STATE OF MICHIGAN

COURT OF APPEALS

ILENE TINMAN and MICHAEL TINMAN, as next friends of TZVIH TINMAN, Plaintiffs-Appellees, v BLUE CROSS AND BLUE SHIELD OF MICHIGAN, Defendant-Appellant.	UNPUBLISHED September 6, 2012 No. 298036 Wayne Circuit Court LC No. 99-932051-CK

Before: GLEICHER, P.J., and METER and DONOFRIO, JJ.

PER CURIAM.

Defendant appeals as of right from an opinion and order awarding $655,000 in attorney fees and $2,440 in costs to plaintiffs. We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

Defendant first argues that the trial court erred in concluding that the doctrine of merger barred consideration of defendant's defense, under MCL 550.1402(11), that its failure to pay the emergency medical expenses of plaintiffs' son, Tzvih Tinman (Tzvih), was the result of a "bona fide error." We disagree. Whether the doctrine of merger bars defendant's assertion of the bona-fide-error defense is a question of law. We review questions of law de novo. *Solution Source, Inc v LPR Assoc Ltd Partnership*, 252 Mich App 368, 377; 652 NW2d 474 (2002).

MCL 550.1402(11) provides:

> In addition to other remedies provided by law, an aggrieved member may bring an action for actual monetary damages sustained as a result of a violation of this section. If successful on the merits, the member shall be awarded actual monetary damages or $200.00, whichever is greater, together with reasonable attorneys' fees. If the health care corporation shows by a preponderance of the evidence that a violation of this section resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid the error, the amount of recovery shall be limited to actual monetary damages.

The trial court concluded that the doctrine of merger barred defendant's assertion of the bona-fide-error defense in MCL 550.1402(11) because an earlier order, on November 10, 2005,

constituted a final judgment to which the doctrine applied. "When a cause of action is reduced to a final judgment, merger serves to bar a subsequent suit based on the same cause of action between the same parties." *Solution Source*, 252 Mich App at 376. See also *Union Guardian Trust Co v Rood*, 308 Mich 168; 13 NW2d 24 (1944) (a plaintiff's original claim is merged into a final judgment and any subsequent litigation is based on the judgment itself).

The November 10, 2005, order stated that it "disposes of the last pending claim and closes the case, except as set forth herein." It stated that "this order and/or any appeal of this Order shall not affect Plaintiff's [sic] continuing right and/or ability to have this Court consider the proper *amount* of attorneys' fees and costs to be awarded Plaintiff [sic] pursuant to MCL 550.1402(11) as set forth in this Court's July 11, 2005 Order, or otherwise." (Emphasis added.) The July 11, 2005, order referenced in the November 10, 2005, order, stated: "It is further ordered that, for the reasons stated on the record, the Court will consider the proper *amount* of attorneys' fees and costs to be awarded Plaintiff [sic] pursuant to MCL 550.1402(11) pursuant to a motion to be filed by Plaintiff [sic] for an award of such attorneys' fees and costs, a response to such motion by Defendant, and an appropriate hearing, evidentiary hearing, or trial as determined by the Court." (Emphasis added.) At the April 28, 2005, hearing preceding the July 11, 2005, order, the parties clearly argued the applicability of the bona-fide-error defense. After listening to arguments pertaining to this defense, the trial court stated, on the record, that plaintiffs were entitled to an award of fees, and it then entered the order indicating that the *amount* of fees would be determined at a later date. The written order specifically referred to the record of the hearing. Clearly, then, considering the context and explicit language of the July 11 and November 10 orders, there was a final judgment indicating that attorney fees were appropriate; only the amount was left to be determined after November 10, 2005. Accordingly, the trial court did not err in applying the doctrine of merger to prevent defendant from relitigating the bona-fide-error issue.[1]

Defendant next argues that the trial court erred in refusing to deny in its entirety plaintiffs' request for attorney fees on the ground that the amount initially requested was excessive. We disagree. This Court reviews for an abuse of discretion a trial court's award of attorney fees and its determination of the reasonableness of the fees. *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008); *Augustine v Allstate Ins Co*, 292 Mich App 408, 424; 807 NW2d 77 (2011). "An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes." *Smith*, 481 Mich at 526. "Any findings of fact on which the trial court bases an award of attorney fees are reviewed for clear error, but questions of law are reviewed de novo." *Reed v Reed*, 265 Mich App 131, 164; 693 NW2d 825 (2005) (citations omitted). The determination regarding whether a trial court may deny a request for attorney fees in its entirety on the ground that the requested fees are excessive requires this Court to interpret MCL 550.1402(11). We review questions of statutory interpretation de novo. *Detroit Leasing Co v Detroit*, 269 Mich App 233, 235; 713 NW2d 269 (2005).

