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"Reasonable" vs. "Actual": Supreme Court Declines To Address Whether A "Reasonable Attorney Fee" Under The Case Evaluation Rule Can Be Based On A Rate That Exceeds What Was Actually Billed

By Drew Broaddus

The Michigan Supreme Court recently vacated its own March 2010 order granting leave to appeal in *Singer v Sreenivasan,* unpublished opinion per curiam of the Michigan Court of Appeals, issued Sept. 1, 2009 (Docket No. 284575). Although not binding precedent, the Court of Appeals' opinion in *Singer* offers important insights into how trial courts can determine what is a "reasonable attorney fee" under the Case Evaluation Rule, MCR 2.403(O)(1).

In *Singer*, Plaintiff rejected a $95,000 case evaluation award. The matter proceeded to trial, where a jury returned a verdict of $42,500 in Plaintiff's favor (which the trial court adjusted for prejudgment interest to $46,758.41). This verdict – although it was in Plaintiff's favor – was "more favorable" to Defendant under MCR 2.403(O)(1), because it was more than 10% below the case evaluation award. Defendant was awarded case evaluation sanctions, which included reasonable attorney fees. Plaintiff appealed the case evaluation award, arguing (among other things) that Defendant could not recover a "reasonable attorney fee" based on a rate higher than the rate counsel for Defendant actually billed.

The Court of Appeals rejected Plaintiff's argument. *Id.* at *5. The Court looked to former Chief Justice Cliff Taylor's then recent plurality opinion in *Smith v Khouri*, 481 Mich 519 (2008). *Smith* explained that the Case Evaluation Rule "permits an award of a

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The Supreme Court's denial of leave in *Singer* is not precedent as it did not express an opinion as to whether the Court of Appeals' decision was correct. However, the current law (upon which *Singer* relied) is that a prevailing party may recover attorney fees which are greater than the actual fees charged under the Case Evaluation Rule.

Singer and the prior cases do not establish an *entitlement* to an hourly rate beyond what was actually charged. Rather, the rule merely says that trial courts have the discretion to give such an award. The request must still be supported by attorney affidavits outlining various factors and market data in accordance with *Smith.*

Justice (then Judge) Alton Davis sat on the Court of Appeals' panel in *Singer.* For this reason, he did not participate in the Supreme Court's decision to deny leave. The Court of Appeals' *Singer* opinion may give us some indication of how our newest Justice will approach this issue in the future.

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[1] Secrest Wardle represented the Defendant in *Cleary*.

reasonable fee, i.e., a fee similar to that customarily charged in the locality for similar legal services, which, of course, may differ from the actual fee charged…." The Court of Appeals also cited *Cleary v Turning Point*, 203 Mich App 208 (1993)[1], where it had previously allowed a "reasonable attorney fee" under MCR 2.403(O)(1) that was "calculated at an hourly rate higher than the hourly rate that defendant was charged by defense counsel." *Id*. at 212.

In *Singer*, Defendant's counsel requested a "reasonable fee" of $250 per hour, which was more than the actual fee. The requested rate was supported by the 2007 Economics of Law Survey from the State Bar of Michigan and affidavits from Defendant's counsel and another attorney. The trial court determined that a rate of $175 an hour was "reasonable under the circumstances." Plaintiff did not argue that this hourly rate was unreasonable or that the trial judge abused his discretion. Rather, Plaintiff simply argued that MCR 2.403(O)(1) requires an attorney fee to "be incurred" in order to be recoverable. According to Plaintiff, awarding an attorney fee at an hourly rate greater than the rate charged was the equivalent of awarding punitive damages. The Court of Appeals rejected this argument based on prior decisions including *Cleary.* These decisions "leave no doubt that a reasonable attorney fee awarded can be calculated at an hourly rate higher than the rate charged." *Singer, supra*, at *7.

The Court of Appeals' decision appears to have rested largely upon statements in *Smith* and *Zdrojewski v Murphy*, 254 Mich App 50, 72 (2002) that a "reasonable" fee does not necessarily have to be *the same* as the actual fee charged. However, those decisions stopped short of explicitly saying a fee could be calculated at a rate *higher* than what was charged.

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