

HOW TO AWARD ATTORNEY FEES IN VARIOUS CIVIL ACTIONS

MICHIGAN JUDGES' ASSOCIATION
MACKINAC ISLAND, MICHIGAN

AUGUST 11-13, 2024

HON. JOSEPH TOIA, 16TH CIRCUIT
MT. CLEMENS, MICHIGAN

HON. J. JOSEPH ROSSI, 17TH CIRCUIT COURT
GRAND RAPIDS, MICHIGAN

HON. DONNA B. HOWARD, 2ND CIRCUIT COURT
ST. JOSEPH, MICHIGAN



Credits: Hon. Kathleen Feeney, Hon. Jon VanAlsberg, 16th Circuit Legal Services Director
Jackie Schulz, 17th Circuit Research Attorney Emily Partridge, and many more ...

INTRODUCTION

DISPUTES OVER ATTORNEY FEES TEND TO PRODUCE THE MOST TEDIOUS HEARINGS AND LEGAL OPINIONS.

VACATION AND REMAND OF ATTORNEY FEE AWARDS – WHETHER GRANTED OR DENIED – TEND TO BE UNUSUALLY FREQUENT.



THE AMERICAN RULE

THE “AMERICAN RULE” PROVIDES THAT THE PREVAILING PARTY IN LITIGATION IS NOT ENTITLED TO RECOVER ITS ATTORNEY FEES FROM THE OPPOSING PARTY UNLESS EXPRESSLY ALLOWED BY STATUTE, COURT RULE, COMMON LAW EXCEPTION, OR BY THE PARTIES’ CONTRACT.

- *INT’L OUTDOOR, INC. v SS MITX, LLC, ET AL.*, __ MICH APP __; __ NW3D __, (2023) (DOCKET NOS. 359082 AND 359811); *SKAATES v KAYSER*, 333 MICH APP 61; 959 NW2D 33 (2020).

EXCEPTIONS TO THE RULE ARE NARROWLY CONSTRUED.

BROOKS v ROSE, 191 MICH APP 565, 575, 478 NW2D 731 (1991)

THE EXCEPTIONS, HOWEVER, ARE LEGION.

THE CONTRACT EXCEPTION TO THE AMERICAN RULE

- ENFORCEABLE AS GENERAL DAMAGES, NOT COSTS:
 - *FLEET BUS CREDIT, LLC v KRAPOHL FORD LINCOLN MERCURY CO*, 274 MICH APP 584, 589; 735 NW2D 644 (2007).
- MAY ALSO INCLUDE ATTORNEY FEES ON APPEAL:
 - *TALMER BANK & TR v PARIKH*, 304 MICH APP 373, 403; 848 NW2D 408 (2014), VACATED IN PART ON OTHER GROUNDS 497 MICH 857 (2014).
- AGREEMENT IN CONSENT JUDGMENT REGARDING ATTORNEY FEES ENFORCEABLE AS CONTRACT:
 - *ROSE v ROSE*, 289 MICH APP 45, 51; 795 NW2D 611 (2010).

COMMON LAW EXCEPTIONS TO THE AMERICAN RULE

- MISCONDUCT:
 - *PERSICHINI V WILLIAM BEAUMONT HOSP*, 238 MICH APP 626, 639; 607 NW2D 100 (2000).
- UNREASONABLE CONDUCT DURING LITIGATION:
 - *REED V REED*, 265 MICH APP 131, 164-165; 693 NW2D 825 (2005).
- FRAUDULENT OR UNLAWFUL CONDUCT:
 - *YPSILANTI CHARTER TWP V KIRCHER*, 281 MICH APP 251, 286-287; 761 NW2D 761 (2008).
- LIMITED TO FEES RESULTING FROM MISCONDUCT:
 - *REED*, 265 MICH APP AT 165-166.
- PRIOR LITIGATION EXCEPTION:
 - *GRACE V GRACE*, 253 MICH APP 357, 371; 655 NW2D 595 (2002).

