouri, supra* in support of the claim that the matter *must* be remanded by this Court simply to get the list. First, *Smith* is a plurality opinion which is not particularly persuasive on the question of ticking off items on a

[7] 1/3 of the amount demanded of the jury would equal $122,760, nearly $100,000 *less* than Plaintiff's counsel demanded after the jury awarded only 16% of the amount demanded for damages.

RECEIVED by MSC 2/23/2015 5:22:03 PM

list. Second, *Smith* does not **require** trial court's to use the method it recommends (i.e. start with reasonable market rate times reasonable number of hours expended). Rather, the opinion repeated uses the word "should" rather than "shall" or "must." See e.g. 481 Mich at 522 and 531. Moreover, as noted above, Plaintiff failed to provide the trial court with any evidence at all of "the fee customarily charged in the locality for similar legal services," the starting point for the *Smith* analysis.

Additionally, even if the trial court failed to follow the exact outline set forth in *Smith*, such failure was harmless error at worst not requiring reversal. Indeed numerous cases both before and after *Smith* have found that there is no requirement that at trial court strictly adhere to the *Smith* factors or expressly delineate its consideration of each factor in cases not involving case evaluation sanctions. *See e.g. John J Fannon Co v Fannon Prod, LLC,* 269 Mich App 162, 172; 712 NW2d 731 (2005)*; In re Attorney Fees & Costs,* 233 Mich App 694, 705; 593 NW2d 589 (1999*), Byers v. State Farm Mut. Auto. Ins. Co.*, 2009 Mich. App. LEXIS 2283, 2009 WL 3491619 (Mich. Ct. App. Oct. 29, 2009) attached Exhibit A; *In re Estate of Wetsman,* 2012 Mich. App. LEXIS 1803, 34, 2012 WL 4210413 (Mich. Ct. App. Sept. 20, 2012) attached Exhibit B.

Notably, at no point in the Application for Leave to Appeal or in the brief on appeal to the Court of Appeals did Plaintiff argue that the award of $23,000+ for attorney fees *was unreasonable*. Rather, the argument is all form over substance. Plaintiff urges this Court to grant leave solely because the trial court did not recite a rote, formulaic checklist, not because the Court of Appeals did not have sufficient information to decide whether the award was reasonable and not because the award was, in fact, unreasonable. Because the "i's" weren't dotted, the award must be reversed, according to Plaintiff no matter that the dotting of those 'i's" was made

impossible by Plaintiff's failure to provide the dots, so to speak and without regard to whether the result achieved comported with the requirement that the award be reasonable.

To the extent that Plaintiff touched upon reasonableness at all, or, for that matter, on the "reasonably hourly rate", it was only to cite the State Bar Law Office Economics Survey regarding average attorney rates *which was provided to the trial court by* ***Defendant***. In fact, argument based upon that Survey was never posited to the trial court by the Plaintiff even after Defendant attached it to Defendant's brief opposing the attorney fee request. Plaintiff invented an entirely new argument for the benefit of the Court of Appeals, one which was *not* presented to the trial court, the actions of which Plaintiff now so bitterly rebukes. Therefore, even if this Court were to determine that the *Smith* procedure must be applied in No Fault cases, reversal and remand would very likely have no significant effect on the outcome since Plaintiff's attorney failed to meet his burden of establishing what a "reasonable hourly rate" may have been back when he had the chance (or two chances) at the trial court level.

Third, *Smith* does not explicitly apply to a no fault case because *Smith* involved attorney fees awarded as case evaluation sanctions, not as no fault penalty attorney fees. As such, case evaluation sanctions serve a different purpose; they punish a losing party for forcing a trial at all. The award of attorney fees necessarily includes all fees incurred by the opposing party after case evaluation rejection per MCR 2.403(O)(6)(b). That rule explicitly requires the court to determine a reasonable *hourly or daily* rate. See *Univ Rehab Alliance, supra*; MCL 500.3148(i) contains no such directive. In fact, it would seem inapposite to require the assignment of an hourly rate to a field such as No Fault law wherein the majority of the actual fees not awarded as penalty fees are based not on an hourly rate but on contingent fee agreements. Because the amount to be assessed must be a "reasonable" fee for the work performed and because most of the factors previously

RECEIVED by MSC 2/23/2015 5:22:03 PM

employed by Michigan courts were geared toward determining reasonableness in light of similar cases (e.g. geographic area, experience level of the attorney, complexity of the case) the trial court here made its decision based upon appropriate considerations given the dearth of evidence provided to it by Plaintiff. The trial court's actions in this case also comport with the Court of Appeals decision in *Univ Rehab Alliance, supra* which explicitly considered and rejected the direct application of *Smith* to no fault attorney fee cases and expressly recognized the trial court's award of attorney fees based on a contingency fee agreement was reasonable. 279 Mich App at 702.

Other panels of the Court of Appeals, since the decision in *Smith*, have likewise found that the analysis set forth in *Smith* does not apply to "fee-shifting" provisions, those which, like the No Fault Act, encourage litigants to protect their rights by providing for a reasonable attorney fee should they prevail. *See e.g. McNeal v. Blue Bird Corp.,* 2014 Mich. App. LEXIS 1082, 2014 WL 2619408 (Mich. Ct. App. June 12, 2014) Exhibit C, and *Stariha v. Chrysler Group*, 2012 Mich. App. LEXIS 1283 (Mich. Ct. App. June 28, 2012) interpreting the Michigan Consumer Protection Act's attorney fee provision Exhibit D.

It should also be noted that the iconic decision in *Wood* was a No Fault attorney fees case which arose under MCL 500.3148, the statute at issue in this case, unlike the decision in *Smith.* Also, this Court, in *Smith,* recognized the difference between attorney fees awarded as case evaluation sanctions, which are required to compensate the prevailing parties for "a reasonable hourly or daily rate for services necessitated by the rejection" and attorney fees not so limited. In fact, former Justice Taylor noted that the reason he did not favor applying the "proportionality factor" in cases arising from MCR 2.403 was that it conflicted with the "necessitated by the rejection" provision of that rule.

RECEIVED by MSC 2/23/2015 5:22:03 PM

While, of course, this Court may decide that the *Smith* factors should, or even must be used in awarding attorney fees pursuant to MCL 500.3148, it has not yet done so and, for the reasons argued above, this would not be an appropriate "poster child" case in which to provide direction to lower courts should this Court be inclined to apply the *Smith* criteria to No Fault cases. In fact, the approach utilized by the trial court in this case is in accord with this Court's 2000 decision in *Michigan DOT v. Randolph*, 461 Mich. 757; 610 N.W.2d 893 (2000) in which this Court noted that the trial court should have begun its analysis by determining whether the fee actually charged to the client was reasonable. The trial court in this case, therefore, would not be bound by the exposition recommended in Smith as to how it came to decide the amount awarded in attorney fees.

The jurisprudence on the topic prior to *Smith* was that the trial courts were not required to enunciate in detail how and why fees were found to be reasonable with detailed discussions of each factor set forth by in *Wood* and *Smith. John J Fannon Co v Fannon Prod LLC*, 269 Mich App 162, 172 (2005); See also *Schellenberg v Rochester Lodge No 2225 of the Benevolent & Protective Order of Elks*, 228 Mich App 20, 45 (1998) quoting *Wood v DAIIE*, 413 Mich at 589. In short, it is not reversible error for a trial court to fail to address each (non-exclusive) factor mentioned in the attorney fees jurisprudence.

Plaintiff cites *Augustine v Allstate Ins Co*, 292 Mich App 408 (2011) for the proposition that the trial court committed reversible error requiring remand for, in essence, an accounting of each factor delineated in *Smith.* First, *Augustine* does not hold that each *Smith* factor must be addressed. Secondly, *Augustine* had been remanded prior to the 2011 decision with specific instruction to the lower court to make specific findings, consistent with *Smith*, on each attorney

RECEIVED by MSC 2/23/2015 5:22:03 PM

whose fees plaintiff sought to recover and the lower court had defied this Court's directive. Because of that failure, this Court held:

> Given the remand directive, the trial court's award of attorney fees was an abuse of discretion under the law-of-the-case doctrine because the trial court failed to make specific findings consistent with Smith.

292 Mich App at 426. Therefore, as noted by the Court of Appeals' majority opinion, the application of the *Smith* test in *Augustine* was mere dicta. There is, in fact, no conflict among panels of the Court of Appeals as to whether *Smith* applies to cases applying MCL 500.3148.

Moreover, *Augustine* is factually inapposite. In *Augustine,* the party seeking the attorney fees had provided substantial information to the lower court regarding the reasonable rate topic. Two evidentiary hearings were held, Plaintiff produced letters from four other attorneys regarding the fees those attorneys regularly charged for similar work. Also noteworthy is the fact that the determination by the trial court on remand was that a reasonable rate was $500 per hour. This Court reversed that finding again because Plaintiff had failed to provide sufficient evidence to support that such a rate was reasonable and noted:

> Also, amazingly absent from the testimony, evidence of anecdotal experiences, and other statements was any substantive evidence that real, actual clients have paid $500 an hour in similar circumstances.

292 Mich App at 427. Such evidence was likewise lacking in this case.

Plaintiff's reliance on the unpublished decision in *C&D Capital LLC v Colonial Title*, 213 WL 2278127; Mich App 523 (2013) is likewise unavailing. First, the case enjoys no precedential weight but, in addition, in *C&D* the moving party had actually provided evidence with which the trial court could apply the *Smith* factors. *C&D* is not a no fault case but, rather, a case evaluation sanctions case to which *Smith* has factual application, unlike this case. Similarly, *Prins v Mich State Police*, 299 Mich App 634 (2013), cited by Plaintiff, does not address no fault

RECEIVED by MSC 2/23/2015 5:22:03 PM

attorney fees but, rather, statutory attorney fees including "all fees related to achieving production of public records" sought in the FOIA case. In *Prins*, the entire discussion of the determination of the attorney fee by the trial court was:

> This Court has reviewed the attorney fees requested by Defendant [sic] and determines without any disrespect to defense [sic] counsel's experience or expertise, that a reasonable attorney fee for representation at the trial and appellate court levels is $175 per hour at 70 hours or $12,250 . . . .