[1] Defendant suggests, tangentially, that the July 11, 2005, order was erroneous, but this issue was not included in the statement of questions presented for appeal, and we do not consider it. *Busch v Holmes*, 256 Mich App 4, 12; 662 NW2 64 (2003).

In *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999), the Michigan Supreme Court explicated the following principles of statutory interpretation:

> The rules of statutory construction are well established. The foremost rule, and our primary task in construing a statute, is to discern and give effect to the intent of the Legislature. This task begins by examining the language of the statute itself. The words of a statute provide the most reliable evidence of its intent . . . . If the language of the statute is unambiguous, the Legislature must have intended the meaning clearly expressed, and the statute must be enforced as written. No further judicial construction is required or permitted. Only where the statutory language is ambiguous may a court properly go beyond the words of the statute to ascertain legislative intent. [Internal citations and quotation marks omitted.]

In short, this Court must discern the legislative intent that may reasonably be inferred from the words used in the statute. *Mich State Employees Ass'n (MSEA) v Dep't of Corrections*, 275 Mich App 474, 478; 737 NW2d 835 (2007). "The wisdom of a statute is for the determination of the Legislature and the law must be enforced as written." *Detroit Leasing Co*, 269 Mich App at 239.

The plain language of MCL 550.1402(11) provides that a plaintiff who prevails on the merits "*shall* be awarded . . . reasonable attorneys' fees." (Emphasis added.) The use of the term "shall" indicates a mandatory provision. *MSEA*, 275 Mich App at 480. The only statutory exception is that no attorney fees are to be awarded if the defendant shows by a preponderance of the evidence that the statutory violation resulted from a bona fide error despite the maintenance of procedures reasonably adapted to avoid the error. MCL 550.1402(11). The Legislature did not provide an exception for plaintiffs whose initial fee requests were excessive.

To be sure, the fee applicant carries the burden of proving that the requested fees were incurred and that they are reasonable. *Smith*, 481 Mich at 528-529; *Reed*, 265 Mich App at 165-166. It thus follows that if the applicant fails to meet that burden, the trial court must decline to award attorney fees. Moreover, to avoid encouraging excessive fee requests, a trial court should carefully endeavor to limit any award to a reasonable amount by adhering to the analysis in *Smith*, 481 Mich at 530-534, rather than attempt to "split the difference" such as by awarding a certain percentage of the requested amount. Further, the excessive nature of an initial request may be relevant in determining whether the plaintiff has established the reasonableness of any purported fees. Fee-shifting provisions are "not designed to provide a form of economic relief to improve the financial lot of attorneys or to produce windfalls." See, generally, *id*. at 528. If, however, the fee applicant can satisfy his or her burden of establishing reasonable attorney fees that were incurred, the trial court may not deny a fee request in its entirety merely because the initially requested amount exceeded what was later determined to be reasonable. The federal case law cited by defendant is inapt in light of the mandatory nature of the attorney-fee language

in MCL 550.1402(11).[2] Therefore, the trial court did not err in implicitly rejecting defendant's argument on this issue.

Defendant next argues that the trial court abused its discretion in refusing to complete the evidentiary hearing regarding attorney fees. We agree. Generally, a trial court's decision regarding whether to hold an evidentiary hearing is reviewed for an abuse of discretion. *Kernen v Homestead Dev Co*, 252 Mich App 689, 691; 653 NW2d 634 (2002).

"The party requesting attorney fees bears the burden of proving they were incurred, and that they are reasonable. When requested attorney fees are contested, it is incumbent on the trial court to conduct a hearing to determine what services were actually rendered, and the reasonableness of those services." *Reed*, 265 Mich App at 165-166 (citations omitted). "If a factual dispute exists over the reasonableness of the hours billed or hourly rate claimed by the fee applicant, the party opposing the fee request is entitled to an evidentiary hearing to challenge the applicant's evidence and to present any countervailing evidence." *Smith*, 481 Mich at 532.

