

# CASE EVALUATION CASE LAW UPDATE

by Lee Hornberger

## I. INTRODUCTION

This article reviews recent Michigan Supreme Court and Court of Appeals cases concerning MCR 2.403 case evaluation law.

## II. CASE EVALUATION

### A. SUPREME COURT DECISIONS

#### 1. *Smith v Khouri* Attorney Fee Ruling Applies In FOIA Cases

*Coblenz v City of Novi*, \_\_\_ Mich \_\_\_ (2009). In this Freedom of Information Act, MCL 231 *et seq*, case, the Supreme Court held that the method for determining attorney fees in a FOIA case is the same as those outlined in the case evaluation attorney fee case of *Smith v Khouri*, 481 Mich 519 (2008).

#### 2. Case Evaluation Attorney Fee Amount Determination

*Juarez v Holbrook*, 483 Mich 970 (2009). The majority (Cavanaugh, Weaver, Kelly, and Hathaway) denied the application for leave to appeal in this case evaluation attorney fee case.

The dissent (Markman, Corrigan, and Young) would have vacated that part of the Court of Appeals judgment that held that the Circuit Court properly determined the amount of case evaluation attorney fees. Defendant was entitled to sanctions because the jury verdict was well below the case evaluation award that all parties had rejected. One day after the Circuit Court decision, the Supreme Court issued *Smith* in which the Supreme Court clarified the process of calculating case evaluation attorney fees. According to the dissent, the Circuit Court should begin the process of calculating a reasonable attorney fee by determining the reasonable hourly or daily rate customarily charged in the locality for similar legal services under MRPC 1.5(a)(3) .

With the change of Michigan Supreme Court one seat, the new majority is apparently utilizing *Smith* as authority for remand when the lower court has granted low attorney fees, while the present three Justice minority would use *Smith* as authority for remand when the lower court has granted high attorney fees. *Juarez*. Before the one Justice switch, just the opposite had occurred. *Smith*.

#### 3. Attorney Fee Amount Caused By Other Party's Litigation Conduct

***Beach v Kelly Auto Group, Inc***, 482 Mich 1101 (2008). Although the attorney fee award was disproportionate to “the amount involved and the results obtained,” the Circuit Court properly attributed the extraordinary fees to Defendant’s conduct, which unnecessarily caused additional cost. This was affirmed by the Supreme Court.

#### **4. Right to a Hearing for Attorney Fee Amount**

***Young v Nandi***, 482 Mich 1007 (2008), reiterated that the losing party is entitled to a hearing concerning the amount of attorney fees and costs to be assessed because of case evaluation sanctions.

#### **5. Determination of Reasonable Attorney Fee**

***Smith v Khouri***, 481 Mich 519 (2008), a dental malpractice case, reviewed a Circuit Court’s award of “reasonable” attorney fees as part of case evaluation sanctions under MCR 2.403(O). The Court in a four (Taylor, Young, Corrigan, and Markman) to three (Cavanaugh, Weaver, and Kelly) decision held that the Circuit Court should begin the calculating of a reasonable attorney fee by determining the reasonable hourly or daily rate customarily charged in the locality for similar legal services, using reliable surveys or other credible evidence. This number would then be multiplied by the reasonable number of hours expended.

As indicated, *Smith, id.* is beginning to generate a cottage industry of Supreme Court discussion. *Coblenz and Juarez*.

*Smith* has been followed in *Heaton v Benton Constr Co*, \_\_ Mich App \_\_ (2009).

#### **6. Discovery Sanction Dismissal Order Not A “Verdict”**

***Oram v Oram***, 480 Mich 1163 (2008), held that case evaluation sanctions are not available when the dismissal order is the result of discovery sanctions rather than a “verdict.”

#### **7. Interest On Case Evaluation Sanctions**

***Ayar v Foodland Distrib*s**, 472 Mich 713 (2005), held that interest begins to accrue on case evaluation sanctions attorneys fees assessed from the date of the filing of the complaint. MCL 600.6013(8).

#### **8. Appellate Attorney Fees Not Available For Sanctions**

***Haliw v City of Sterling Heights***, 471 Mich 700 (2005), held that case evaluation sanction attorney fees do not include appellate attorney fees and costs.

