



Volume XX, No. 28
July 30, 2008

FROM THE LAW OFFICES OF GARAN LUCOW MILLER, P.C.

LAW FAX

A Publication for Insurance Providers and Adjusters

www.garanlucow.com

Garan Lucow Miller, P.C. 1111 West Long Lake Road, Suite 300 Troy, Michigan 48098 248.641.7600

From the Co-Editors
James L. Borin & Simeon R. Orlowski

SUPREME COURT ADDRESSES ISSUE OF PROPER WAY TO COMPUTE CASE EVALUATION SANCTIONS

Thomas Christy¹ – Contributor

In *Smith v Khouri*, decided July 2, 2008 (citation not yet available), the Michigan Supreme Court claims to “fine tune” the method to determine the amount of attorney fees awarded as case evaluation sanctions. However, the opinion is more significant than the court indicates.

BACKGROUND RE: CASE EVALUATION

Most *Law Fax* readers are familiar with case evaluation², a process used in most civil lawsuits for money damages in Michigan state courts.³ Case evaluation usually occurs after discovery closes. A three-attorney

¹ Mr. Christy is an associate in the Firm’s Troy office and can be reached at (248) 641-7600 or at tchristy@garanlucow.com.

² Before 2000, MCR 2.403 called this process “mediation”, and the authorizing statutes, MCL 600.4951 et seq., still do. Because it differs so much from what is called “mediation” elsewhere in the country, it was often called “Michigan mediation”, and the Michigan Supreme Court eventually changed its court rule name to avoid confusion.

³ The Michigan federal courts have adopted case evaluation by local rule (Eastern District L.R. 16.3 and Western District L.R. 16.5), but the federal courts do not always have authority to

panel reviews each case based on briefs and a short hearing, typically lasting about 20 minutes. The panel sets a dollar amount that the panel feels is an appropriate settlement for the case. The parties to the lawsuit then have 28 days in which to accept or reject the panel's evaluation.

If both⁴ parties accept the evaluation, then the case is settled and judgment is entered for the evaluation amount. If either party rejects the evaluation, then the case proceeds to summary disposition motions (if they have not yet occurred) and/or trial. However, if the evaluation panel unanimously approved the evaluation, then the rejecting parties can be subject to pay the other side's costs and "reasonable" attorney fees "necessitated by the rejection"⁵.

Specifically, the adjusted verdict or judgment is compared to the case evaluation award. If *one* party rejects the evaluation and the other accepts it, then the rejecting party is subject to sanctions⁶ if the judgment does not improve the rejecting party's position by at least 10%. If *both* parties reject the evaluation, then a party is subject to sanctions if the judgment worsens its position by at least 10%. Sanctions are mandatory if the case is resolved by a trial, but are discretionary if the case is resolved by summary motion.

The "reasonable" amount of attorney fees awarded as sanctions is the issue in *Smith*.

FACTS IN SMITH

The Supreme Court may have accepted *Smith* for review because of the extreme attorney fee award. The plaintiff sued the defendants for dental malpractice. The plaintiff accepted the case evaluation award of \$50,000; the defendants rejected it. The adjusted jury verdict was \$46,631, meaning that, although the defendants bettered the case evaluation award, they failed to improve their position by 10%. Accordingly, they were subject to sanctions.

Although the adjusted verdict was only \$46,631, the plaintiff sought \$68,707 in attorney fees incurred by four different attorneys during trial, including two who were present at the trial itself. The claimed rate was \$450 per hour for partners and \$275 per hour for associates, towards the high end for the Detroit market. The defendants challenged both the attorneys' rates and the need for two attorneys at trial, claiming that both were unreasonable. The defendants noted that the Michigan Bar Journal's 2003 survey found that the median rate

award attorney fees as sanctions. The extent of this authority is beyond the scope of this article.

⁴ The multi-party rules are somewhat more complicated and are beyond the scope of this article.

⁵ Only fees incurred after the 28 day acceptance/rejection period are "necessitated by the rejection". *Taylor v Anesthesia Associates of Muskegon, P.C.*, 179 Mich App 384, 386; 445 NW2d 525 (1989). Appellate fees and costs cannot be awarded. *Haliw v City of Sterling Heights*, 471 Mich 700, 711; 691 NW2d 753 (2005).