The Court of Appeals, therefore, remanded because there was *nothing* in the record to reflect why the trial court did what it did or whether the awarded rate was reasonable. The trial court here expostulated at more length about the basis for its decision, including the failure of the Plaintiff to provide the evidence required of the party seeking attorney fees. As noted above, this Court denied leave to appeal in *Prins* in 2009, after the decision in *Smith*.

CONCLUSION

Plaintiff has failed to establish grounds for leave to appeal. There is nothing in the background of this case which would render it worthy of this Court's consideration or which would contribute to the jurisprudence of Michigan. The trial court, as the Court of Appeals held, did not abuse its discretion. Perhaps most importantly, the award of $23,412.48 was reasonable, especially in light of the $62,000 verdict the award and Plaintiff has not argued to the contrary in her Application. Leave to Appeal should be denied.

SCHWARTZ LAW FIRM, P.C.

By: /S/ Susan Leigh Brown

Susan Leigh Brown (P41128)
Attorney for Defendant-Appellee
37887 West Twelve Mile Road, Suite A
Farmington Hills, Michigan 48331
(248) 553-9400

Dated: February 23, 2015

RECEIVED by MSC 2/23/2015 5:22:03 PM

RECEIVED by MSC 2/23/2015 5:22:03 PM

EXHIBIT A

RECEIVED by MSC 2/23/2015 5:22:03 PM

LexisNexis

User Name: SUSAN.BROWN

Date and Time: Feb 21, 2015 4:57 p.m. EST

Job Number: 17402169

Document(1)

1. *Byers v. State Farm Mut. Auto. Ins. Co., 2009 Mich. App. LEXIS 2283*

   Client/Matter: 0555-268

   Narrowed by:

Content Type	Narrowed by
Cases	Custom: Custom

RECEIVED by MSC 2/23/2015 5:22:03 PM

Cited
As of: February 21, 2015 4:57 PM EST

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.

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] Kent Circuit Court. LC No. 06-0056644-CK.

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. 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.

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.

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. Defendant only paid a portion of the claims submitted. Regarding plaintiff's wage loss benefits,

RECEIVED by MSC 2/23/2015 5:22:03 PM

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 trial would be

[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.

RECEIVED by MSC 2/23/2015 5:22:03 PM

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.

RECEIVED by MSC 2/23/2015 5:22:03 PM

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 [5] 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.

RECEIVED by MSC 2/23/2015 5:22:03 PM

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)(ii). 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 hadan oral agreement regarding replacements 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.

RECEIVED by MSC 2/23/2015 5:22:03 PM

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

RECEIVED by MSC 2/23/2015 5:22:03 PM

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 Aviex 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

[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.

RECEIVED by MSC 2/23/2015 5:22:03 PM

reversed the trial court's declaratory judgment awarding future PIP benefits because the jury only 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.

---

[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*.

RECEIVED by MSC 2/23/2015 5:22:03 PM

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 review the propriety of the award under that standard. *Univ Rehabilitation Alliance, Inc, supra at 700 n 3*.

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 award fell outside the range of reasonable and principled outcomes.

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

RECEIVED by MSC 2/23/2015 5:22:03 PM

EXHIBIT B

RECEIVED by MSC 2/23/2015 5:22:03 PM

LexisNexis

User Name: SUSAN.BROWN

Date and Time: Feb 21, 2015 4:58 p.m. EST

Job Number: 17402181

Document(1)

1. *In re Estate of Wetsman, 2012 Mich. App. LEXIS 1803*

   Client/Matter: 0555-268

RECEIVED by MSC 2/23/2015 5:22:03 PM

Cited
As of: February 21, 2015 4:58 PM EST

In re Estate of Wetsman

Court of Appeals of Michigan

September 20, 2012, Decided

No. 292350, Nos. 292738; 301356, No. 294961, Nos. 296365; 301355

Reporter
2012 Mich. App. LEXIS 1803; 2012 WL 4210413

In re Estate of CHARLOTTE WETSMAN.STEPHEN ERIC SHEFMAN, Personal Representative of the Estate of CHARLOTTE WETSMAN, Appellant, v THOMAS BRENNAN FRASER, Special Fiduciary, JUDITH GAIL SILBERMAN, and PETER SHEFMAN, Appellees.STEPHEN SHEFMAN, Appellant, v THOMAS BRENNAN FRASER, Special Fiduciary, JUDITH GAIL SILBERMAN, and PETER SHEFMAN, Appellees.ESTATE OF CHARLOTTE WETSMAN, Plaintiff-Appellee, and STEPHEN ERIC SHEFMAN, Plaintiff, v PETER ELLIOT SHEFMAN, Defendant-Appellant.In re CHARLOTTE WETSMAN TRUST.STEPHEN ERIC SHEFMAN, Appellant, v PETER ELLIOTT SHEFMAN, JUDITH GAIL SILBERMAN, and THOMAS BRENNAN FRASER, Appellees.

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 Probate Court. LC No. 2007-309955-DE. Oakland Probate Court. LC No. 2007-309955-DE. Oakland Probate Court. LC No. 2008-319207-CZ. Oakland Probate Court. LC No. 2009-324688-TV.

Core Terms

probate court, personal representative, probate, decedent's, fiduciary, appointment, removal, attorney's fees, successor trustee, interested person, estate's action, expenses, successor, proceedings, argues, slander of title, disqualification, hourly rate, subject-matter, condominium, provisions, appeals, first annual, the will, amendments, provides, duties, notice, final account, petitioned

Judges: Before: JANSEN, P.J., and BORRELLO and BECKERING, JJ.

Opinion

PER CURIAM.

These consolidated appeals involve proceedings in the Oakland County Probate Court regarding (1) the supervised administration of the probate estate of Charlotte Wetsman, who died testate in 2007 (the estate action), (2) a slander of title action concerning estate property, brought by the decedent's son Stephen Shefman, while acting as personal representative, against the decedent's other son, Peter Shefman (the slander of title action), and (3) the court-supervised administration of the decedent's inter vivos trust, beginning in 2009 (the trust action). In the estate action, Stephen appeals as of right from the probate court's orders removing him as personal representative and partially granting his petition for allowance of his first annual account (Docket No. 292350), appointing Thomas Brennan Fraser, a public administrator, as successor personal representative (Docket No. 292738), and allowing Stephen's second and final account in accordance [*2] with the court's prior opinions and orders (Docket No. 301356). In Docket No. 294961, Peter appeals as of right from the probate court's order, following a bench trial, awarding the estate limited damages in the slander of title of action. In the trust action, Stephen appeals as of right from the probate court's orders removing him as successor

RECEIVED by MSC 2/23/2015 5:22:03 PM

trustee and appointing Fraser as successor trustee (Docket No. 296365), and granting Fraser's request for instructions to allow certain expenses incurred by the decedent's estate to be paid by trust assets (Docket No. 301355). In each appeal, we affirm.

I. FACTS AND PROCEDURAL BACKGROUND

The decedent died in February 2007, survived by three children, Stephen, Peter, and Judith Gail Silberman. In April 2007, Stephen petitioned the probate court to admit a copy of decedent's will, dated October 30, 1991, and to appoint him as personal representative of decedent's estate as provided in the will. Article II of the will provided for various items of personal property to be divided between the decedent's children by agreement or, in the absence of an agreement, as decided by the personal representative. Article III provided for the residuary estate [*3] to be distributed to Stephen, as successor trustee under a trust established by the decedent, dated October 30, 1991, and as subsequently amended, to be integrated with, administered, and accounted for as part of the trust estate.

A principal asset in the residue of the decedent's estate was a vacant lot that was part of a condominium development in the city of Ann Arbor. The condominium property had been conveyed to the decedent in 1997 pursuant to a warranty deed signed by Peter, as president of the Terrance Land Development Corporation. The trust agreement, as amended in 1995, awarded $5,000 to each of the decedent's grandchildren, and provided that Peter was to receive certain real property in Florida, provided he "agrees to accept said assignment, transfer, and conveyance in full satisfaction of all claims, demands, causes of action, rights, titles or interests in which he may have or claim to have against the Trust and the Estate of GRANTOR, otherwise Peter Shefman, GRANTOR's son, shall take nothing under the Trust[.]"[1] Stephen and Silberman were to share equally in the remaining trust principal. Article VI(A) of the trust agreement provided for the use of the trust principal [*4] to pay any administrative expenses and claims of the decedent's estate to the extent that the estate assets were insufficient to pay those expenses and claims. Article VII-I(B) of the trust empowered the successor trustee to purchase property belonging to decedent's estate and to make loans to the personal representative.

In the estate action, the probate court appointed Stephen as personal representative of decedent's estate. Stephen, an attorney, also appeared as counsel for the personal representative. Peter filed ongoing objections to the validity of the decedent's will, arguing that it was the product of Stephen's undue influence against the decedent. The probate court struck Peter's objections in an order entered on October 22, 2007, which also granted discovery sanctions to Stephen.[2] Proceedings were thereafter conducted concerning various disputes by one or more of the decedent's children, including Stephen's entitlement to funds in joint bank accounts with decedent, Peter's objections to Stephen's proposed sale of the condominium property, and whether a ring possessed by Silberman **[*5]** and artwork possessed by Stephen were part of the decedent's estate.

In June 2008, Stephen filed an amended, supplemental inventory of the decedent's estate, showing total assets, including the condominium property, valued at $89,475. He also petitioned the probate court for approval of the sale of the condominium property. In July 2008, Stephen petitioned the probate court to allow his first annual account, which requested approval of fiduciary and attorney fees exceeding $145,000. Silberman and Peter unsuccessfully moved for Stephen's removal as personal representative. In August 2008, Peter recorded a notice of lis pendens for the condominium property, which alleged that issues affecting the ownership of the property were involved in the estate action, which was described as a "sham legal process."

