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NEWSLETTER

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Section Announcement

The Consumer Law Section Annual Meeting will be held virtually on September 29, 2022 at 2 p.m. The meeting will feature the award of the Frank J. Kelley Consumer Law Award, which is being given this year to the organization Michiganders for Fair Lending, a grass-roots organization which has placed an initiative on the ballot for this fall to regulate payday lending in Michigan. We will also be electing officers and new members to the Consumer Law Council, and there will be a short panel presentation.

The Council also welcomes Francis Murphy, who joins the Council to fill a vacancy.

Section Members to Vote on Amendments to By-Laws at Annual Meeting

RECOMMENDATIONS FOR AMENDMENT

Article III – Council and Officers

Recommendation: Add a new section, Section 2a –
Ex-officio members of Council

All past Chairs of the Council shall, at their option, sit as ex-officio members of the Council for an indeterminate period of time. They shall participate in matters before the Council, lending their expertise and guidance in such matters. They may be appointed to the various committees that are established by the Council, as is appropriate. They shall be included in all communications and announcements as all members of the Council are. Ex-officio members of the Council shall not have the right to vote on matters brought before the Council, nor shall they be included in determining whether a quorum of the Council is present at any meeting.

Rationale

The people who have served in the position of Chair of the Consumer Law Section Council have demonstrated a strong commitment to advancing the interests of consumers in Michigan. The experience they gained in the position of Chair through their interactions with other sections of the State Bar of Michigan and in working with the Officers, Administration, and staff of the State Bar of Michigan is a valuable asset for the Consumer Law Section. It should not be wasted merely because the person is no longer actively on the Council. It is important to the operation of the Council to maintain a continuity with previous Councils to avoid unnecessary duplication of efforts. For that reason, and many other intangible reasons, the past Chairs should be encouraged to continue their contribution to the Section by sitting as ex-officio members of the Council if they so choose. In doing so, the Council would benefit from their expertise and guidance by their participation in Council business.

Article VI – Duties and Powers of the Council

Recommendation: Amend Section 6. Absences.

Any member of the Council who shall be absent from three (3) consecutive regular meeting of the Council *without excuse* shall be deemed to have resigned and the vacancy created shall be filled by the Council.

Rationale

Those who have made a commitment to participate on the Consumer Law Section Council have demonstrated their commitment to consumer causes. Unfortunately, because of the requirements of the practice of law or because of circumstances beyond

the control of those members of the Council it is possible that the member cannot be present at three consecutive meetings of the Council. When those circumstances arise, consideration should be granted to that member. Such a situation is different from the member who shirks his or her responsibility to the Council by failing to attend meetings.

Article VII – Committees

Recommendation: Correct typo Section 1 – Standing Committees

Insert a comma between "Education" and "Legislative"

Rationale

These are two separate committees, not one.

Recommendation: Amend Section 8 – Committee Meetings

Committee meetings will be called as necessary by the Section or Committee Chairs. Meetings may be held in person or via telephone conference *or other conferencing methods.*

Rationale

The added language takes into account advancements in communication technology such as ZOOM or SKYPE or TEAMS or any newer method of conducting a virtual meeting.

Article VIII – Section Meetings

Recommendation: Amend Section 1. Annual Meeting

The annual meeting of the Section shall be held during the *month of September* at such time and by such method as may be arranged by the Council. The annual meeting shall include such programs and order of business as may be arranged by the Council.

Rationale

Notwithstanding the recently announced increase in SBM fees/dues to practice law in Michigan, the SBM has abandoned the format of an annual meeting, leaving those sections who previously conducted their annual meetings in conjunction with the SBM Annual Meeting. As written in the section's current by-laws, there would be no annual meeting of the Consumer Law Section since there is no SBM Annual Meeting. The language change would mandate an annual meeting in September, to be convened and conducted as determined by the Council. Should the SBM reinstitute the Annual Meeting format, the new language in our by-laws would allow the Council to set the annual section meeting in conjunction with the SBM meeting as in the past.

