

**STATE OF MICHIGAN
WASHTENAW COUNTY TRIAL COURT**

JEROME SCHULTE, ET AL.,
Plaintiffs,

v

CITY OF ANN ARBOR,
Defendant.

Case No. 09-48-NZ
Hon. Archie C. Brown

Peter W. Macuga (P28114)
Attorney for Plaintiff

Stephen K. Postema (P38871)
Attorney for Defendant

**OPINION AND ORDER GRANTING DEFENDANT'S
ATTORNEY FEES & COSTS**

Held in Ann Arbor, Michigan
on February 19, 2010

This action is before the Court on the Defendant's Request for Attorney Fees and Costs, that had been taken under advisement by the Court, and that was awarded pursuant to this Court's grant of Plaintiff's Motion for Partial Summary Disposition. After review of the pleadings submitted by counsel for the parties, previous argument by counsel in court, and for the further reasons stated by the Court in this Opinion and Order, the Court grants the Defendant its attorney fees and costs for the services rendered by its attorney in the amount set forth below.

The general "American rule" is that "attorney fees are not ordinarily recoverable unless statute, court rule or common-law exception provides the contrary." *Smith v. Khouri*, 481 Mich. 519,526 (2008).

One means for an award of attorney fees and costs is a finding that the claim or defenses interposed by a party is without merit and/or frivolous pursuant to MCR 2.114(F) and MCR 2.625(A)(2), and MCL 600.2591.

In this Court's ruling on November 19, 2009, the Court granted the Defendant's request for its attorney fees and costs regarding Count II of Plaintiff's complaint, taking under advisement the amount of the fees and costs subject to further pleadings filed by the parties.

The basis for the award of attorney fees and costs as earlier placed on the record was this Court's finding that Plaintiff's action was without merit and frivolous pursuant to MCR 2.114 (E) and (F) and MCR 2.625(A)(2), and MCL 600.2591.

Much of Plaintiff's Answer to Defendant's Request for Attorney Fees and Costs is in essence a Motion for Reconsideration, and therefore, is not properly before the Court. The Court will only consider that part of the response that addresses the issue before the Court, that being the determination of a reasonable attorney fee to Defendant.

The Supreme Court in *Smith v. Khouri, supra*, set forth the factors to be considered by the trial court in determining the reasonableness of an award of attorney fees. The Court must determine the reasonable hourly rate customarily charged in the locality for similar legal services, multiplied by the reasonable number of hours expended, with the calculation subject to adjustment up or down based on the factors stated in *Wood v. DAHE, 413 Mich. 573 (1982)* and in MRPC 1.5(a).

The determination of the reasonable hourly rate customarily charged in the locality for similar legal services, entails the use of reliable surveys or other-credible evidence. The Court has previously heard testimony on this issue in other cases within the last year. The Court also relies upon Defendant's Attachments B (the 2007 State Bar of Michigan Economics of Law Practice Summary Report) and C (the Michigan Lawyers Weekly 2006 Economics of Law Practice Monitor) to the Affidavit of Abigail Elias.

Defendant argues that the request for attorney fees at a rate of \$210.00 per hour is unreasonable

for a "non-private practicing attorney", because that rate exceeds the hourly rate of \$84.21 per hour paid to Defendant's counsel as an in-house attorney. Plaintiff contends that a reasonable hourly rate is \$40.00 per hour.

An award of attorney fees is not limited to the attorney's individual compensation, but should include overhead costs and support staff costs of that attorney's office. *Allard v. State Farm Ins. Co.*, 271 Mich App 394 (2006); *Anglers of Ausable, Inc. v. Dep't of Environmental Quality*, 283 Mich App 115 (2009).

The Court finds that an hourly fee in the amount of \$210.00 represents the fee customarily charged in this locality for similar legal services, which is reflected by the market rate for the attorney's work. The market rate is the rate that lawyers of similar ability and experience in the community normally charge their paying clients for the type of work in question. *Smith v. Khoury, supra*, p. 480.

The Court can see the merit in Defendant's request and has ruled similarly for a public entity (a University), particularly where the attorney was engaged in a 6 day jury trial. The Court also appreciates that a reasonable hourly rate for in house counsel may be less than what outside counsel would have been paid by the entity, particularly involving pretrial matters. For these reasons the Court determines that the reasonable hourly rate for Ms. Elias' services to the Defendant is \$160.00 per hour. In so doing the Court relies upon the factors stated in *Wood v. DAHE*, 413 Mich. 573 (1982) and in MRPC 1.5(a) below.

The Rules of Professional Responsibility, MRPC 1.5(a), set forth the following factors to be considered in determining the reasonableness of an attorney fee:

1. the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
2. the likelihood, if apparent to the client, that the acceptance of the particular employment would preclude other employment by the lawyer;

3. the fee customarily charged in the locality for similar legal services;
 4. the amount involved and the results obtained;
 5. the time limitations imposed by the client or by the circumstances;
 6. the nature and length of the professional relationship with the client;
 7. the experience, reputation and ability of the lawyer or lawyers performing the services;
- and
8. whether the fee is fixed or contingent.

Defendant's attorney submitted an itemized bill identifying the amount of time spent, that being 32.56 hours, for services rendered for the period April 1, 2009 through December 1, 2009.

Plaintiff objects arguing that Defendant's time is overstated, however, Plaintiff does not identify with any specificity what time entries are "overstated" other than reference to the 4.43 hours spent on April 6, 2009 and a broad claim that discovery as to the time expended "would shed light on the reasonableness of the time claim."

A party "may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority." *People v. Kelly*, 231 Mich App 627, 640-641 (1998).

As both parties surely realize, each attorney spends more or less time on each matter depending on a myriad of factors, including in part those identified in *Wood v. DAIE*, 413 Mich. 573 (1982) and in MRPC 1.5(a), that the Court does not need to recount here. This Court does not find the hours charged by Defendant's attorney fees are clearly excessive. Defendant has satisfactorily submitted detailed billing records that do not appear to this Court to be excessive, redundant or otherwise unnecessary, particularly given the nature of the issues involved and the attorney's skill, reputation and experience.

The Court finds that the time expended in the amount of 32.56 hours at the rate of \$160.00 per

hour results in a total attorney fee of \$5,209.60 plus costs of 20.00 for a total award of \$5,229.60.

The Court finds, for all the reasons set forth above, that the costs incurred are reasonable given the issues placed before the Court. Similarly, the Court finds that the attorney fees incurred are reasonable given the issues placed before the Court.

Plaintiff's request for discovery and an evidentiary hearing on both frivolousness and attorney fees is denied. The issue of frivolousness is not properly before the Court to grant the relief requested. The issue of attorney fees does not require either discovery or an evidentiary hearing for the reasons set forth above.

IT IS ORDERED that the total amount of attorney fees and costs awarded to Defendant in the amount of \$5,229.60 shall be paid by Plaintiff to Defendant within 60 days of the date of this Order without interest. In addition to any other costs or sanctions that may be imposed by this Court if Plaintiff fails to pay as ordered, judgment interest shall accrue upon the entire unpaid balance retroactive to the date of this Order, if not paid as ordered above.

DATED: February 19, 2010



Hon. Archie C. Brown
Trial Court Judge

PROOF OF SERVICE

The undersigned certifies that the foregoing instrument was served upon all parties to the above cause to each of the attorneys of record herein at their respective addresses disclosed on the pleadings on _____ 20____

By: _____ U.S. Mail _____ Express Mail
Hand Delivered Fax _____ Inter Office

Signature