---

[1] Stephen testified that the decedent sold the Florida property before he became successor trustee.

[2] The order was amended nunc pro tunc in March 2010 to provide that the will was admitted to probate.

RECEIVED by MSC 2/23/2015 5:22:03 PM

After the probate court denied Peter's motion for disqualification in the estate action, the court entered an order on September 23, 2008, canceling the notice of lis pendens. Despite that order, Stephen, as personal representative of the estate, filed a slander of title action against Peter, [*6] which was assigned to a different probate court judge. Ultimately, following a bench trial in August 2009, the judge determined that the elements for a slander of title claim were established, but that damages were nominal. In an order entered on November 2, 2009, the court awarded the decedent's estate damages of $726, representing the costs associated with obtaining and recording the order removing the notice of lis pendens in the estate action.

The estate action was assigned to a new judge in January 2009. Following an evidentiary hearing that concluded on May 11, 2009, the successor judge partially approved the attorney and fiduciary fees sought by Stephen in his first annual account as personal representative. Stephen was awarded $3,975 in attorney fees and $3,615 in fiduciary fees. In addition, in light of events that had occurred since the predecessor judge denied the request for Stephen's removal, the successor judge sua sponte revisited whether Stephen should continue to serve as personal representative. The court determined that Stephen was no longer suitable to serve as personal representative and should be removed immediately. In an order entered on May 11, 2009, Stephen's [*7] fiduciary powers were suspended and Fraser was appointed as special fiduciary to investigate the status of the then-pending slander of title action, determine the impact of that case on the estate, and review and report on the status of the estate. In a subsequent order entered on May 28, 2009, the successor judge reiterated his decision appointing a special fiduciary and ordered that Stephen was to be removed as personal representative. On June 3, 2009, Fraser was appointed successor personal representative of the estate, effective May 11, 2009.

In July 2009, Stephen petitioned the probate court to allow his second and final account as personal representative, for the period through May 28, 2009. As part of that account, Stephen sought attorney and fiduciary fees exceeding $179,000. In an order dated February 26, 2010, Stephen was allowed attorney fees of $15,687 for his own legal services, and fiduciary fees of $1,580. The court also approved attorney fees of $2,973 for attorney Richard Siriani in the estate action. On November 5, 2010, Stephen's second and final account was approved in accordance with the court's previous opinions and orders.

In July 2009, proceedings in the trust [*8] action also commenced. The judge who was assigned the estate action in January 2009 ordered Stephen to file and register the decedent's trust in the probate court, and granted Fraser's petition for court supervision of the trust. On July 22, 2009, Stephen filed the trust registration in the probate court. On January 22, 2010, Stephen was removed as successor trustee and replaced by Fraser. In subsequent proceedings, Fraser filed a petition for the probate court's approval to use trust funds to pay certain fees and expenses associated with the decedent's estate. On November 5, 2010, the probate court entered an order allowing the fees and expenses to be paid from the trust "as necessary and appropriate."

II. STANDARD OF REVIEW

The probate court's factual findings are reviewed for clear error. *In re Temple Marital Trust, 278 Mich App 122, 128; 748 NW2d 265 (2008)*. "A finding is clearly erroneous when a reviewing court is left with a definite and firm conviction that a mistake has been made, even if there is evidence to support the finding." *In re Bennett Estate, 255 Mich App 545, 549; 662 NW2d 772 (2003)*. We give deference to the probate court's "special opportunity" to judge the credibility [*9] of witnesses who appear before it. *MCR 2.613(C)*. The court's conclusions of law are reviewed de novo. *Alan Custom Homes, Inc v Krol, 256 Mich App 505, 512; 667 NW2d 379 (2003)*.

We also review de novo jurisdictional issues and questions of law involving the interpretation or validity of a statute. *Estes v Titus, 481 Mich 573,*

RECEIVED by MSC 2/23/2015 5:22:03 PM

578-579; 751 NW2d 493 (2008); In re McEvoy, 267 Mich App 55, 69; 704 NW2d 78 (2005). The proper interpretation and application of a court rule is also reviewed de novo as a question of law, applying principles of statutory construction. Henry v Dow Chem Co, 484 Mich 483, 495; 772 NW2d 301 (2009). A probate court's construction of a will or trust is likewise reviewed de novo. In re Raymond Estate, 483 Mich 48, 52; 764 NW2d 1 (2009); In re Reisman Estate, 266 Mich App 522, 526; 702 NW2d 658 (2005).

A probate court's dispositional rulings, such as whether to remove a trustee or personal representative, are reviewed for an abuse of discretion. In re Temple Marital Trust, 278 Mich App at 128; In re Baldwin Trust, 274 Mich App 387, 404; 733 NW2d 419 (2007), aff'd 480 Mich 915 (2007); Comerica Bank v City of Adrian, 179 Mich App 712, 730; 446 NW2d 553 (1989). Decisions [*10] regarding the amount of reasonable attorney fees or compensation for a personal representative in an estate action are also reviewed for an abuse of discretion. In re Temple Marital Trust, 278 Mich App at 128; In re Baird Estate, 137 Mich App 634, 637; 357 NW2d 912 (1984). Whether to grant a motion for reconsideration is also reviewed for an abuse of discretion. Woods v SLB Prop Mgt, LLC, 277 Mich App 622, 629; 750 NW2d 228 (2008). An abuse of discretion occurs when the probate court chooses an outcome outside the range of reasonable and principled outcomes. In re Temple Marital Trust, 278 Mich App at 128.

III. ESTATE ACTION

A. DOCKET NO. 292350

In Docket No. 292350, Stephen appeals the probate court's May 28, 2009, order removing him as personal representative and partially granting his petition for allowance of his first annual account in the estate action. While Stephen also seeks review of a portion of the order appointing a special fiduciary and an earlier May 11, 2009, order in which Fraser was designated and appointed as the special fiduciary, an appeal to this Court from a probate court order is limited to the portion of the under MCR 5.801(B) that is subject to this Court's jurisdiction. [*11] Comerica Bank, 179 Mich App at 729-730. At the time Stephen filed his appeal in Docket No. 292350, MCR 5.801(B)(1)(a) provided for an appeal by right to this Court from an order "appointing or removing a personal representative, conservator, or trustee, or denying such an appointment."[3] Because the appointment of a special fiduciary is not within subrule (1)(a) or any of the other subrules listed in MCR 5.801(B), we do not consider Stephen's arguments concerning Fraser's appointment as special fiduciary.

With respect to those portions of the May 28, 2009, order that are subject to this Court's jurisdiction, Stephen argues that the order should be set aside because the judge who entered it should have been disqualified under MCR 2.003 on the grounds that he was biased and had personal knowledge of disputed evidentiary facts.

MCR 2.003 applies to proceedings in probate court. See MCR 5.001. Under MCR 2.003(D)(1), formerly MCR 2.003(C)(1), a motion for disqualification must be filed within 14 **[*12]** days after discovery of the grounds for disqualification.[4] Where a party is aware of a judge's alleged judicial bias and does not move for disqualification, the issue is not preserved for appeal. Kroll v Crest Plastics, Inc, 142 Mich App 284, 491; 369 NW2d 487 (1985). The disqualification of a judge under MCR 2.003 is further subject to the rule that "[t]o preserve for appellate review the issue of a denial of a motion for disqualification of a trial court judge, a party must request referral to the chief judge of the trial court after the trial court judge's denial of the party's motion." Welch v Dist Court, 215 Mich App 253, 258; 545 NW2d 15 (1996), see also MCR 2.003(D)(3)(a), formerly MCR 2.003(C)(3)(a).

[3] The court rule was amended, effective April 1, 2010, and former subrule (B)(1)(a) was recodified as subrule (B)(2)(a) and expanded to include a "trust protector as referred to in MCL 700.7103(n)."

[4] The court rule governing a motion for disqualification was amended after entry of the May 28, 2009, order, but the 14-day time limit was not changed.

RECEIVED by MSC 2/23/2015 5:22:03 PM

Considering that Stephen's claim is based on an oral decision rendered on May 11, 2009, we find no merit to Stephen's argument that he could not have moved for disqualification before entry of the May 28, 2009, order that is the subject of this appeal. Further, Stephen could have moved for reconsideration of the order under MCR 2.119(F). [*13] As the beneficiary of the will admitted to probate in the estate action, he also had standing to move for disqualification on the basis of judicial bias over the next two years, after he was removed as personal representative, but he did not do so. Because Stephen clearly had an opportunity to move for disqualification, and did not do so, he did not preserve this issue for appeal.

Nonetheless, this Court may overlook preservation requirements where failure to consider an issue would result in manifest injustice, consideration of the issue is necessary to a proper determination of the case, or the issue presents a question of law and the facts necessary for its resolution have been presented. Steward v Panek, 251 Mich App 546, 554; 652 NW2d 232 (2002). This Court is also empowered to consider any issue that, in this Court's opinion, justice requires be considered and resolved. Paschke v Retool Indus (On Rehearing), 198 Mich App 702, 705; 499 NW2d 453 (1993), rev'd on other grounds 445 Mich 502 (1994). However, our review of the record does not disclose anything about the judge's May 11, 2009, opinion that warrants relief from the May 28, 2009, order.

No relief is warranted unless a basis [*14] for disqualification is shown that affected the outcome of the proceeding. Hull & Smith Horse Vans, Inc v Carras, 144 Mich App 712, 719; 376 NW2d 392 (1985); see also Davis v Chatman, 292 Mich App 603, 615; 808 NW2d 555 (2011). If there are factual issues to resolve, they must be resolved in the probate court. Brill v Brill, 75 Mich App 706, 711; 255 NW2d 739 (1977).