The History and Current Status of Attorney Fee Calculations in Michigan

By Gary M. Victor

There are a myriad of statures and court rules in Michigan that provide for awards of reasonable attorney fees. A simple West Law search shows that there are hundreds of such statutes and court rules. Statutes containing attorney fee provisions vary from those in the more well-known Elliot-Laron Civil Rights Act[1] or the Freedom of Information Act[2] to perhaps less familiar provisions in the Whistle Blowers Act[3] or the Motor Vehicle Service and Repair Act.[4] Court rule provisions also vary from the common rules on such as the since amended rules on case evaluations[5] or offers of judgment[6] to rules regarding vexatious pleadings in the Court of Appeals[7] or garnishments after judgment.[8]

Michigan courts have long been plagued with trying to find some method of establishing consistency and objectivity in awards of "reasonable" attorney fees across all these different statutes and court rules. This goal is important as it, hopefully, would encourage more accurate attorney fee determinations in trial courts as well as provide appellate courts with a better opportunity to analyze trial court decisions. This article will track the cases engaged in this long-time effort to establish a more

objective and unified method of making attorney fee calculations in Michigan and the State's current position on the issue.

The Early Cases

Perhaps the first case to delineate criteria for attorney fee calculations was the 1928 case of *Fry v. Montague.*[9] *Fry* arose out of the sale of 58 pair of silver black foxes for which payment was not made. The attorney seeking fees had represented the trustee for the nearly bankrupt seller in negotiating a settlement with the buyer. A dispute developed and the attorney filed suit asking for $4,000 in fees. The attorney was awarded $2,000 and both parties appealed.

In discussing what should be considered in such a case. The Court stated:

> We should, of course, consider the time spent, the amount involved, the character of the service rendered, the skill and experience called for in the performance of the work, and the results achieved.[10]

Without discussing these criteria in any detail, the court affirmed the $2,000 award relying principally on the experience of the trial judge as to whether there was an abuse of discretion.

Another early case is the 1937 case of *Becht v, Miller*.[11] This case arose out an estate dispute over an allowance of $7,500 in attorney fees from the estate. The Court quoted *Fry's* criteria, spent considerable effort analyzing the attorney's work and held that the trial court had abused its discretion by setting the fee too high, reducing the fee to $2,000. It is odd to have appellate courts hold a trail court's award of attorney fees as being too high. Again, the overall emphasis was on an abuse of discretion.[12]

The *Fry* criteria was the most notable set of court articulated principles to be used in attorney fee calculations for over forty years. The next case in this line came in 1973 with Court of Appeals case of *Crawley v. Schick*.[13]

The *Crawley* v. *Schick* Criteria

Crawley arose out of an automobile accident wrongful death case. Crawley, the administratrix, negotiated a settlement of $55,000. The trial court awarded Crawley 1/3 of the settlement as attorney fees. Liberty Mutual Insurance Company intervened to recoup workmen's compensation benefits. One issue on appeal was the inclusion of the attorney fee as part of the costs of the settlement.

In discussing the attorney fee issue, the Court stated:

> Where the amount of attorney fees is in dispute each case must be reviewed in light of its own particular facts. There 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.[14]

Without thoroughly examining each of its own criteria, the Court concluded that the fee was "not in excess in reasonable fees for the services performed."[15]

The next step in the attorney fee journey came some nine years later with the Supreme Court case of *Wood v. Detroit Automobile Inter-Insurance Exchange.*[16]

In *Wood* the Supreme Court Adopts the *Crawley* Criteria

Wood involved a motorcyclist injured in an accident with a car. Wood sued for an unreasonable denial of personal injury protection (PIP) benefits. Eventually, a default judgment was entered for Wood including $50,000 for mental anguish and a $5,000 attorney fee.[17] The Court of Appeals reversed the $50,000 for mental anguish and affirmed the remainder. The Supreme Court granted leave.[18]

On the issue of attorney fees, the Court specifically adopted the *Crawley* factors[19]and further instructed trial courts as follows:

> While a trial court should consider the guidelines of *Crawley*, it is not limited to those factors in making its determination. Further, the trial court need not detail its findings as to each specific factor considered. The award will be upheld unless it appears upon appellate review that the trial court's finding on the "reasonableness" issue was an abuse of discretion.[20]

The Court remanded for the trial court to consider an adjustment in the attorney fee as a result of the reversal of the mental anguish award.