Here, the trial court held an evidentiary hearing over four days.[3] The only witness to testify at the hearing was plaintiffs' attorney Elwood S. Simon, and his testimony was not completed at the end of the fourth day. Plaintiffs did not present the testimony of any of the eight other attorneys for whose services plaintiffs sought to collect fees. Throughout the evidentiary hearing, plaintiffs' counsel indicated that other witnesses would testify regarding their hours billed. For example, on the second day of the hearing, when the trial court questioned a particular billing entry, plaintiffs' counsel Stuart Lebenbom stated, "Your Honor, I trust you're a fair man. You're not going to prejudge this case *without providing an opportunity to bring witnesses. We're just starting, Judge. We're just starting*." (Emphasis added.) Later, Lebenbom told the court, "To a degree there are things which require judgment calls *and the witnesses are going to testify as to how they made their calls, and that's it*." (Emphasis added.) On the third day of the hearing, Lebenbom told the court, "So what I've done is we've created some summaries and we've gone over this stuff individually, all of our efforts individually, and Mr. [John P.] Zuccarini[, an attorney in Simon's firm], *who I'll be calling next*, has done some compilations of the total time." (Emphasis added.) At a later point, Lebenbom assured the court that "Mr. Zuccarini can testify" regarding an apparent discrepancy in a billing entry. Lebenbom also suggested that other witnesses would be available for defense counsel to cross-examine when he stated that it was "defense counsel's job after [plaintiffs] make that prima facie showing to then go through the individual ones and say how did you determine that this or that or this or that goes to this or that."

During his testimony, Simon suggested that Zuccarini would testify regarding the preparation of documents supporting the fee application. Simon testified, "Mr. Zuccarini was primarily involved in that preparation, *and when he testifies I'm sure he can tell you exactly what*

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[2] "Moreover, lower federal court decisions are not binding precedent in this Court." *Allen v Bloomfield Hills Sch Dist*, 281 Mich App 49, 59; 760 NW2d 811 (2008).

[3] The predecessor trial judge presided over the evidentiary hearing.

he did to come to the description and why." (Emphasis added.) Simon also testified that the billing summaries "were done by Mr. Zuccarini. He can tell you how the process worked. We've explained that to [defense counsel] a number of times." On cross-examination by defense counsel, Simon testified that Zuccarini "can tell you why the description [on a time slip] was changed from the original entry." Simon further testified:

> *Q.* So if we want some understanding of [plaintiffs' attorney] Mr. [Michael G.] Wassmann's [billing] judgment and discretion we should ask him?
>
> *A.* Or Mr. Zuccarini. He had conversations with him.

Further, the trial court during the evidentiary hearing indicated at various points that witnesses other than Simon would be available for defense counsel to cross-examine. For example, the court indicated to defense counsel that "[y]ou may get up on cross-examination in reference to any fee that they ask you may challenge it [sic]." Later, the court stated, "Mr. [Lance C.] Young and Mr. Wassmann [two of the attorneys for whose services plaintiffs sought to collect fees], somebody's got to show all that they did in connection with this matter to justify whatever hours they're charging. So if Mr. Simon says I did this, we'll listen to him. If he says this was done by one of the other attorneys, *then we'll skip on by it and see what the other attorneys have to say*." (Emphasis added.) The trial court stated that defense counsel "can go down every entry and say what did you do and why did you do it and how does it relate to this." Later, the court stated, "I will allow the defense to go through each and every [billing entry] that they may challenge. If they think, for instance, they want to challenge a conference that was held on 6-30-20 [sic] with [Zuccarini] and then read case strategy, then fine. They can challenge that." When defense counsel indicated that he wished to challenge billing entries by different attorneys for "conferences that don't seem to match up," the trial court stated, "I'll let you get into that in cross-examination."

Also, on the first day of the hearing, the trial court suggested that defense counsel could cross-examine Wassmann, who did the most work on behalf of the Simon firm:

> If you're putting me to the task of reading this whole big book [of exhibits], I'm not going to do it because—I can't do it because then I look at it and I don't know if Mr. Wassmann is—It's Michael G. Wassmann. He said he spent 1,223 hours and three-quarters of an hour at $435 an hour for a half a million dollars worth of fees on this one question.
>
> Huh? For what? What did you [sic]? You were not the lead attorney or anything that I saw necessarily. What did you do and when did you do it? *I gather [defense counsel] has a right to ask him what did you do? When did you do it and how did you do it*. [Emphasis added.]