It is clear from the trial court's May 11, 2009, opinion that it applied the criteria in Article III of the Estates and Protected Individuals Code (EPIC), MCL 700.3101 et seq., for removing a personal representative for cause and, in particular, focused on MCL 700.3611(2) when removing Stephen as personal representative.[5] The court found that Stephen had a duty to act in the best interests of the estate and the parties. The court considered several factors in determining that Stephen was not suitable for the office of personal representative, including Stephen's conflict with Peter, Stephen's lack of credibility regarding his knowledge of the conflict, and a determination that Stephen was taking advantage of his position to deprive Silberman and Peter of certain assets. While the court also considered information that he [*15] received from his court staff regarding Stephen's repeated contacts with them, we find no merit to Stephen's argument that this constituted disqualifying conduct. MCR 2.003(C)(1)(c), formerly MCR 2.003(B)(2), provides for disqualification where "[t]he judge has personal knowledge of disputed evidentiary facts concerning the proceeding," but does not apply to knowledge gained by a judge in the course of judicial proceedings. See FMB-First Nat'l Bank v Bailey, 232 Mich App 711, 729; 591 NW2d 676 (1998). While Stephen's contacts with court staff involved events outside the courtroom, Stephen does not dispute that the contacts took place. In addition, the record establishes that Stephen continued to contact the court's staff even after the court informed him at a hearing on May 1, 2009, that his ex parte communications with staff was inappropriate.

Although Stephen argues that it was appropriate for him to attempt to speak with the court's [*16] staff in an effort to provide information on a matter of law in his capacity as an attorney, the danger of ex parte communications is that they will expose a judge to one-sided argument and, at worst, invite improper influence. Grievance Administrator v Lopatin, 462 Mich 235, 262-263; 612 NW2d 120 (2000). Under the Michigan Rules of Professional Conduct, a lawyer shall not seek to

[5] The EPIC became effective April 1, 2000, see MCL 700.8101(1), and, except as otherwise provided in the EPIC, it applies to a "governing instrument executed by a decedent dying after that date." MCL 700.8101(2)(a). The decedent in this case died in 2007.

RECEIVED by MSC 2/23/2015 5:22:03 PM

influence a judge. MRPC 3.5(a). Because it is undisputed that Stephen contacted the judge's staff after being cautioned on May1, 2009, that his conduct was inappropriate, Stephen has not established any disputed evidentiary fact concerning the estate action that would warrant the trial court's disqualification on the basis that it had personal knowledge of disputed evidentiary facts concerning the proceeding.

Stephen's claim of judicial bias based on the court's May 11, 2009, opinion also fails. A party challenging a judge for bias or prejudice must overcome a heavy presumption of judicial impartiality. Cain v Dep't of Corrections, 451 Mich 470, 497; 548 NW2d 210 (1996). A judge's rulings against a party, "no matter how erroneous, or vigorously expressed, are not disqualifying." Bayati v Bayati, 264 Mich App 595, 603; 691 NW2d 812 (2004). [*17] A judge's opinion must display such deep-seated favoritism or antagonism that fair judgment is impossible. In re Contempt of Henry, 282 Mich App 656, 680; 765 NW2d 44 (2009). There is nothing in the probate court's May 11, 2009, opinion which indicates that it was actually biased against Stephen, or which indicates that fair judgment was impossible.

Stephen next challenges the suspension of his authority as personal representative pursuant to the probate court's May 11, 2009, order that also provided for appointment of a special fiduciary. Stephen's challenge to the suspension of his authority is moot in light of the probate court's subsequent May 28, 2009, order removing him as personal representative. Substantively, the order of suspension merely gave effect to the probate court's ruling on May 11, 2009, that Stephen's removal as personal representative was to take effect immediately. Because the dispositive issue is whether Stephen's removal was proper, it is unnecessary to consider Stephen's challenge to the suspension order. *B P 7 v* Bureau of State Lottery, 231 Mich App 356, 359; 586 NW2d 117 (1998).

With respect to Stephen's removal as personal representative, Stephen argues that [*18] the probate court had no authority under MCL 700.3611 or any other provision of the EPIC to sua sponte remove him as personal representative or to take this action without affording him a hearing regarding the matter. The goal when construing a statute is to ascertain the Legislature's intent. Robinson v City of Lansing, 486 Mich 1, 15; 782 NW2d 171 (2010). To determine that intent, statutory provisions are not to be read in isolation, but rather are to be read together to harmonize their meaning and give effect to the act as whole. *Id. at 15*.

MCL 700.3611(1) provides that "[u]pon filing of the petition, the court shall fix a time and place for hearing. The petitioner shall give notice to the personal representative and to other persons as the court orders." Thus, the statute contemplates that a personal representative is entitled to notice and a hearing when an interested person petitions the probate court to remove a personal representative for cause. But the EPIC also permits a probate court to act on its own motion when it appears that a personal representative "may take some action that would jeopardize unreasonably the interest of the petitioner or some other interested person." [*19] MCL 700.3607(1). It also provides that where there is a supervised administration of an estate, the supervised personal representative is responsible to both the court and interested persons. MCL 700.3501(2). "Supervised administration is a single in rem proceeding to secure complete administration and settlement of a decedent's estate under the court's continuing authority that extends until entry of an order approving estate distribution and discharging the personal representative or other order terminating the proceeding." MCL 700.3501(1).

In this case, the court did not sua sponte act at the May 11, 2009, hearing to raise the issue of Stephen's continued fitness as personal representative, but rather revisited, in light of subsequent events, the prior petitions for removal filed by Silberman and Peter, which had been denied by the predecessor judge, without prejudice, in July 2008. Further, a successor judge generally may revisit an order entered by a

RECEIVED by MSC 2/23/2015 5:22:03 PM

predecessor judge to arrive at a more correct adjudication of the case before entry of a final judgment. MCR 2.604(A); Meagher v Wayne State Univ, 222 Mich App 700, 718; 565 NW2d 401 (1997). A sua sponte ruling to remove a personal [*20] representative is not improper so long as it is not done in contravention of a party's due process rights. Al-Maliki v LaGrant, 286 Mich App 483, 486-487; 781 NW2d 853 (2009); In re Baldwin Trust, 274 Mich App at 389-390.

Procedural due process is a flexible concept that essentially ensures fundamental fairness. Reed v Reed, 265 Mich App 131, 159; 693 NW2d 825 (2005). "Procedure in a particular case is constitutionally sufficient where there is notice of the nature of the proceedings and a meaningful opportunity to be heard by an impartial decision maker." *Id.* Even an opportunity to move for rehearing may provide a party with procedural due process. See Paschke, 198 Mich App at 706.

It is clear from the record in this case that the probate court gave Stephen notice at the May 11, 2009, hearing of its decision to remove him immediately as personal representative. There is no indication in the record that Stephen stated any objection to decision, despite having any opportunity to address various matters after this ruling. Nor did Stephen seek reconsideration of the May 28, 2009, order, despite having an opportunity to do so under MCR 2.119(F). Rather, Stephen petitioned the probate court **[*21]** on June 12, 2009, to remove Fraser as special fiduciary and successor personal representative. Stephen was given an opportunity to address any claim of procedural error at a June 24, 2009, hearing concerning his petition, but did not expound upon any alleged deficiency other than to indicate that he would be relying on reasons raised in appeals to this Court. Stephen was also given an opportunity to address Fraser's argument, after Fraser's investigation of the case, that the probate court's removal of Stephen as personal representative was appropriate, but he chose not to respond, asserting that he was allotted insufficient time to make a response. The probate court ruled:

> I am fully aware of the reasons that I removed you and not—Mr. Fraser could have gone on for another hour, I think, uh, and not covered all of the reasons that you should be removed, Mr. Shefman. I stand by that order and Mr. Fraser is the personal representative and I'm not removing him and I'm approving of the action I took. It's appropriate that you be removed and Mr. Fraser be appointed.

Considering the record as a whole, while Stephen chose not expound on his objections to his removal as personal representative **[*22]** in the probate court, he was not deprived of a meaningful opportunity to be heard regarding this matter. According, any procedural error was harmless. MCR 2.613(A).

Stephen also argues that the probate court abused its discretion by removing him as personal representative of decedent's estate. We disagree. Under MCL 700.3611(2), a personal representative may be removed in the "best interests of the estate." A personal representative is a fiduciary. MCL 700.1104(e). "A fiduciary stands in a position of confidence and trust with respect to each heir, devisee, beneficiary, protected individual, or ward for whom the person is a fiduciary" and "shall discharge all of the duties and obligations of a confidential and fiduciary relationship, including the duties of undivided loyalty; impartiality between heirs, devisees, and beneficiaries; care and prudence in actions; and segregation of assets held in the fiduciary capacity." MCL 700.1212(1). The personal representative's duties include settling and distributing the decedent's estate in accordance with the terms of a probated and effective will and the EPIC, and "as expeditiously and efficiently as is consistent with the best interests of **[*23]** the estate." MCL 700.3703(1).

The probate court found that Stephen was unsuitable to serve as personal representative because he was not fulfilling his duty to act in the best interests of the estate or the parties. The estate action had been open for approximately two years, and the court had the opportunity to hear

RECEIVED by MSC 2/23/2015 5:22:03 PM

Stephen's testimony regarding various estate matters, including his first annual account for the period ending June 11, 2008. During this period, Stephen succeeded in striking Peter's objections to the admission of the will, which were based on Stephen's alleged misconduct. The estate itself was small because most of the decedent's assets had been placed in her trust, and the will provided that the residuary of the decedent's estate was to be transferred to that trust. There was ample evidence to support the probate court's determination, particularly when evaluating Stephen's requested attorney and fiduciary fees, that the estate was not particularly complex, but rather had become complicated by the personalities of Stephen and Peter. We find no clear error in the probate court's assessment of the nature and magnitude of the conflict. *MCR 2.613(C)*; *In re Bennett Estate, 255 Mich App at 549*.

In **[*24]** addition, the probate court gave appropriate consideration to Stephen's use of his multiple positions as personal representative and attorney for the estate to gain an advantage over Peter and Silberman. This advantage manifested itself in the fees sought by Stephen, which the probate court found were excessive and included matters that largely benefitted Stephen individually as opposed to relating to his duties as personal representative. The probate court's findings amply demonstrate that it was in the best interests of the estate to remove Stephen as personal representative. Unlike *In re Kramek Estate, 268 Mich App 565; 710 NW2d 753 (2005)*, the evidence in this case showed that Stephen's role as personal representative was complicating the case and that he could not be relied upon to perform his duties owed to other interested parties in an impartial manner. Therefore, the probate court did not abuse its discretion in removing Stephen as personal representative.