COURT RULE EXCEPTIONS

- MCR 1.109(E)(6)- FILINGS NOT WELL GROUNDED IN FACT OR LAW, OR FILED FOR AN IMPROPER PURPOSE
- MCR 1.109(E)(7)- PLEADING A FRIVOLOUS CLAIM OR DEFENSE
- MCR 2.313(A)(5), MCR 2.313(B)(2)(E), MCR 2.313(C)(2)- SANCTIONS FOR FAILURE TO COMPLY WITH DISCOVERY REQUESTS/ORDERS
- MCR 2.401(G)(2), MCR 2.410(D)(3)(B)- FAILURE TO ATTEND/PARTICIPATE IN CONFERENCE OR ADR
- MCR 2.405(D)(3)- REJECTION OF OFFER OF JUDGMENT
- MCR 2.503(D)- AWARD AS CONDITION FOR ADJOURNMENT OF TRIAL, ADR, CONFERENCE, OR MOTION HEARING
- MCR 2.603(D)(4)- AWARD AS CONDITION FOR SETTING ASIDE DEFAULT
- MCR 3.603(E)- INTERPLEADER ACTIONS

STATUTORY EXCEPTIONS TO THE AMERICAN RULE IN CIVIL CASES

- **NO-FAULT ACT (MCL 500.3148)** AN ATTORNEY IS ENTITLED TO REASONABLE FEES FOR PURSUING OVERDUE PERSONAL OR PROPERTY INSURANCE BENEFITS.
- **CONSTRUCTION LIEN ACT (MCL 570.1118(2))** *SOLUTION SOURCE, INC V LPR ASSOCIATES LTD. PARTNERSHIP*, 252 MICH APP 368; 652 NW2D 474 (2002).
- **STATUTORY CONVERSION/EMBEZZLEMENT (MCL 600.2919A)** *NEW PROPERTIES, INC V GEORGE D. NEWPOWER, JR., INC.*, 282 MICH APP 120; 762 NW2D 178 (2009).
- **MICHIGAN SALES REPRESENTATIVE ACT (MCL 600.2961(6))**
- **FRIVOLOUS ACTIONS (MCL 600.2591)**
- **AMONG MANY OTHERS...**

STANDARDS FOR DETERMINING REASONABLENESS OF FEES



- *SMITH V KHOURI*, 481 MICH 519; 751 NW2D 472 (2008).
 1. DETERMINE THE FEE CUSTOMARILY CHARGED
 2. DETERMINE THE REASONABLE NUMBER OF HOURS EXPENDED
 3. ADJUST THE BASELINE AWARD UP OR DOWN IF APPROPRIATE
- *PIRGU V UNITED SERVS AUTO ASSN.*, 499 MICH 269; 884 NW2D 257 (2016).
 - SIMPLIFIED THE FACTORS FOR MAKING AN UPWARD OR DOWNWARD ADJUSTMENT OF THE BASELINE AWARD

STEP ONE: DETERMINE THE FEE CUSTOMARILY CHARGED



- JUDICIAL NOTICE OF THE SBM SURVEYS:
 - *VITTIGLIO V VITTIGLIO*, 297 MICH APP 391, 409-410; 824 NW2D 591 (2012)
- REASONABLENESS OF FEE NOT DETERMINED SOLELY BY LOCATION:
 - *BOLT V LANSING*, 238 MICH APP 37, 61; 604 NW2D 745 (1999)
- EXPERT TESTIMONY IS GENERALLY NOT REQUIRED:
 - *ZEELAND FARM SERVICES, INC V JBL ENTERPRISES, INC*, 219 MICH APP 190; 555 NW2D 733 (1996)
- ANALYSIS OF THE REASONABLENESS OF THE HOURLY RATE INCLUDES THE ATTORNEY'S EXPERIENCE AND CREDENTIALS, THE LOCATION OF THE COURT, AND THE AREAS OF LAW AT ISSUE

STEP TWO: DETERMINE THE REASONABLE NUMBER OF HOURS EXPENDED



- REQUIRE AN ITEMIZED FEE STATEMENT FOR THE ATTORNEY FEES REQUESTED
- CONSIDER REDACTIONS AND THE NEED FOR A PROTECTIVE ORDER/IN CAMERA REVIEW
- ROUNDING-UP, MINIMUM TIME CHARGES, AND OTHER FEE-BILLING PRACTICES
- DETERMINE WHAT FEES RESULTED FROM THE UNDERLYING MISCONDUCT
- VAGUE DESCRIPTIONS OF SERVICES — SUFFICIENT TO DISTINGUISH AWARDBLE FEES FROM OTHER MATTERS

MULTIPLYING THE REASONABLE HOURLY RATE BY THE REASONABLE NUMBER OF HOURS EXPENDED PROVIDES “A BASELINE FIGURE,” *PIRGU*, 499 MICH AT 281.