The trial court stated that defense counsel had a right to cross-examine the attorneys:

> The fact that you—Listen, you could say we had a conference of five hours discussing this and that and the other and each of you charge whatever hourly fee you want. But the defense would have a right to ask, well, what did

> you do, Mr. Lebenbom? What did you do, Mr. Simon? What did you do, Mr. Wassmann, what anybody did [sic]?
>
> He has a right. I don't see where you can just say, well, Judge, here. Here's a big, old fat book with a lot of hours in it which we say we spent on this one issue and so pay us, and it amounts to a million dollars.

The trial court stated that "I need to have every one of these persons, whoever they were, come in here and tell me what they did and why [they] did it and how it relates to this issue." The court further stated, "*I'm going to let [defense counsel] have an opportunity to question every lawyer as to what they did for the hours that they did it*." (Emphasis added.)

In addition, defense counsel indicated before the hearing began that he "anticipate[d] a protracted cross-examination of plaintiff's [sic] attorneys to determine just how many hours were truly related to individual claim issues, in addition to the tedious inquiry necessary to clarify issues such as duplicative effort, inefficiency, and reasonable rates." Defense counsel also explained during the evidentiary hearing various ways in which he planned to challenge the reasonableness of the requested fees. For example, defense counsel explained how he would cross-examine Wassmann:

> Your Honor, let me give you an example or two.
>
> I have the right to ask Mr. Wassmann what did the hundreds and hundreds of hours that you and Mr. Young spent trying to set aside Your Honor's protective order and the Federal Court's protective order, what did that have to do with whether Mr. Tinman has signs and symptoms of an emergency when he went o [sic] Beaumont?
>
> I'm going to ask Mr. Wassmann why do you have two time entries the same date, September 10th, 2001? In one entry you say you spent 9.75 hours—That's a pretty long day—when he also spent another seven hours on the same day. I want to know how is this superman working so hard on this $811 case.

Defense counsel also suggested he would challenge the generic and block nature of various billing entries. Near the end of the fourth day of the evidentiary hearing, defense counsel explained another proposed line of cross-examination of Wassmann:

> MR. WALSH [defense counsel]: But again, your Honor, that doesn't explain at all why [a billing entry] relates to Mr. Tinman's individual claim. And, you know we started on this topic with hundreds and hundreds of hours by Mr. Wassmann claimed in Exhibit 1. And nobody is in a position to tell us—
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> THE COURT: He was.
>
> MR. WALSH: —Mr. Wassmann perhaps. 'Cause I would love to ask him how he could spend a tremendous amount of time, day in day out. And, you know spending literally two full weeks preparing for an argument that last [sic] a half an hour.

On this record, we conclude that the trial court abused its discretion in refusing to complete the evidentiary hearing. At the end of the fourth day of the hearing, only one of the nine attorneys for whose services plaintiffs were seeking nearly $1 million in fees had testified, and his testimony was not completed. As discussed, the trial court and plaintiffs' counsel indicated during the hearing that other witnesses would be available for cross-examination, and defense counsel articulated specific grounds on which he would cross-examine the attorneys regarding the reasonableness or accuracy of the hours billed. Further, defendant was not afforded an opportunity to present any countervailing evidence. Although this case has been pending for many years, the protracted nature of the attorney-fee dispute is due in part to the stay occasioned by plaintiffs' unsuccessful appeal of the class-certification issue. Further, the length of the hearing may be explained by the significant number of hours billed for nine attorneys and the sizable amount of fees plaintiffs are seeking. It is thus reasonable to allow the hearing to continue so that defendant can have an opportunity to cross-examine the attorneys regarding the reasonableness of the hours billed and their hourly rates. To the extent that the bona-fide-error defense remains viable, defendant should also be permitted to present evidence on that issue during the hearing. Defendant was entitled to have the evidentiary hearing completed.