We next consider Stephen's challenge to the amount of attorney fees allowed by the probate court as part of his first annual account as personal representative. The EPIC provides that a personal representative, except as **[*25]** restricted or otherwise provide by a will or court order in a formal proceeding, "acting reasonably for the benefit of interested persons," may

> [e]mploy an attorney to perform necessary legal services or to advise or assist the personal representative in the performance of the personal representative's administrative duties, even if the attorney is associated with the personal representative, and act without independent investigation upon the attorney's recommendation. An attorney employed under this subdivision shall receive reasonable compensation for his or her employment. [*MCL 700.3715(w)*.]

To properly charge an item against an estate, it must be shown that the services benefit the estate as a whole, and not an individual or group of individuals. *Becht v Miller, 279 Mich 629, 638; 273 NW 294 (1937)*; see also *In re Valentino Estate, 128 Mich App 87, 90; 339 NW2d 698 (1983)*. Where attorney fees are properly chargeable against an estate, a court must consider the factors in *MRPC 1.5(a)* when determining the reasonableness of the attorney fees. *MCR 5.313(A)*. The burden of proving the reasonableness of requested attorney fees is on the party requesting them. *Smith v Khouri, 481 Mich 519, 528-529; 751 NW2d 472 (2008)*.

We **[*26]** find no clear error in the probate court's findings concerning the difficulty in separating Stephen's claim for attorney fees for matters related to him individually and as beneficiary of the estate, as opposed to personal representative. A court's ability to make a proper allocation of attorney fees and expenses that relate to an individual's multiple capacities bears directly on whether the individual has satisfied his burden of proof. *In re Davis's Estate, 312 Mich 258, 266; 20 NW2d 181 (1945)*. Although the probate court did not detail the particular items that it allowed from Stephen's statement of attorney services, Stephen has failed to establish that the number of hours allowed by the court was an abuse of discretion. Stephen has also failed to establish that the court

RECEIVED by MSC 2/23/2015 5:22:03 PM

abused its discretion in awarding attorney fees at an hourly rate of $175, rather than the requested hourly rate of $300. Even Stephen's expert witness, Joseph Ehrlich, testified that the requested rate was on the "high side" for an attorney, like Stephen, who is not a probate specialist. The record also discloses that the court gave appropriate consideration to the factors in MRPC 1.5(a). We conclude that the [*27] court's ultimate decision to award $3,975 to Stephen for attorney fees was not an abuse of discretion.

We also uphold the probate court's decision denying any attorney fees for the services of attorney Siriani during the relevant time period. The probate court did not clearly err in finding that Siriani's work during this period was performed for Stephen in an individual capacity, and not for the benefit the estate. *In re Temple Marital Trust, 278 Mich App at 128*.

Lastly, the probate court did not abuse its discretion in setting the amount of Stephen's compensation as personal representative for the period covered by the first annual account. *In re Baird Estate, 137 Mich App at 637*. Under the EPIC, Stephen was entitled to reasonable compensation. *MCL 700.3719(1)*. The probate court found that the same problems that existed in evaluating attorney fees also existed in evaluating Stephen's requested fiduciary fees. The court rejected Stephen's requested hourly rate of $125 that, according to Stephen's own testimony, was derived from making inquires of various people. Again, Stephen's own expert testified that the requested rate was on the high side. No empirical data was presented in support [*28] of the requested rate, but it is apparent from the probate court's decision that it considered fee requests by other fiduciaries. The court found that "$125 is at the absolute top end of fees that are requested by fiduciaries who come into the court," and noted that, in cases where such fees are requested, a skilled fiduciary performed a service that was complicated in one respect or another. Considering the evidence that Stephen was not an experienced fiduciary and that the case was not overly complex, the probate court did not abuse its discretion in using an hourly rate of $40, or in ultimately allowing $3,615, as reasonable compensation for Stephen's fiduciary services.

B. DOCKET NO. 292738

In Docket No. 292738, Stephen challenges the probate court's June 3, 2009, order appointing Fraser as successor personal representative. Stephen argues that the probate court had no authority under the EPIC or any court rule to sua sponte appoint a personal representative. Stephen's argument ignores the posture of the estate action when the probate court made its appointment. As indicated previously, the estate action was subject to the probate court's continuing authority because it involved [*29] the supervised administration of the decedent's estate. *MCL 700.3501(1)*. Further, Stephen had already been removed as personal representative for cause. The record also indicates that Fraser had already fulfilled his assigned duties as special fiduciary by preparing a May 25, 2009, report summarizing the status of the estate action and his recommendation that a successor personal representative be appointed immediately.[6] As the only fiduciary at that time, Fraser was an "interested person" in the proceeding. See *MCL 700.1105(c)* (defining "interested person," in part, as including the incumbent fiduciary and persons identified by supreme court rules); see also *MCR 5.125(A)(6)* (treating a special fiduciary appointed under *MCL*

[6] Although we have determined that we lack jurisdiction to review the probate court's appointment of Fraser as special fiduciary on May 11, 2009, we note that MCL 700.1309(a) authorized the probate court to appoint a special fiduciary to perform specific duties based on reliable information. See also MCR 5.204. The basis for the appointment in this case was Stephen's immediate [*30] removal as personal representative on May 11, 2009, which was accomplished by the probate court's entry of an immediate order suspending Stephen's fiduciary powers and the subsequent removal order entered on May 28, 2009. Considering that a fiduciary is responsible for providing reasons to the probate court for continuing the administration of a decedent's estate, MCL 700.3951(1), it was appropriate for the court to look to a special fiduciary to obtain a status report in conjunction with the removal of Stephen as personal representative.

RECEIVED by MSC 2/23/2015 5:22:03 PM

700.1309 as a special person entitled to notice of a petition in a probate proceeding).

Pursuant to MCL 700.3505, the probate court was authorized to grant relief at any time during the pendency of its supervised administration of the decedent's estate on the petition of an interested person.[7] Therefore, Fraser arguably should have presented his status report and recommendation to the probate court as part of a petition. Nonetheless, "[a]n objection to the appointment of a personal representative may be made only in a formal proceeding." MCL 700.3203(2). Because Stephen had the opportunity to be heard with respect to his objections to Fraser acting as successor personal representative at the hearing on June 24, 2009, any procedural error [*31] that occurred when the probate court initially made its appointment on June 3, 2009, was harmless. MCR 2.613(A); cf. In re Baldwin Trust, 274 Mich App at 389-390.

Lastly, considering that Stephen's challenge to Fraser's appointment rests solely on Stephen's claim that he should not have been removed as personal representative in the first instance, which we have rejected, we find no basis for disturbing the probate court's June 3, 2009, order appointing Fraser as successor personal representative.

C. DOCKET NO. 301356

Stephen raises two issues in Docket No. 301356 regarding his second and final account as fiduciary, which was approved by the probate court in an order dated November 5, 2010, in accordance with previously issued opinions and orders. Stephen challenges [*32] the probate court's determinations regarding the amount of allowable attorney fees and allowable compensation for his services as personal representative. Those matters were decided in an order dated February 26, 2010.[8]

The record indicates that the probate court awarded Stephen compensation for the full 39.5 hours requested, but at a reduced hourly rate of $40, resulting in an award of $1,580 for his service as personal representative. The probate court noted that the $40 hourly rate was the same rate that it used when awarding compensation in connection with Stephen's first annual account, but also received additional evidence before determining that $40 was an appropriate hourly rate. We find no basis for concluding that the probate court abused [*33] its discretion in determining a reasonable hourly rate. Accordingly, we affirm the probate court's determination of the amount of allowable compensation for Stephen's fiduciary services for the period of his second and final account as personal representative.

With respect to allowable attorney fees, we note that Stephen's argument on appeal focuses solely on the amount of attorney fees allowed by the probate court for his own attorney services. The probate court awarded Stephen attorney fees of $15,687, which were based on an hourly rate of $195.

Stephen argues that the probate court erred in its determination of allowable attorney fees because it did not follow the approach in Smith, 481 Mich 519. That approach addresses how reasonable attorney fees should be determined for purposes of awarding case evaluation sanctions under MCR 2.403(O)(6)(b). See Univ Rehab Alliance, Inc v Farm Bureau Gen Ins Co of Mich, 279 Mich App 691, 700 n 3; 760 NW2d 574 (2008). But it has also been applied to a determination of statutory attorney fees. Augustine v Allstate Ins Co, 292

[7] At the time Fraser was appointed successor personal representative, MCL 700.1106(o) defined a "petition" as "a written request to the court for an order after notice." The statute was amended, effective April 1, 2010, and the definition now appears in subpart (p). Under MCR 5.102, a petitioner must "cause to be prepared, served, and filed, a notice of hearing for all matters requiring notification of interested persons." MCR 5.102.

[8] Because MCR 5.801(B)(2)(x) provides for an appeal by right from an order allowing or disallowing an account, and the attorney and fiduciary fees were requested by Stephen as part of his second and final account, which was not fully resolved until entry of the November 5, 2010, order, and because Stephen timely filed his appeal from that order, we disagree with Fraser's argument that this Court lacks jurisdiction to consider Stephen's claim.

RECEIVED by MSC 2/23/2015 5:22:03 PM

Mich App 408, 429 n 2; 807 NW2d 77 (2011). The approach requires a court to determine a baseline reasonable fee, derived from [*34] the fee customarily charged in the locality for similar legal services, and to then multiply that amount by the reasonable number of hours expended in the case, and then make up or down adjustments as appropriate using the factors listed in MRPC 1.5(a) and Wood v DAIIE, 413 Mich 573, 588; 321 NW2d 653 (1982), and any additional relevant factors. Smith, 481 Mich at 530-531.