STEP THREE: APPLY THE *PIRGU* FACTORS TO THE BASELINE AWARD

- (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.
- (8) WHETHER THE FEE IS FIXED OR CONTINGENT. *PIRGU*, 499 MICH AT 281-282.

WHEN/WHETHER A HEARING IS NECESSARY

- AN EVIDENTIARY HEARING IS REQUIRED IF THE REASONABLENESS OF THE HOURLY RATE OR THE HOURS BILLED IS CONTESTED. *SOUDEN V SOUDEN*, 303 MICH APP 406, 415; 844 NW2D 151 (2013)
- AVOIDING ENCOURAGEMENT OF EXCESSIVE FEE REQUESTS BY CAREFUL ANALYSIS, NOT SHOOTING FROM THE HIP OR “SPLITTING THE DIFFERENCE.” *TINMAN V BLUE CROSS AND BLUE SHIELD OF MICHIGAN*-UNPUBLISHED PER CURIAM OPINION OF THE COURT OF APPEALS (DOCKET NO. 298036, SEPTEMBER 6, 2012) CITING *SMITH*, 481 MICH. AT 530–534
- PRACTICE NOTE: WHILE ATTORNEY FEE CLAIMS ARE FREQUENTLY CONTESTED, THE SCOPE OF THE DISPUTE MAY BE NARROWED, PERHAPS SIGNIFICANTLY, IF THE COURT REQUESTS SPECIFIC RESPONSES. IF ATTORNEY FEES HAVE BEEN RESERVED DURING PRETRIAL PROCEEDINGS, OR ARE AWARDED AT TRIAL, THE NEED FOR AN EVIDENTIARY HEARING MAY BE REDUCED BY SETTING OUT A SPECIFIC PROCEDURE.

FEES ATTRIBUTABLE TO LEGAL ASSISTANTS/PARALEGALS

- MCR 2.626 PERMITS AN AWARD OF ATTORNEY FEES TO INCLUDE FEES INCURRED BY A LEGAL ASSISTANT, SUBJECT TO SPECIFIC REQUIREMENTS
- ARTICLE 1, § 6 OF THE BYLAWS OF THE STATE BAR OF MICHIGAN (SBM):
 - (A) WHO HAS GRADUATED FROM AN ABA APPROVED PROGRAM OF STUDY FOR LEGAL ASSISTANCE AND HAS A BACCALAUREATE DEGREE; OR
 - (B) HAS RECEIVED A BACCALAUREATE DEGREE IN ANY FIELD, PLUS NOT LESS THAN TWO YEARS OF IN-HOUSE TRAINING AS A LEGAL ASSISTANT; OR
 - (C) WHO HAS RECEIVED AN ASSOCIATE DEGREE IN THE LEGAL ASSISTANT FIELD, PLUS NOT LESS THAN TWO YEARS OF IN-HOUSE TRAINING AS A LEGAL ASSISTANT; OR
 - (D) WHO HAS RECEIVED AN ASSOCIATE DEGREE IN ANY FIELD AND WHO HAS GRADUATED FROM AN ABA APPROVED PROGRAM OF STUDY FOR LEGAL ASSISTANTS, PLUS NOT LESS THAN TWO YEARS OF IN-HOUSE TRAINING AS A LEGAL ASSISTANT; OR
 - (E) WHO HAS A MINIMUM OF FOUR (4) YEARS OF IN-HOUSE TRAINING AS A LEGAL ASSISTANT;