### **B. PUBLISHED COURT OF APPEALS DECISIONS**

## **1. Summary Disposition Order Is Verdict**

In *Peterson v Fertel*, 283 Mich App 232 (2009), prevailing defendants filed summary disposition motions before the case evaluation session and evaluation. The Circuit Court granted the motions before the evaluation. Plaintiff did not accept the evaluation, hence rejecting it. After the evaluation, plaintiff filed a timely motion for reconsideration which was denied after the evaluation was not accepted. The Circuit Court granted defendants's motion for case evaluation sanctions because, in the Circuit Court's viewpoint, the entry of the order after the evaluation rejection denying the reconsideration of the summary disposition order was a "verdict."

Plaintiffs appealed arguing that the denial of the reconsideration motion was not a "verdict" because the original order granting the summary disposition motions was entered before the evaluation. The Court of Appeals affirmed the Circuit Court's granting of attorney fee sanctions. According to the Court of Appeals, the ruling on Plaintiff's reconsideration motion was a case evaluations rule "verdict."

## **2. Stipulated Damage Amount**

In *Tewis v Amex Assurance Co*, 283 Mich App 76 (2009), the parties stipulated the amount of damages. Only the liability issue was decided by the jury. The losing party argued that, since the parties stipulated the amount of damages, there was no "verdict" concerning monetary amount and hence case evaluation sanctions could not be granted. The Court of Appeals disagreed and reversed the trial court's denial of evaluation sanctions.

## **3. Statutory Attorney Fees As Affecting "Verdict" Amount**

*Ivezaj v Auto Club Ins Ass'n*, 275 Mich App 349 (2007), held that the award of statutory attorney fees should not be included as part of the "verdict" when determining if a party is liable for case evaluation sanctions. The decision also indicated that, if the case evaluators incorporated statutory attorney fees when determining the valuation, the attorney fees should be considered part of the "verdict."

# **C. UNPUBLISHED COURT OF APPEALS DECISIONS**

## **1. Existence of Appeal From Case Evaluation Sanctions**

In *King v American Axle & Manufacturing, Inc*, unpublished opinion of the Court of Appeals, issued June 4, 2009 (Docket No 281928), the case evaluation sanction Plaintiff timely appealed on November 9, 2007, the October 23, 2007, "final order" granting Defendant summary disposition. Plaintiff did not file a new claim of appeal of the December 14, 2007, order granting case evaluation sanctions. The Court of Appeals held that it did not possess jurisdiction over the case evaluation issue because Plaintiff did not file a timely notice of appeal covering such sanctions. A "final order" includes "a postjudgment order awarding ... attorney fees and costs

under MCR 2.403.” MCR 7.202(6)(a)(iv).

## **2. “Interest of Justice” Exception**

**Dormak v Zook**, unpublished opinion of the Court of Appeals, issued May 21, 2009 (Docket No 284665), held that the Circuit Court erred when it denied Defendant’s motion for actual costs by utilizing the MCR 2.403(O)(11) “interest of justice” exception. The Court of Appeals indicated that the Circuit Court’s denial of sanctions pursuant to the interest of justice exception is reviewed for an abuse of discretion. For the interest of justice exception to be applicable, one of several “unusual circumstances” has to exist. Such circumstances include legal issue of first impression or public interest, unsettled law and substantial damages are at issue, significant financial disparity between the parties, effect on third persons may be significant, and where prevailing party engages in misconduct.

## **3. Party Refuses To Settle As Affecting Sanctions**

In **Moravcik v Trinity Health-Michigan**, unpublished opinion of the Court of Appeals, issued March 24, 2009 (Docket No 281838), both parties rejected the evaluation. Defendant made no attempt to settle. At trial, the jury returned a no cause of action verdict in favor of Defendant. The Circuit Court denied Defendant’s motion for case evaluation sanctions because Defendant had made no attempt to settle. The Court of Appeals reversed. According to the Court of Appeals, the Circuit Court had impermissibly added a restriction that depended on the rejecting party’s willingness to settle.

## **III. CONCLUSION**

Michigan Supreme Court and Courts of Appeals recent decisions have generally continued to strengthen case evaluation principles. This includes: (1) *Ayar*, interest on case evaluation sanction; (2) *Peterson*, summary disposition is case evaluation verdict; (3) *Tevis*, stipulated damage amount can be verdict; *Dormak*, interest of justice exception; and (4) *Moravcik*, sanction unaffected by refusal to settle.

Some decisions have arguably articulated principles other than, or in addition to, case evaluation sanctions. These decisions include: (1) *Haliw*, appellate attorney fees not available for case evaluation sanctions and (2) *King*, timeliness of appeal from case evaluation sanctions.

In addition, at least one decision, *Smith*, concerning the calculation of attorney fees, is having ramifications beyond case evaluation law. *Coblentz*; and *Juarez*.

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