⁶ MCR 2.403 itself does not use the word "sanctions" for the costs and fees that it awards, but appellate courts, including the *Smith* court, have frequently referred to them as such.

for partners was only \$200 and for associates was only \$150. After the plaintiff's attorneys agreed to drop seven hours from the bill, the Oakland County Circuit Court allowed the remaining \$65,556 in fees without an evidentiary hearing. The defendants appealed the attorney fee award to the Court of Appeals, where they were unsuccessful, and then to the Supreme Court.

The Supreme Court reversed, finding that the circuit court did not adequately support its finding that the attorney fees were reasonable. It remanded the case for a new determination. Chief Justice Taylor wrote the lead opinion, which Justice Young joined fully. Justice Corrigan, joined by Justice Markman, joined most of the lead opinion but dissented on one point, as discussed below. Justice Cavanagh, joined by Justices Weaver and Kelly, dissented.

WHAT HAS CHANGED

The Supreme Court affirmed that the factors for determining reasonable attorney fees set forth in *Wood v Detroit Automobile Inter-Ins Exch*, 413 Mich 573; 321 NW2d 653 (1982), apply to case evaluation:

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.
6. The nature and length of the professional relationship with the client.

The Supreme Court acknowledged that trial courts have also applied the eight factors in Michigan Rule of Professional Conduct (MRPC) 1.5(a) to case evaluation sanctions, and approved their use, also. These factors overlap with the *Wood* factors, but are not the same:

1. The time and labor required, the novelty of 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. [Emphasis added.]
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.
8. Whether the fee is fixed or contingent.

These laundry lists of factors are not new. The *Smith* decision is more interesting for its other details. Lawyers and clients should note the following:

—Trial courts must begin with MRPC factor 3, i.e. the customary hourly rate rather than the attorney's actual rate. The Supreme Court explicitly stated that reasonable fees are not "the prices charged to well-to-do clients by the most noted lawyers" and was influenced by the fact that the *Smith* trial court accepted such a premium rate without ever examining what other attorneys charged. Trial courts may adjust the customary rate up or down based on the other factors. However, trial courts are instructed to multiply the customary hourly rate by the number of hours before adjusting the rate; presumably, the Supreme Court wants trial courts to consider the resulting number before proceeding.

Justice Cavanagh, in dissent, questioned whether finding the customary rate first will make any difference, because the other factors will still allow a different rate. However, the majority believed that finding the customary rate first will result in more consistent awards.

—The prevailing party must submit "detailed billing records" to support the number of attorney hours claimed.

—The MRPC factors, unlike the *Wood* factors, specifically call for the *local* rate, and the *Smith* court emphasized that trial courts should try to determine the local rate where possible.

—The *Smith* majority's approach, following MCR 2.403(O)(6)'s language, requires finding an hourly rate, even if the attorney requesting sanctions used a contingent or other non-hourly billing method. Footnote 20 of Chief Justice Taylor's lead opinion goes further, suggesting that the fact that a contingent fee was used (and also the result achieved) should be completely ignored, although Justices Corrigan and Markman, otherwise in the majority, dissented from this footnote, meaning that it is not binding.

This approach raises a quandary: In areas such as tort litigation or bulk collections where plaintiff's attorneys usually work on a contingent fee, how can an hourly rate ever be established? To the extent such attorneys have hourly rates, they probably do so from "moonlighting" in other areas of the law; however, rates are supposed to be reasonable for the type of work performed, not based on another type.

—In determining a reasonable rate, trial courts may rely on economic surveys such as those published by the State Bar of Michigan. While this may seem non-controversial,

Justice Cavanagh's dissent raises numerous valid criticisms: The State Bar surveys are done infrequently (usually every five years) and may be out of date; the surveys, if localized at all, may not have sufficient responses in some locales to be accurate; and, now that such surveys have "official" status in case evaluation, attorneys may exaggerate their fees in survey responses in order to "game" the rates higher.

The last criticism is particularly valid in tort litigation, with well-defined plaintiffs' and defendants' bars that are compensated differently and that likely would be surveyed separately. If the plaintiffs' survey rate will be used only when the plaintiff receives a fee award, and the defendants' survey rate will be used only when the defendant receives a fee award, plaintiffs' and defendants' attorneys alike have incentive to exaggerate because their own rate will never be used against them. Given that the majority approves the use of privately conducted surveys, not just the State Bar's own, biased private surveys may appear.

In contrast, exaggerated rates are less likely in business litigation, where today's plaintiff is tomorrow's defendant; only one rate could be established. Lawyers would have less incentive to exaggerate because the same rate could be used for or against them.