As of *Wood*, whether or not trial courts detailed their findings on the *Crawley* guidelines, the appellate emphasis was on abuse of discretion. A further clarification and objectification of attorney fee decisions would have to await for another Supreme Court decision. In the interim, two Court of Appeals cases relating to a more objective approach to fee determinations—the lodestar—deserve mention.

The first is *Smolen v. Dahlman Apts, Ltd.*[21] *Smolen* was a Landlord-Tenant Relationships Act[22]/Michigan Consumer Protection Act[23](MCPA) case involving the question of whether Michigan residential landlords could retain security deposit monies for the costs associated with apartment cleaning. After some 400 hours of time, the trial court had awarded $2,000

in attorney fees under the MCPA. On appeal, plaintiffs argued that the Court should adopt a lodestar—a reasonable hourly rate times the reasonable amount of hours worked—as the starting point in attorney fee calculations. Although remanding for a new fee hearing, the Court declined to adopt this lodestar approach.[24] Instead, the Court merely reiterated a reliance of the factors outlined in *Crawley v. Schick.*[25]

The second case, *Howard v. Canteen Corp,*[26] was brought under the Civil Rights Act[27] and reached a contrary decision less than a year after *Smolen.* The Court approved a lodestar:

> The most useful starting point for determining the amount of a reasonable attorney fee is the number of hours reasonably expended on the case multiplied by a reasonable hourly rate.[28]

After the contradictory holdings of *Smolen* and *Howard*, some trial courts used a lodestar approach in calculating attorney fees while others relied on *Crawley.* The adoption of a lodestar approach had to wait another nine years for the Supreme Court decision in *Smith v. Khouri*.[29]

The Supreme Court Adopts A Lodestar Approach

Smith V. Khouri was the first Supreme Court case to hold that some version of the lodestar should be used as the beginning point in calculating attorney fee awards. *Smith* was an appeal of an attorney fee award under the case evaluations rule—MCR 2403(O). After examining the existing methods of calculating a reasonable attorney fee, the Court stated:

> We conclude that our current multifactor approach needs some fine-tuning. We hold that a trial court should begin its analysis by determining the fee customarily charged in the locality for similar legal services, i.e., factor 3 under MRPC 1.5(a). In determining this number, the court should use reliable surveys or other credible evidence of the legal market. This number should be multiplied by the reasonable number of hours expended in the case (factor 1 under MRPC 1.5[a] and factor 2 under *Wood*). The number produced by this calculation should serve as the starting point for calculating a reasonable attorney fee. We believe that having the trial court consider these two factors first will lead to greater consistency in awards. Thereafter, the court should consider the remaining *Wood*/MRPC factors to determine whether an up or down adjustment is appropriate. And, in order to aid appellate review, a trial court should briefly discuss its view of the remaining factors.[30]

Some commentators suggested that there were several problems with the Court's fee analysis.[31] Despite its shortcomings, *Smith* at least established a form of lodestar as a beginning point for use in calculating reasonable attorney fees. One cannot fault the Court's intention.[32]

The *Smith* lodestar became the principle method of determining attorney fees under both statutes and court rules for the next eight years. The latest attempt by the Supreme Court to tinker with attorney fee calculations came in the 2016 case of *Pirgu v United Services Automobile Assn*.[33]

Pirgu—The Latest Step in the Attorney Fee Journey

Pirgu, like *Wood,* is an unreasonable denial of (PIP) benefits case. The Court stated the issue was the application of the *Smith* framework to the no-fault insurance act.[34] The Court of Appeals had held otherwise. Leave to appeal was made to the Supreme Court. In lieu of granting leave, the Court reversed with new guidance on attorney fee calculations.[35]