Although the probate court did not strictly follow that approach in this case, this case does not involve an award of case evaluation sanctions. Rather, it involves attorney fees for an attorney that a personal representative, "acting reasonably for the benefit of interested persons," may employ "to perform necessary legal services or to advise or assist the personal representative in the performance of the personal representative's administrative duties." MCL 700.3715(w). Under MCR 5.313(A), "[i]n determining the reasonableness of fees, the court must consider the factors listed in MRPC 1.5(a)." Generally, however, a court is not required to make detailed findings regarding each factor when determining reasonable attorney fees. See John J Fannon Co v Fannon Prod, LLC, 269 Mich App 162, 172; 712 NW2d 731 (2005); In re Attorney Fees & Costs, 233 Mich App 694, 705; 593 NW2d 589 (1999). [*35] The purpose of a court articulating its view of appropriate factors is to aid appellate review. Smith, 481 Mich at 537.

We are not persuaded that the probate court's failure to follow the particular baseline formula in Smith, 481 Mich at 531, warrants a remand for a redetermination of fees. The approach taken by the probate court differs from *Smith* only in that the court was required to follow MCR 5.313(A) and the evaluation of reasonable attorney fees was made without initially multiplying a baseline market rate against the number of reasonable hours. The probate court complied with the directive of MCR 5.313(A) that it consider the factors in MRPC 1.5(a). The probate court found that it had considered those factors when determining an hourly rate of $175 in connection with Stephen's first annual account, and that it had the benefit of additional testimony when evaluating the reasonableness of Stephen's requested fees in connection with his second and final account. The court found that Stephen did not meet his burden of showing entitlement to the requested hourly rate of $300, but that some increase over the previously awarded rate of $175 was justified because of increased expenses [*36] that Stephen may have occurred in operating his law practice. The court also found that the hours reported by Stephen presented the same concerns that existed with the first annual account with respect to time spent by Stephen in pursuit of his personal interests and personal conflicts with his siblings. We decline to consider Stephen's proposed survey information from October 2010 because that information was not available to the probate court when it decided this matter in February 2010. After reviewing the record, we conclude that the probate court did not abuse its discretion in determining the amount of Stephen's allowable attorney fees for the period of Stephen's second and final account.

IV. SLANDER OF TITLE ACTION

In Docket No. 294961, Peter raises four issues concerning the estate's slander of title action against him. Following a bench trial, the trial court issued a verdict in favor of the estate, but awarded damages of only $726. The probate court found that Peter was liable for common-law slander of title, which requires proof of "falsity, malice, and special damages, i.e. that the defendant maliciously published false statements that disparaged a plaintiff's right in property, [*37] causing special damages." B & B Investment Group v Gitler, 229 Mich App 1, 8; 581 NW2d 17 (1998). Special damages include litigation costs. Id. at 9. The probate court did not award litigation costs for the cost of prosecuting the slander of title action because it determined that the action could have been avoided. But it awarded $726, representing Stephen's fees for four hours of legal services, at an hourly rate of $175, to obtain an order removing the notice of lis pendens, and expenses of $26 to record the order.

RECEIVED by MSC 2/23/2015 5:22:03 PM

Peter first argues that the probate court erred in awarding attorney fees without determining the legal authority and capacity of the party requesting attorney fees. He argues that Stephen routinely switched his "title" and associated authority, and appeared in a variety of different capacities. He also asserts that Stephen failed to authenticate his entitlement to attorney fees. Peter's argument confuses the estate action and the slander of title action. Although the special damages in the slander of title action were based on attorney services provided by Stephen to the estate, the probate court required the estate to submit an affidavit detailing the amount of attorney [*38] fees associated with the removal of the notice of lis pendens. The court also gave Peter an opportunity to respond to the affidavit, but he did not do so. Because Peter did not file a response, the probate court appropriately determined the amount of allowable attorney fees without an evidentiary hearing. *Smith, 481 Mich at 532*. On appeal, Peter has not demonstrated any basis for disturbing the probate court's award of attorney fees of $700 and expenses of $26 associated with the removal of the notice of lis pendens.

Peter also argues that the probate court erred in allowing the estate to benefit from Stephen's wrongdoing. Peter asserts that Stephen was removed as personal representative of decedent's estate for improper conduct, and that he engaged in fraudulent conduct with respect to the condominium property underlying his notice of lis pendens. Peter also asserts that he did not have an opportunity to address the proper ownership of the condominium property. Again, Stephen has unduly confused the estate action and the slander of title action. Peter's allegation that he did not have an opportunity to address the ownership of the condominium property is refuted by the probate court's [*39] summation of his own testimony. The court's September 28, 2009, opinion and order reflects that Peter admitted that the condominium property was given to the decedent as collateral for a loan that he did not repay, but that Peter claimed that he did not know that he was signing a deed during the loan transaction. Peter has not substantiated his argument on appeal or otherwise established any basis for disturbing the probate court's findings regarding his liability for special damages to the plaintiff-estate in the slander of title action.

Peter next argues that the probate court violated his right to due process by allowing his subpoenaed witness to testify by telephone at trial. Peter raised this due process issue in his motion for reconsideration of the probate court's September 28, 2009, opinion and order entered after the bench trial, but we find no basis for disturbing the probate court's denial of that motion. *Woods, 277 Mich App at 629*. First, Peter does not address the probate court's determination at trial that good cause existed to allow the witness to testify by telephone. See *MCR 2.402(B)*. Second, the transcript of the witness's testimony indicates that neither the probate [*40] court nor Fraser, who appeared on behalf of the estate, had difficulty understanding the witness's testimony. Further, the probate court summarized certain testimony for Peter that he claimed he was not able to understand. Because this record establishes that Peter had a meaningful opportunity to present his evidence and make arguments at trial, he was not deprived of due process. *Reed, 265 Mich App at 159*; see also *Al-Maliki, 286 Mich App at 485*. Third, even if error did occur, it was harmless because the witness's testimony was relevant only to the issue of special damages and the probate court did not award any special damages related to the estate's failure to complete the sale of the property to the witness. Therefore, no relief is warranted. *MCR 2.613(A)*.

Lastly, Peter argues that the probate court erred by ignoring a settlement agreement between himself and Fraser, as successor personal representative of the decedent's estate, which Peter alleges was reached after the probate court issued its September 28, 2009, opinion and order. Because there is no record evidence that the settlement agreement was ever presented to the probate court, we reject this claim of error.

V. [*41] TRUST ACTION

A. JURISDICTION

RECEIVED by MSC 2/23/2015 5:22:03 PM

In Docket No. 296395, Stephen appeals the probate court's January 22, 2010, order removing him as successor trustee and appointing Fraser as successor trustee. In Docket No. 301355, Stephen appeals the probate court's November 5, 2010, order granting Fraser's request for instructions to allow certain expenses incurred by the decedent's estate to be paid with trust funds. In both appeals, Stephen challenges the probate court's jurisdiction to decide issues affecting the trust after entry of a July 21, 2009, order, entered nunc pro tunc as of July 8, 2009, which required Stephen, as successor trustee of the trust, to file and register the decedent's trust with the probate court and requiring court supervision of that trust, in response to a petition filed by Fraser, as the successor personal representative of decedent's estate.

Although Stephen frames his argument in Docket No. 296395 as primarily involving the probate court's subject-matter jurisdiction, he concedes in Docket No. 301355 that the probate court had subject-matter jurisdiction. Substantively, Stephen's arguments in both appeals address whether the probate court acquired personal jurisdiction over **[*42]** him and the "trust," and whether the probate court's jurisdiction was properly invoked by an interested person. Stephen also urges this Court to consider his arguments in light of provisions of the Michigan Trust Code, MCL 7007.101 *et seq*,, which are contained in amendments and additions to Article VII of the EPIC that became effective April 1, 2010. See MCL 700.8204. Stephen submits that all orders entered in the trust action are void or should be vacated.

Contrary to what Stephen argues, the amendments and additions to article VII of EPIC do not apply to this dispute, because all relevant acts and proceedings were concluded before April 1, 2010, the effective date of those amendments. MCL 700.8206 provides, in pertinent part:

> (1) Except as otherwise provided in article VII, all of the following apply on the effective date of the amendatory act that added this section:
>
> (a) The amendments and additions to article VII enacted by the amendatory act that added this section apply to all trusts created before, on, or after that effective date.
>
> (b) The amendments and additions to article VII enacted by the amendatory act that added this section apply to all judicial proceedings concerning trusts [*43] commenced on or after that effective date.
>
> (c) The amendments and additions to article VII enacted by the amendatory act that added this section apply to judicial proceedings concerning trusts commenced before that effective date unless the court finds that application of a particular provision of the amendments and additions would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the particular provision of the amendments and additions does not apply and the superseded provisions apply.
>
> * * *
>
> (2) The amendments and additions to article VII enacted by the amendatory act that added this section do not impair an accrued right *or affect an act done before that effective date*. If a right is acquired, extinguished, or barred upon the expiration of a prescribed period that has commenced to run under any other statute before that effective date, that statute continues to apply to the right even if it has been repealed or superseded. [Emphasis added.]

"Proceeding" is defined is defined in MCL 700.1106(r), formerly MCL 700.1106(p), to include a "petition." A "petition" means a "written request to the court for an **[*44]** order after notice." MCL 700.1106(p), formerly MCL 700.1106(o). "Court" means the "probate court or, when applicable, the family division of circuit court." MCL 700.1103(j).

Because the relevant proceedings in this case concluded in July 2009, when the probate court

RECEIVED by MSC 2/23/2015 5:22:03 PM

ordered Stephen to file and register the trust, and ordered court supervision of the trust, and Stephen completed the act of registration in July 2009, the provisions of the Michigan Trust Code in Article VII of the EPIC, which became effective April 1, 2010, do not apply. MCL 700.8206(2).

Turning to Stephen's jurisdictional arguments, we find that Stephen confuses principles of standing and jurisdiction. Although Stephen has conceded in Docket No. 301355 that the probate court had subject-matter jurisdiction, because Stephen continues to argue that jurisdiction was not invoked by a petition filed by a person with standing, we shall consider this issue. It is necessary to distinguish between subject-matter jurisdiction, personal jurisdiction, and standing.