—When multiple attorneys try a case, trial courts must determine whether using additional attorneys was reasonable under the circumstances before awarding fees for them. However, the court provided no guidance about how to do so.

—A separate reasonable rate must be determined for each lawyer working on the case.

—The burden to prove the reasonableness of fees lies with party requesting them. Furthermore, a court may not take judicial notice of the customary or going local rate, but must rely only on evidence. The attorney requesting the fees may not rely solely on his own affidavits.

—In perhaps the most important holding, the majority states that the party opposing the attorney fee request has an absolute right to an evidentiary hearing to contest the request.

IMPACT

Case evaluation's purpose is to discourage unneeded litigation, and yet, by raising evidentiary standards and allowing evidentiary hearings, *Smith* seems to invite more of it. The history of Federal Rule 11, which also allows attorney fees as sanctions, is illustrative. Four years after modern Rule 11 was passed, one court lamented that "the time saved by deterring frivolous litigation tends to be offset in hearings on Rule 11 motions and countermotions". *Whittington v Ohio River Co*, 115 FRD 201 (ED Ky 1987). And this was despite the fact that the Rule 11 advisory committee suggested that courts determine the sanctions based on the existing record without a hearing. Given that the Michigan Supreme Court now has mandated evidentiary hearings, things may be even worse under *Smith*.

The court has increased the prevailing party's burden to prove a reasonable rate. Judicial notice is no longer available, and the prevailing attorney must give evidence of rates other than his own. If the prevailing attorney introduces evidence through friendly colleagues, their testimony will be suspect as biased. On the other hand,

the *Smith* opinion does not give the prevailing attorney any discovery devices to obtain evidence from attorneys with whom he is not acquainted, and even if he could do such discovery, competing firms likely would object to revealing their rates as confidential information. Prevailing attorneys will probably need to depend entirely on anonymous surveys, which, as noted, have their own flaws.

Conversely, the prevailing party has too much leverage when proving the attorney hours spent. The prevailing party is entitled to attorney fees for services "necessitated by the rejection". Presumably, this includes fees for the new sanctions evidentiary hearing itself. If an unscrupulous lawyer for a prevailing party exaggerates his hours, the losing party will be hesitant to challenge them because, even if he has an excellent chance of proving the hours unreasonable, he will be paying both sides' attorney fees for the sanctions hearing.

Rather than refining *Wood's* method to determine an attorney fee, the *Smith* court may have better served the court system by changing the method altogether. The *Smith* court acknowledged that case evaluation sanctions will often be less than actual attorney fees; that case evaluation's main purpose is to encourage settlement, not to compensate the attorneys; and that the new *Smith* method still is not an "exact science". Given these facts, why not adopt a simpler method? For example, the State Court Administrative Office could annually set a statewide hourly rate that applies to all cases, and the number of hours could be objectively determined, e.g., hours actually spent in trial⁷ multiplied by two to account for preparation time. While a prevailing party might not recover all its fees with such a method, it would still encourage parties to accept case evaluation and would avoid extensive sanctions litigation.

**COURT OF APPEALS AFFIRMS AWARD OF
REASONABLE ATTORNEY FEE TO PLAINTIFF EQUATING
TO \$1600 PER HOUR BASED ON CONTINGENCY FEE AGREEMENT**

Matthew LaBeau⁸ – Contributor

The award of attorney fees for unreasonable delay and/or denial of benefits under MCL 500.3148 is always an important consideration when making the decision as to whether or not to deny no fault benefits to a claimant. The Court of Appeals decision in *University Rehabilitation Alliance Inc v Farm Bureau Gen Co of Michigan*, ___ Mich App ___ (2008) provides further guidance regarding what constitutes an unreasonable denial, and what constitutes a reasonable attorney fee.

⁷ Under the current rule, attorney fee sanctions are awarded for all post-rejection proceedings, not only trial. Typically, this includes late summary disposition motions. However, summary disposition, by narrowing the issues in a case, helps facilitate settlement more often than it hinders it; why discourage summary disposition?

⁸ Mr. LaBeau is an associate in the Firm's Detroit office and can be reached at (313) 446-1530 or at mlabeau@garanlucow.com.