After examining the history of attorney fee determinations under *Wood* and *Smith*, the Court expressed the need for an adjustment and a new approach as follows:

> Unfortunately, *Smith* requires trial courts to consult two different lists of factors containing significant overlap, which unnecessarily complicates the analysis and increases the risk that courts may engage in incomplete or duplicative consideration of the enumerated factors. Therefore, we distill the remaining *Wood* and MRPC 1.5(a) factors into one list to assist trial courts in this endeavor:
>
> (1) the experience, reputation, and ability of the lawyer or lawyers performing the services, (2) the difficulty of the case, i.e., the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly, (3) the amount in question and the results obtained, (4) the expenses incurred, (5) the nature and length of the professional relationship with the client, (6) the likelihood, if apparent to the client, that acceptance of the particular employment will preclude other employment by the lawyer, (7) the time limitations imposed by the client or by the circumstances, and (8) whether the fee is fixed or contingent.
>
> These factors are not exclusive, and the trial court may consider any additional relevant factors. In order to facilitate appellate review, the trial court should briefly discuss its view of each of the factors above on the record and justify the relevance and use of any additional factors.[36]

Subsequent to the Supreme Court's decision in *Pirgu*, Courts of Appeals have remanded numerous cases back to trial courts for attorney fee recalculation in differing types of

cases. Most of these cases were unreported, however, there are three reported cases: *Burton v State*[37]involved the Wrongful Imprisonment Compensation Act,[38] *Cadwell v City of Highland Park*[39] involved the Whistleblower Protection Act,[40] and *Powers v Brown*[41] involved Statutory Conversion.[42]

Given the serious application by Courts of Appeals of the *Pirgu* standard, an objective approach to attorney fee calculations seems to be a bit closer to realization. Consolidating the *Wood* and MRPC sources makes this latest approach more specific. Perhaps more important is the requirement that trial judges "should" discuss each of the factors on the record and "justify the relevance and use of any additional factors." Hopefully, trial judges will make more reasonable fee awards in the first instance and appeals are more likely to succeed when trail judges stray from the path by making unreasonable fee awards.

Before concluding, one other case should be discussed. That case is *Jordan v. Transnational Motors Inc*.[43]

Jordan v. Transnational Motors, Inc and Consumer Protection

Prior to 1995, trial courts had often made low fee awards in consumer protection type cases relying on the *Crawley* and/or the Rule of Professional Conduct criteria of the "amount involved and the results achieved". *Jordan* was a defective vehicle case brought under the Magnuson-Moss Warranty Act (MMWA)[44] and the MCPA. *Jordan* held that in consumer protection cases the trial courts must consider the remedial purposes of the statutes involved when making attorney fee awards. As stated by the Court:

> In consumer protection as this, the monetary value of the case is typically low. If courts focus only on the dollar value and the result of the case when awarding attorney fees, the remedial purposes of the statutes in question will be thwarted. Simply put, if attorney fee awards in these cases do not provide a reasonable return, it will be economically impossible for attorneys to represent their clients. Thus, practically speaking, the door to the courtroom will be closed to all but those with either potentially substantial damages, or those with sufficient economic resources to afford the litigation expenses involved. Such a situation would indeed be ironic: it is precisely those with ordinary consumer complaints and those who cannot afford their attorney fees for whom these remedial acts are intended.[45]

Jordan, it appears, makes the trial court' failure to consider the remedial purpose of providing the fee award reversible error.[46] For those of us that represent consumers under fee shifting statutes, *Jordan* was and is a game changer. In many, if not most of our cases, the attorney time invested will be worth multiples of what the client may recover.

