

## COA Opinion: Trial court failed to adequately analyze plaintiff's request for attorney fees using the Smith factors.

27. April 2011 By Jason Byrne

On April 26, 2011, the Court of Appeals published Judge Donofrio's opinion for a unanimous panel in *Augustine v. Allstate Insurance Company*, No. 296646. In this case, the Court of Appeals vacated the trial court's award of \$250,000 in attorney fees and remanded the case for rehearing and redetermination in accordance with its opinion. It directed the trial court determine "the fee customarily charged in the locality for similar legal services" and to make specific findings regarding each attorney whose fees plaintiffs sought to recover. It warned that a conclusory statement that "the trial court has considered the factors and holds as follows. . ." without clearly setting forth a substantive analysis of the factors on the record is insufficient.

Plaintiff was seriously injured in an automobile accident and sought first-party no-fault benefits from defendant, her insurer, to pay for her permanent attendant care. Plaintiff brought the instant suit after defendant stopped paying the benefits. The jury awarded plaintiff \$371,700 of the \$929,000 she sought. The trial court awarded plaintiff \$312,625 in attorney fees under MCL 500.3148 for defendant's "unreasonable delay" in making benefit payments. Defendant appealed and the Court of Appeals remanded the case in light of the recent holding in *Smith v. Khouri*, 481 Mich 519 (2008), and outlined the factors that it wanted the trial court to consider pursuant to *Smith*. The trial court held an evidentiary hearing and ultimately awarded plaintiff \$250,000 based on a \$500 hourly rate and 537 hours of work. The present appeal ensued.

In vacating the award again, the Court of Appeals determined that the trial court erred in several respects. First the trial court erred in denying defendant's discovery requests. The Court of Appeals reasoned that the simple billing statement without any corroboration of the time reflected was insufficient evidence to demonstrate the reasonableness of the attorney fees. The Court noted that the burden was on the party requesting attorney fees to demonstrate their reasonableness. The Court suggested that plaintiffs could have provided a copy of the litigation file with all items that include the mental impressions, thoughts or strategies of counsel broadly and completely redacted. The Court concluded that the "trial court's failure to even entertain such a procedure seems highly unreasonable and therefore an abuse of discretion."

Second, the Court concluded that the trial court failed to comply with the Court of Appeals' first remand directive and in doing so violated the law of the case doctrine. The Court previously directed "the trial court to make specific findings, consistent with *Smith*, on each attorney whose fees plaintiff sought to recover. . . ." and to "determine the fee customarily charged in the locality for similar legal services." The Court concluded the trial court's acknowledgement of the *Smith* factors inadequate. It stated that a meaningful application of the factors is more than a recitation of those factors prefaced by a statement such as "after careful review of the criteria the ultimate finding is as follows..."

Next the Court determined that the trial court erred in admitting attorney letters in support of fee calculation. The Court concluded that the letters were hearsay, as they were offered to prove the truth of the matter asserted. Further, the letters did not meet the requirements of the business records exception under MRE 803(6) nor were they admissible under MRE 803(24) as no evidence was offered to demonstrate circumstantial guarantees of trustworthiness.

The Court of Appeals then considered the sufficiency of the trial court's assessment of the number of hours for the attorney fee calculation. The Court described the record as meager. It thought that it was inconceivable that plaintiff's attorneys would not keep adequate records of time spent, since plaintiff's complaint demanded attorney fees and since plaintiff's attorneys alleged that they are top tier attorneys with exceptional experience in their field. The Court stated that a hearing on remand will necessarily require expansion. The Court concluded that since the trial court clearly erred in assessing the number of hours, the trial court's calculation of attorney fees was error.

Finally the Court provided a general discussion of the *Smith*, *Wood*, and MRPC 1.5(a) factors for awarding attorney fees. It noted that the Supreme Court reminds trial courts to discuss the *Wood* and MRPC 1.5 factors in a manner sufficient "to aid appellate review." It stated that "an analysis is not sufficient if it consists merely of the recitation of the factors followed by a conclusory statement that "the trial court has considered the factors and holds as follows. . ." without clearly setting forth a substantive analysis of the factors on the record.