In *University Rehabilitation*, the plaintiff, Kimberly Sterling, sustained injuries when she was either pushed from or jumped out of a moving motor vehicle. Defendant, the plaintiff's no fault insurer, refused to pay benefits because it asserted that injuries from an assault were exempt from coverage as it was not an accidental injury. Once the claimant's boyfriend was acquitted of assault, defendant agreed to pay benefits with interest, but refused to pay attorney fees. The trial court ruled that defendant's original denial was unreasonable and the 25% contingency fee to which the claimant agreed was fair and granted attorney fees to plaintiff consistent with that agreement. The defendant appealed the decision, and the Court of Appeals affirmed.

The Court initially examined whether the initial denial was unreasonable. As stated by the court, an insurer's delay in making payments under the No Fault Act is not unreasonable if it is based on a legitimate question of statutory construction, constitutional law, or factual uncertainty. The Court distinguished Ms. Sterling's case from other cases cited by the defendant involving assault because, unlike those cases where a motor vehicle was merely the location of the assault and injuries were incidental to the motor vehicle, Ms. Sterling's injuries directly resulted from falling from a motor vehicle while it was in motion and being used for transportation. There is, therefore, no hard and fast rule precluding PIP benefits for injuries resulting from an assault. There was also no indication that Ms. Sterling intended to hurt herself. Therefore, the Court held that defendant did not have a reasonable basis at any time for denying plaintiff PIP benefits under the facts of this case.

The Court went on to examine whether the attorney fee claimed by plaintiff was reasonable. The trial court properly employed a multi-factor test considering (1) professional standing and experience of the attorney, (2) the skill, time, and labor involved, (3) the amount in question and 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. The Court opined that a reasonable attorney fee is determined by considering the totality of the circumstances. The Court also determined that there is no restriction under MCL 500.3148(1) that an attorney fee be based on a reasonable hourly rate, but on the same token, acknowledged that a contingency fee is not presumptively reasonable.

The trial court found that plaintiff's attorneys, the law firm of Sinas, Dramis, Brake, Broughton, & McIntyre, P.C., were highly qualified and skilled attorneys. Furthermore, the Court concluded that the plaintiff could have incurred substantial attorney fees had plaintiff retained counsel on an hourly basis and had defendant continued to contest coverage (Defendant's representative conceded that defendant would have appealed the court's decision had Ms. Sterling's boyfriend been found guilty of assault). While plaintiff's attorney only put 30 hours into the case, the trial court weighed the potential for extensive litigation at an hourly rate as a reasonable reason for plaintiff to retain counsel on a contingent basis.

Even though plaintiff's attorneys were awarded an attorney fee of over \$50,000 for 30 hours of work, amounting to over \$1600 per hour, the contingency fee agreement was reasonable under all the facts and circumstances of the case. Therefore, the trial court did not abuse its discretion. In particular, the Court reasoned that defendant prompted the necessity of a contingent fee agreement, and that not awarding the contingency fee would reward defendant and punish plaintiff for a situation the defendant created. The amount of time put in by plaintiff's counsel was not a critical factor in determining a reasonable attorney fee.

In summary, it is crucial that no fault insurers be correct on the law when they are making a denial based on an interpretation of the No Fault Act. The attorneys at Garan Lucow Miller, P.C. are readily available to answer any question that arises in such situations. Furthermore, insurers must be aware that, even though a case may be

short lived, they may be required to pay a large contingency fee, regardless of the hourly rate or number of hours worked by plaintiff's counsel.

BASICS OF NO FAULT

The introductory no fault course will be offered at the Southfield campus of Lawrence Tech University commencing on Monday, September 15, 2008 and running continuously through Monday, November 24, 2008. Please contact Tim Meloche at (248) 204-4055 for registration information.

TROY BREAKFAST SEMINAR

The Firm's annual No Fault Seminar will be held at the Troy Marriott on September 18, 2008. There are many important issues which will be discussed at this seminar, including a presentation by Sharon Filas, CPA, regarding the *Ross* decision from the Michigan Supreme Court. The Supreme Court's recent decision in *Cooper v ACIA*, which opens the door to claims of fraud, will be discussed in depth, inclusive of suggestions on claim handling to avoid litigation. We will also present a review of cases pending in the Supreme Court which will significantly impact no fault claims handling, including *USF&G v MCCA*, *Benefiel v Auto Owners*, *Scott v State Farm* and *Budget Rent-A-Car v City of Detroit*. Please email your registration to Beth Bezenah at bbezenah@garanlucow.com.