Conclusion

Given Michigan's hundreds of statutes and court rules providing for awards of reasonable attorney fees, over time considerable judicial effort has been expended in attempts to unify and objectify fee determinations. This article has examined the history of those efforts. This history started with the early cases in the 1920s and 1930s to *Crawley v. Schick*[47]in 1973 and *Wood v. Detroit Automobile Inter-Insurance Exchange*[48]in 1982 with their delineated guidelines. Finding this approach inadequate, the Supreme Court moved on to 2008's *Smith v. Khouri*[49]adopting a lodestar—a reasonable hourly rate times the reasonable number of hours worked—as the beginning point in fee calculations. It then refined that approach in 2016 in its latest decision on the matter, *Pirgu v.United Services Automobile Assn*.[50] Trial court must now start with the lodestar and explain, at least briefly, it application of other criteria. Furthermore, Under *Jordan v Transnational Motors,*[51] trial courts are required to consider remedial purpose the statutes involved when making fee awards in consumer cases. Hopefully, now trial court attorney fee decisions will be more accurate and more easily reviewed on appeal.

Endnotes

1 MCLA § 37.2802

2 MCLA § 15.240.

3 MCLA § 15.363.

4 MCLA § 257.1336.

5 Rule 2.403--amended to eliminate sanctions.

6 Rule 2.405--amended to clarify the interest of justice exception.

7 Rule 7.216.

8 Rule 3.101.

9 242 Mich. 391 (1928).

10 *Id* at 393.

11 279 Mich. 629 (1937).

12 Additionally, the Court held that it was not bound by the expert opinion of attorneys who had testified that the reasonable value of services of the attorney in question was approximately $10,000. The issue of other attorneys testifying to the value of a fee applicant's services, in terms of reasonable hourly rates, will present itself later on.

13 148 Mich.App 728, (1973).

14 *Id* at 737.

15 *Id* at 738.

16 413 Mich.573 (1982).

17 Reasonable attorney fees are available to the prevailing party pursuant to MCLA § 500.3148(1).

18 *Wood* at 577-578

19 *Id* at 588.

20 *Id*.

21 186 Mich.App. 292 (1990). (*Smolen II*).

22 MCLA § 540.601 *et seq.*

23 MCLA § 445.901, *et seq.*

24 *Id* at 296.

25 On a positive note, *Smolen II* Court did hold that attorney fees were available for work on appeal. *Smolen II* at 298

26 192 Mich.App 447 (1992), rev'd on other grounds in *Raffety vs. Markovitz*, 461. Mich. 265 (1999).

27 MCLA § 27.2101 *et seq.*

28 *Howard* at 437,

29 481 Mich. 519 (2008).

30 *Id* at 530-531.

31 *See, e.g.,* Gary M. Victor, *Smith vs Khori, the Supreme Court Adopts a Modified Lodestar Likely to Produce Lower Fee Awards,* 13 Consumer Law Newsletter 5 (No.2, August, 2009).

32 "[W]e choose to provide the guidance that has been. . .sorely lacking for the many Michigan courts that are asked to impose "reasonable attorney fees" under our fee-shifting rules and statutes." Smith at 536.

33 499 Mich. 269 (2016).

34 *See*, MCLA § 500.3148(1).

35 *Smith* at 271.

36 *Id* at 281-282.

37 2022 WL 568548 (February, 2022).

38 MCL § 691.1751 et.seq.

39 324 Mich App 642 (2018).

40 MCL § 15.361, et seq.

41 328 Mich App 617 (2019).

42 MCL § 600.2919(a).

43 212 Mich.App. 94 (1995).

44 15 USC 2301, *et seq.*

45 212 Mich App at 97-98.

46 *See,* Gary M. Victor, *Recent Attorney Fee Cases and Their Potential Effect in Consumer Protection Cases*, 78 MichBI 278, 279-280 (No. 3, March. 1999).

47 148 Mich.App 728, (1973).

48 413 Mich.573 (1982).

49 481 Mich. 519 (2008).

50 499 Mich. 269 (2016).

51 212 Mich.App. 94 (1995).