"Subject matter jurisdiction and standing are not the same thing." Altman v Nelson, 197 Mich App 467, 472; 495 NW2d 826 (1992). An issue of subject-matter jurisdiction may [*45] be raised at any time. Smith v Smith, 218 Mich App 727, 729-730; 555 NW2d 271 (1996). It is determined by the allegations in a pleading. Altman, 197 Mich App at 472. Subject-matter jurisdiction is generally defined as "a court's power to hear and determine a cause or matter." In re Petition by Wayne Co Treasurer for Foreclosure of Certain Lands for Unpaid Prop Taxes, 265 Mich App 285, 291; 698 NW2d 879 (2005). "There is a wide difference between a want of jurisdiction in which case the court has no power to adjudicate at all, and a mistake in the exercise of undoubted jurisdiction, in which the action of the trial court is not void although it may be subject to direct attack on appeal." Jackson City Bank & Trust Co v Fredrick, 271 Mich 538, 544; 260 NW 908 (1935). An error with respect to an individual's standing to bring an action constitutes a mistake in the exercise of subject-matter jurisdiction. Altman, 197 Mich App at 479. A cause of action provided to a litigant by law may establish standing. Lansing Sch Ed Ass'n v Lansing Bd of Ed, 487 Mich 349, 372; 792 NW2d 686 (2010).

The probate court is a court of limited jurisdiction and derives all of its powers from statutes. Manning v Amerman, 229 Mich App 608, 611; 582 NW2d 539 (1998). [*46] There is no dispute that the probate court has jurisdiction over the administration of a trust. MCL 700.1302(b). In addition, it is clear that an "interested party" was entitled to invoke the probate court's jurisdiction at the time relevant to this proceeding. See MCL 700.7201(2). While the phrase "interested party" was not statutorily defined, MCL 700.1105(c) provided:

> "Interested person". . . includes, but is not limited to, the incumbent fiduciary; an heir, devisee, child, spouse, creditor, and beneficiary and any other person that has a property right in or claim against a trust estate or the estate of a decedent, ward, or protected individual; a person that has priority for appointment as personal representative; and a fiduciary representing an interested person. Identification of interested persons may vary from time to time and *shall be determined according to the particular purposes of, and matter involved in, a proceeding*, and by the supreme court rules. [Emphasis added.][9]

MCR 5.125 lists various interested persons, but also provides that "[t]he court shall make a specific determination of the interested persons if they are not defined by statute or court rule." MCR 5.125(D). Considering the provisions of both MCL 700.1105(c) and MCR 5.125(D), it is clear that the probate court had the authority to decide whether Fraser was an interested person. We must look to the allegations in Fraser's June 2009 petition, filed as successor personal representative of the decedent's estate, to determine whether the

[9] The current version of MCL 700.7201(2) uses the phrase "interested person" rather than "interested party." In any event, "[s]tatutory provisions must be read in the context of the entire act." Driver v Naini, 490 Mich 239, 247; 802 NW2d 311 (2011). [*47] The word "party" is a generic term that can take on different meanings. Nippa v Botsford Gen Hosp (On Remand), 257 Mich App 387, 394-396; 668 NW2d 628 (2003). It is apparent that the phrase "interested party" used in former MCL 700.7201(2) includes an "interested person."

RECEIVED by MSC 2/23/2015 5:22:03 PM

probate court had subject-matter jurisdiction to decide the matter and also determine Fraser's standing to file the petition. Altman, 197 Mich App at 476-477.

Fraser's petition indicates that he sought court supervision over the administration of the trust because it was necessary to look to the trust to pay administrative expenses of the decedent's estate. Although Fraser was not attempting [*48] to make a claim against the estate at that time, because the probate court had the authority to decide whether Fraser was an interested person, the petition was factually sufficient to invoke the probate court's subject-matter jurisdiction. Any claim concerning Fraser's standing to seek registration and court supervision of the trust should have been pursued in an appropriate appeal. Because our review in Docket Nos. 296395 and 301355 is limited to the probate court's January 22 and November 5, 2010, orders, any issue concerning Fraser's status as an interested person at the time the petition was filed is not properly before us.

In light of our determinations that the probate court had subject-matter jurisdiction, and that the particular standing issue raised by Stephen on appeal is not properly for us, it is unnecessary to consider Stephen's argument that petitions filed by Peter and Silberman were insufficient to cure any jurisdictional defect. It is also unnecessary to address Fraser's argument that he could have sought registration of the trust under other provisions of the EPIC, or that a petition filed by Silberman for partial distribution of trust assets was sufficient to confer [*49] subject-matter jurisdiction on the probate court.

With respect to Stephen's argument that the probate court failed to acquire "personal" jurisdiction over him and the trust, we note that actions involving trusts may have characteristics of both in rem and in personam proceedings. Mullane v Central Hanover Bank & Trust Co, 339 U.S. 306, 312; 70 S Ct 652; 94 L Ed 865 (1950). An action in rem, in the strict sense, is directed against the property itself or to enforce a right in property. Detroit v 19675 Hasse, 258 Mich App 438, 448-450; 671 NW2d 150 (2003). An issue involving in rem jurisdiction generally involves whether property that is the subject on an action is located within the forum. MCL 600.751; MCL 600.755; In re Forfeiture of $1,159,420, 194 Mich App 134, 140; 486 NW2d 326 (1992); see also Thaw v Detroit Trust Co, 307 Mich 6, 11; 11 NW2d 305 (1943) (under then-existing Michigan law, a suit for an accounting against a testamentary trustee was an in rem proceeding brought where the trust estate was legally situated).

Stephen does not address any issue that substantively involves the situs of the trust estate. Therefore, we shall limit our consideration in Docket Nos. 296395 and [*50] 301355 to Stephen's claim that the probate court's orders should be voided or vacated on the ground that the probate court lacked personal jurisdiction over him. Jurisdiction over a party is necessary for a court to require a party to comply with its orders. Yoost v Caspari, 295 Mich App 209; 220-221; 813 NW2d 783 (2012); Oberlies v Searchmont Resort, Inc, 246 Mich App 424, 427; 633 NW2d 408 (2001). But an issue involving personal jurisdiction may be waived. People v Lown, 488 Mich 242, 268; 794 NW2d 9 (2011). A defense that a trial court lacks personal jurisdiction over a party or property is waived unless it is raised in the trial court in accordance with applicable court rules. Electrolines, Inc v Prudential Assurance Co, Ltd, 260 Mich App 144, 163-164; 677 NW2d 874 (2003); but see Yoost, 295 Mich App at 220-221 (a court is under a continuing obligation to sua sponte question its jurisdiction over a person). A challenge to personal jurisdiction may also be waived by express or implied consent. Lease Acceptance Corp v Adams, 272 Mich App 209, 229; 724 NW2d 724 (2006); see also Lown, 488 Mich at 268 (a variety of legal arrangements may give rise to consent); MCL 600.701(3).

As indicated [*51] previously, our review in this case is limited to the portions of the January 22 and November 5, 2010, orders that are subject to this Court's jurisdiction. MCR 5.801(B); Comerica Bank, 179 Mich App at 729-730. Neither order contains a jurisdictional ruling. In addition, the

RECEIVED by MSC 2/23/2015 5:22:03 PM

record establishes that Stephen had already registered the trust pursuant to the probate court's July 21, 2009, order. Although Stephen maintains that the registration was done under protest, MCL 700.7103(1) then provided that "[b]y registering a trust or accepting the trusteeship of a registered trust, the trustee submits personally to the court's jurisdiction in a proceeding under section 7201 relating to the trust that is initiated by an interested person while the trust remains registered." The statute contains no exception for a registration under protest. Where statutory language is unambiguous, it is applied as written. Liggons, 490 Mich at 70.

To the extent that Stephen believed that the July 21, 2009, order was unenforceable against him, the appropriate course of action was to pursue an appeal under MCR 5.801.[10] Considering that an issue of personal jurisdiction may be waived, the limited scope of the appeals [*52] in Docket Nos. 296395 and 301355, and the evidence that Stephen registered the trust, Stephen's submission on appeal that personal jurisdiction was not acquired over him, such as to "void" all orders entered in the trust action, is not properly before this Court.

B. DOCKET NO. 206365

Apart from the jurisdictional issue raised in Docket No. 206365, Stephen argues that the probate court did not follow the proper procedure in removing him as successor trustee. Stephen argues that the probate court should have followed MCL 700.3611, which governs the removal of a personal representative, and should have used MCR 5.203 as a guide, and that, regardless of the proper procedure, he was entitled to notice and a meaningful opportunity to be heard regarding the matter.

Stephen's reliance on MCL 700.3611 is misplaced because this statute unambiguously applies only to a personal representative. Liggons, 490 Mich at 70. Stephen's reliance on MCR 5.203 is also misplaced because it does not apply to trustees. See MCR 5.201 [*53] (before and after it was amended, effective April 1, 2010). Other provisions governing proceedings involving the removal of a trustee include MCL 555.26, which provides:

> Upon the petition or bill of any person interested in the execution of an express trust, and under such regulations as shall be established by the court for that purpose, the court of chancery may remove any trustee who shall have violated or threatened to violate his trust, or who shall be insolvent, or whose insolvency shall be apprehended, or who, for any other cause, shall be deemed an unsuitable person to execute the trust. [.]

In this case, the record indicates that Fraser petitioned for Stephen's removal as successor trustee on various grounds, and that Stephen filed a response to the petition and testified regarding his administration of the trust at the evidentiary hearing concerning Stephen's second and final account in the estate action. Although the probate court decided to remove Stephen as successor trustee at that evidentiary hearing without giving the parties an opportunity for oral argument, as a matter of motion practice, a court has discretion to dispense with or limit oral arguments on contested motions. **[*54]** MCR 2.119(E)(3). Further, an opportunity for a rehearing may be sufficient to afford a party due process. Paschke, 198 Mich App at 706. Because Stephen has failed to establish that he was deprived of notice or a meaningful opportunity to be heard, relief is not warranted on the basis of the probate court's alleged procedural error. MCR 2.613(A); see also Al-Maliki, 286 Mich App at 486-487; In re Baldwin Trust, 274 Mich App at 398-399.