SELECTED ATTORNEY FEE CASES

FRAUDULENT OR UNLAWFUL CONDUCT IS
AN EXCEPTION TO THE AMERICAN RULE;
REMAND REQUIRED

INTL OUTDOOR, INC v SS MITX, LLC, __ MICH APP __; __ NW3D __ (2023) (DOCKET
Nos. 359082 AND 359811)

ATTORNEY FEES MAY NOT BE DENIED
SIMPLY BECAUSE ATTORNEY REPRESENTED
PARTY *PRO BONO*

WOODMAN V DEPT OF CORRECTIONS, 511 MICH 427; __ NW2D __ (DOCKET No. 163382, JULY 26, 2023)

MICHIGAN NO-FAULT ACT

PROVIDES FOR AWARD OF ATTORNEY
FEES ...



AS A
PENALTY

BUT THE DENIAL OF BENEFITS MUST BE UNREASONABLE

Denial of attorney fees UPHELD where plaintiff presented no evidence she submitted claims to her disability insurance provider before IME.

Matti v State Farm, unpublished, issued February 22, 2024 (Docket Nos. 364473 and 364975).

MCL 500.3148 APPLIES ONLY TO
“PENALTY PROVISION” ATTORNEY FEES
FROM INSURERS, NOT TO FEES FROM
CLIENTS

WASENKO V AUTO CLUB GROUP, ___ MICH APP ___; ___ NW3D ___ (2023) (DOCKET No.
3614520).

REQUEST FOR ATTORNEY FEES MUST
BE MADE WITHIN A REASONABLE
TIME; REMANDED FOR REVIEW

COLEN V COLEN, 331 MICH APP 295; 952 NW2D 558 (2020)

A COURT MAY IMPUTE INCOME FOR PURPOSES OF DETERMINING A PARTY'S ABILITY TO PAY

SAFDAR V AZIZ, 327 MICH APP 252; 933 NW2D 708 (2019)

HOWEVER,

DENIAL OF ATTORNEY FEES AFFIRMED WHERE PLAINTIFF PROVIDED INSUFFICIENT EVIDENCE OF CLAIMED FEES.

GLOWACKI V GLOWACKI, UNPUBLISHED, ISSUED SEPTEMBER 14, 2023 (DOCKET No. 361775).

ATTORNEY FEES PROPERLY AWARDED AS A CIVIL CONTEMPT SANCTION FOR VIOLATION OF COURT ORDER

PORTER V PORTER, 285 MICH APP 450; 776 NW2D 377 (2009). MOTHER FOUND IN CONTEMPT 3X, STRIKES OUT ON APPEAL.

AWARD OF FEES AFFIRMED; DEFENDANT FAILED TO TIMELY REMOVE PLAINTIFF FROM MORTGAGE DEBT
CAMPBELL V CAMPBELL, UNPUBLISHED (DOCKET No. 361445, OCT. 19, 2023)

- FIND THE FACTS, JUDGE ...
- DENIAL OF MOTHER'S REQUEST FOR ATTORNEY FEES REMANDED DUE TO INSUFFICIENT FACTFINDING

EBY V EBY, UNPUBLISHED, ISSUED OCTOBER 26, 2023 (DOCKET NO. 364709).

ATTORNEY FEE AWARD FOR UNREASONABLE CONDUCT REVERSED DUE TO INADEQUATE FACTFINDING

MOSEY V MOSEY, UNPUBLISHED (DOCKET NO. 357312, APR. 21, 2022)

Unreasonable Conduct

Unreasonable conduct (stalking, belligerence, giving plaintiff “the finger”) and causing unnecessary litigation costs justified award of attorney fees

Kenzie v Kenzie, unpublished (Docket No. 335873, Aug. 8, 2017)

Unreasonable conduct (including a faked notice of hearing resulting in appearance of plaintiff and her attorney in court), and financial need/ability to pay justified award of attorney fees

Kaeb v Kaeb, unpublished (Docket No. 333599, Oct. 19, 2017)

Appellate Fees

Award of appellate attorney fees, in addition to trial fees, upheld on appeal
Lorencz-Krell v Krell, unpublished (Docket Nos. 356764, 358506, July 21, 2022)



QUESTIONS?