The Michigan Supreme Court Makes "May Recover" Mandatory Rather than Discretionary

By Gary M. Victor

There are hundreds of statutes that use the phrase "may recover," usually associated with awards of damages and attorney fees.[1] Generally, when suing under a statutory claim that states the injured party "may recover" certain relief, litigators have accepted the proposition that "may recover" means whether that relief will be awarded is discretionary with the court. For example, the Statutory Conversion statute,[2] provides that: "A person damaged as a result of either or both of the following *may recover* 3 times the amount of actual damages sustained, plus costs and reasonable attorney fees."[3] As recently as 2020, the Court of Appeals in the unpublished opinion *Bahri v Great Lakes Property and Investment, Inc*,[4] where the trial court denied treble damages, the Court of Appeals held that "may recover" treble damages was discretionary under the Statutory Conversion statute. However, the Court remanded requiring that the lower court had to provide "[b]rief, definite, and pertinent findings that reflect that the court was aware of the issues in the case".[5] Turning this world around, the Michigan Supreme Court in the very recent case of *Township v Rice*[6] has held that "may recover" is mandatory depending on "who" may recover and whether that person asks for the statutory remedy.

Township involved a case brought by James Township against a farmer, Rice, under the Right to Farm Act[7] (RTFA). Rice eventually prevailed. MCL § 286.473b of the act provides that a prevailing farm or farm operation:

> *may recover* from the plaintiff the actual amount of costs and expenses determined by the court to have been reasonably incurred by the farm or farm operation in connection with the defense of the action, together with reasonable and actual attorney fees. (emphasis added).

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The trial court held that the "may recover" language was discretionary and refused to grant the relief outlined in statute. The Court of Appeals agreed that the language was discretionary, but as was the case with *Bahri*, remanded requiring the trial court to articulate reasons for its refusal to award the statutory relief. The Supreme Court reversed holding the "may recover" under the RTFA is mandatory rather than discretionary if the prevailing party asks for the statutory relief.

The Supreme Court reached its decision using a statutory interpretation analysis. It reasoned that whether the words "may recover" are mandatory or discretionary depends on to whom the legislature gives the discretion—the court or the injured party. Below is some of the Court's reasoning:

> We disagree with the Court of Appeals and, instead, hold that MCL 286.473b of the RTFA entitles a prevailing farm or farm operation to the actual amount of costs and expenses reasonably incurred in connection with the defense of the action, together with reasonable and actual attorney fees, when so demanded. While the term "may" is ordinarily considered to be permissive, meaning that its use in MCL 286.473b gives discretion rather than imposing a mandatory condition, the statute gives that discretion to the prevailing farm or farm operation, not to the court. MCL 286.473b does not say that the court "may award" costs, expenses, and fees should the farm or farm operation prevail but that the prevailing farm or farm operation "may recover" them. Because defendant, as the prevailing farm or farm operation, exercised his discretion by seeking to recover costs, expenses, and fees, the district court is required to award the costs, expenses, and fees provided for in MCL 286.473b[8].

The Court made it clear that the trial court possesses the discretion only to determine the amount of actual costs, expenses, and fees. There is every reason to believe that that the Court's holding will be applicable to those many statutes that provide "may recover" and do not specifically give discretion to the court instead of the injured party. Again, using the Statutory Conversion statute as an example the "*may recover* 3 times the amount of actual damages sustained, plus costs and reasonable attorney fees," should now be mandatory provided the injured party asks for it and what injured party would be foolish enough not to ask for it.

Those of us that litigate under statutes that provide that the injured party "may recover" certain relief should keep *Township v Rice* in our pocket should we encounter a trial judge that insists the court has the discretion to award the statutory relief. It is likely that the case will come in handy. In a case where the trial court remains recalcitrant and refuses to grant the statutory relief, it would appear to be clear error for appeal.

Endnotes

1 See. e.g., MCL § 324.60503c, MCL § 445.933' MCL § 445.1715, MCL § 448.86 and MCL § 691.1610.

2 MCL § 600.2919(a)(1).

3 *Id.*

4 2020 WL 86261 (February 20, 2020).

5 *Id* at 2.

6 ____ Mich ____ (2022) 2022 WL 2252419, (June 22, 2022).

7 MCL § 286.471, *et seq.*

8 *James Township* (slip opinion at 2).