Stephen also argues that the probate court abused its discretion in removing him as successor trustee. We disagree. The record amply supports the probate court's determination that Stephen's actions were directed at favoring himself over

[10] We note that Stephen indicated at a hearing on October 5, 2009, that he filed an application for leave to appeal the order with the Oakland Circuit Court, but the application was denied.

RECEIVED by MSC 2/23/2015 5:22:03 PM

co-beneficiary Silberman, and that Stephen breached his duty to efficiently and expeditiously administer the trust and comply with its terms. We are not persuaded that the probate court abused its discretion in concluding that Stephen should be removed as successor trustee. *In re Temple Marital Trust, 278 Mich App at 128*; *Comerica Bank, 179 Mich App at 729*. The decision falls squarely within the grounds for removal provided by *MCL 555.26*.

Lastly, Stephen challenges the probate court's decision to appoint Fraser as successor **[*55]** trustee. Stephen argues that the probate court disregarded provisions of the trust in reaching this decision, and that Fraser was not qualified by statute to serve as trustee. Having considered each of Stephen's arguments, we find no basis for disturbing the probate court's decision to appoint Fraser as successor trustee.

At the time the probate court appointed Fraser to act as successor trustee, it had discretion under *MCL 555.27* to appoint a new trustee or to cause the trust to be executed by one of its officers under its direction. The provisions in *MCL 720.202* and *MCL 720.206* concerning the appointment and powers of county public administrators did not preclude the probate court from appointing a county public administrator to act as a trustee under *MCL 555.27*.

In addition, we find no support for Stephen's argument that the probate court disregarded the provisions of the trust. "The cardinal rule of law and the predominant rule in the construction and interpretation of testamentary instruments is that the intent of the testator governs if it is lawful and if it can be discovered." *In re Dodge Trust, 121 Mich App 527, 539; 330 NW2d 72 (1982)*. In construing the meaning of a trust, **[*56]** the settlor's intent is to be carried out as nearly as possible. *In re Kostin Estate, 278 Mich App 47, 53; 748 NW2d 583 (2008)*.

In this case, the probate court acknowledged his understanding that the trust provided for the successor trustee to be Silberman, but found that Silberman was unsuitable to serve as trustee because she did not reside in Michigan, was not able to consistently participate in the proceedings even by telephone, and also had a hostile relationship with Stephen. Because this case did not involve Stephen's resignation, but rather his removal, we disagree with Stephen's argument that a successor trustee should have been selected in accordance with the process in article XIII(e) of the trust, which applies to resignations.

And while article XIII(a) of the original trust agreement provided for Silberman and Peter to jointly serve as successor co-trustees if Stephen was unable to act, it is clear from the decedent's second amendment to the trust that she did not consider Peter capable of being even a co-beneficiary of the trust at that time. The decedent's expressed intent in the second amendment was to remove Peter as a co-beneficiary to avoid an adverse impact on the [*57] other trust beneficiaries and the trust assets. Peter was given the choice of accepting a then-existing parcel of property in Florida or taking nothing under the trust.

But even assuming that the decedent intended for Peter serve as a co-trustee with Silberman in the event Stephen was unable to serve, there is no evidence that either Peter or Silberman would have accepted an appointment to serve in that capacity. In any event, at the time of the probate court's decision, it could not seriously be argued that Peter would be a suitable trustee to administer the trust for the benefit of Silberman and Stephen. Peter's objective, which was evident from his petition filed in the trust action, was to set aside the second amendment based on Stephen's alleged wrongdoing. Further, Stephen has not challenged the probate court's determination that Silberman was not suitable to serve as trustee. In view thereof, and given the probate court's authority to appoint Fraser as successor trustee under *MCL 555.27*, we uphold the probate court's decision.

C. DOCKET NO. 301355

Apart from the jurisdictional issue raised by Stephen in Docket No. 301355, Stephen

challenges the probate court's November 5, 2010, [*58] order granting Fraser's request, as successor trustee of the decedent's trust, to allow Fraser to use trust funds to pay for certain fees and expenses incurred as part of the administration of the decedent's estate. Because this issue involves proceedings on a petition for instructions filed after April 1, 2010, the amendments and additions to Article VII of the EPIC, containing the Michigan Trust Code, apply. *MCL 700.8206(1)(b)*.

We are not persuaded that Fraser's use of trust funds was precluded by the Michigan Trust Code or the trust agreement. The material question is not whether Fraser, as successor personal representative of the decedent's estate, was entitled to the trust funds while assets remained in the decedent's estate, but rather whether Fraser, as successor trustee, had permissive authority to allow the use of trust funds to pay expenses incurred in the administration of the decedent's estate in order to avoid potential interest and other costs that would have been incurred and charged against the estate if outstanding invoices were not timely paid.

The record indicates that at the time Fraser requested instructions from the probate court, there were insufficient liquid **[*59]** assets in the decedent's estate to pay outstanding invoices for certain legal services. The principal residuary asset remaining in the estate was the condominium property that, under article III of the will, was to be transferred to and administered as part of the trust. While article I of the will provides for debts and expenses to be charged to the residuary estate, the trust itself provides in article VI that the principal of the trust estate shall be used for estate expenses to the extent they are not paid out of assets subject to probate, and article VII-I(B) of the trust authorized the successor trustee to engage in certain transactions with the personal representative, including loans deemed necessary or advisable to preserve assets of the decedent's estate.

"The powers and duties of the trustees, and the settlor's intent regarding the purpose of the trust's creation and its operation, are determined by examining the trust instrument." *In re Kostin Estate, 278 Mich App at 53*. Regardless of whether Fraser, in his capacity as successor personal representative, was statutorily entitled to the receipt of trust assets to pay for expenses before all residuary assets remaining in the **[*60]** decedent's estate were liquidated and applied to expenses and other debts, considering the trust instrument as a whole, Fraser, in his capacity as successor trustee, was empowered to make a loan for payment of the expenses. The probate court's order substantively achieves this result. Indeed, it is clear from the probate court's decision granting Fraser's request for instructions that it contemplated Fraser repaying the trust if there were excess funds in the decedent's estate. We express no opinion regarding whether Fraser has properly accounted for the transaction, inasmuch as that issue is beyond the scope of this appeal. Limiting our review to the probate court's grant of Fraser's request for instructions to approve the use of trust funds to pay for administrative expenses of the decedent's estate, as necessary and appropriate, Stephen has not established any basis for appellate relief.

Affirmed.

/s/ Kathleen Jansen

/s/ Stephen L. Borrello

/s/ Jane M. Beckering

RECEIVED by MSC 2/23/2015 5:22:03 PM

RECEIVED by MSC 2/23/2015 5:22:03 PM

EXHIBIT C

RECEIVED by MSC 2/23/2015 5:22:03 PM

LexisNexis

User Name: SUSAN.BROWN

Date and Time: Feb 21, 2015 5:00 p.m. EST

Job Number: 17402193

Document(1)

1. *McNeal v. Blue Bird Corp., 2014 Mich. App. LEXIS 1082*

   Client/Matter: 0555-268

   Narrowed by:

Content Type	Narrowed by
Cases	Court: Michigan

RECEIVED by MSC 2/23/2015 5:22:03 PM

No *Shepard's* Signal™
As of: February 21, 2015 5:00 PM EST

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 COACH WORKS, 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.

RECEIVED by MSC 2/23/2015 5:22:03 PM

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

RECEIVED by MSC 2/23/2015 5:22:03 PM

> 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

RECEIVED by MSC 2/23/2015 5:22:03 PM

> 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. PRIVITY 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 warrantied 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

[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.

RECEIVED by MSC 2/23/2015 5:22:03 PM

> 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 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 SALESPEOPLE, 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

---

[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.

RECEIVED by MSC 2/23/2015 5:22:03 PM

> 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.

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 city 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

RECEIVED by MSC 2/23/2015 5:22:03 PM

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).]

RECEIVED by MSC 2/23/2015 5:22:03 PM

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*

RECEIVED by MSC 2/23/2015 5:22:03 PM

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

RECEIVED by MSC 2/23/2015 5:22:03 PM

[*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 MPCA. 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.

RECEIVED by MSC 2/23/2015 5:22:03 PM

"[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

RECEIVED by MSC 2/23/2015 5:22:03 PM

> 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

RECEIVED by MSC 2/23/2015 5:22:03 PM

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

RECEIVED by MSC 2/23/2015 5:22:03 PM

EXHIBIT D

RECEIVED by MSC 2/23/2015 5:22:03 PM

LexisNexis

User Name: SUSAN.BROWN

Date and Time: Feb 21, 2015 5:02 p.m. EST

Job Number: 17402498

Document(1)

1. *Stariha v. Chrysler Group, 2012 Mich. App. LEXIS 1283*

   Client/Matter: 0555-268

   Narrowed by:

Content Type	Narrowed by
Cases	Court: Michigan

RECEIVED by MSC 2/23/2015 5:22:03 PM

Cited
As of: February 21, 2015 5:02 PM EST

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 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.

I. BASIC FACTS

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

RECEIVED by MSC 2/23/2015 5:22:03 PM

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

RECEIVED by MSC 2/23/2015 5:22:03 PM

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

RECEIVED by MSC 2/23/2015 5:22:03 PM

> 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.

RECEIVED by MSC 2/23/2015 5:22:03 PM

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

[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.

RECEIVED by MSC 2/23/2015 5:22:03 PM

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 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

RECEIVED by MSC 2/23/2015 5:22:03 PM

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

RECEIVED by MSC 2/23/2015 5:22:03 PM

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

RECEIVED by MSC 2/23/2015 5:22:03 PM

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 conviction[1] 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 support[3] 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).