Defendant next argues that the trial court's analysis was insufficient to justify the imposition of $655,000 in attorney fees for a claim of $811. We agree. We conclude that the trial court abused its discretion in awarding attorney fees without making adequate findings regarding the customary fee in the locality for each attorney, the number of hours reasonably expended by each attorney on plaintiffs' individual claim as opposed to their unsuccessful class-action claim, and the use of more than one attorney on the same general tasks.

As discussed, the party requesting attorney fees bears the burden of proving that the fees are reasonable. *Smith*, 481 Mich at 528-529. "In Michigan, the trial courts have been required to consider the totality of special circumstances applicable to the case at hand." *Id*. at 529. In *Wood v Detroit Auto Inter-Ins Exch*, 413 Mich 573, 588; 321 NW2d 653 (1982), mod by *Smith*, 481 Mich at 522, the Michigan Supreme Court listed six factors relevant to computing reasonable attorney fees:

> (1) the professional standing and experience of the attorney; (2) the skill, time and labor involved; (3) the amount in question and the results achieved; (4) the difficulty of the case; (5) the expenses incurred; and (6) the nature and length of the professional relationship with the client. [Internal citation and quotation marks omitted.]

The *Smith* Court noted that the eight factors listed in MRPC 1.5(a), which overlap the *Wood* factors, have also been used to determine reasonable attorney fees:

> "(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 will 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." [*Smith*, 481 Mich at 530, quoting MRPC 1.5(a).]

"In determining 'the fee customarily charged in the locality for similar legal services,' the trial courts have routinely relied on data contained in surveys such as the Economics of the Law Practice Surveys that are published by the State Bar of Michigan." *Smith*, 481 Mich at 530.

The *Smith* Court held that some fine-tuning of the multifactor approach was needed:

> We hold that a trial court should begin its analysis by determining the fee customarily charged in the locality for similar legal services, i.e., factor 3 under MRPC 1.5(a). In determining this number, the court should use reliable surveys or other credible evidence of the legal market. This number should be multiplied by the reasonable number of hours expended in the case (factor 1 under MRPC 1.5[a] and factor 2 under *Wood*). The number produced by this calculation should serve as the starting point for calculating a reasonable attorney fee. We believe that having the trial court consider these two factors first will lead to greater consistency in awards. Thereafter, the court should consider the remaining *Wood*/MRPC factors to determine whether an up or down adjustment is appropriate. And, in order to aid appellate review, a trial court should briefly discuss its view of the remaining factors. [*Smith*, 481 Mich at 530-531.]

The *Smith* Court emphasized that the fee applicant bears the burden to produce satisfactory evidence that the requested rates are reasonable, and it explained the types of proofs needed to establish that the rates comport with those prevailing in the locality for similar legal services. *Id.* at 531-532.

> The fees customarily charged in the locality for similar legal services can be established by testimony or empirical data found in surveys and other reliable reports. But we caution that the fee applicant must present something more than anecdotal statements to establish the customary fee for the locality. Both the parties and the trial courts of this state should avail themselves of the most relevant available data. For example, as noted earlier, in this case defendant submitted an article from the Michigan Bar Journal regarding the economic status of attorneys in Michigan. By recognizing the importance of such data, we note that the State Bar of Michigan, as well as other private entities, can provide a valuable service by regularly publishing studies on the prevailing market rates for legal services in this state. We also note that the benefit of such studies would be

> magnified by more specific data relevant to variations in locality, experience, and practice area. [*Id*. at 531-532.]

"[R]easonable fees are different from the fees paid to the top lawyers by the most well-to-do clients." *Id*. at 533.

Next, the *Smith* Court explained that the "court must determine the reasonable number of hours expended by each attorney." *Smith*, 481 Mich at 532. The fee applicant is required to "submit detailed billing records, which the court must examine and opposing parties may contest for reasonableness. The fee applicant bears the burden of supporting its claimed hours with evidentiary support." *Id*. The reasonable hourly rate must be multiplied by the reasonable hours billed to produce a baseline figure. *Id*. at 533. The court should then "consider the other factors and determine whether they support an increase or decrease in the base number." *Id*. If multiple attorneys expended hours on a case, the trial court "should be careful to perform a separate analysis with reference to [each attorney] . . . , considering both the hourly rates and the number of hours reasonably expended . . . ." *Id*. at 534. A court should also consider whether it was reasonable to have multiple lawyers "on the clock" during the case. *Id*.

In *Augustine*, 292 Mich App at 413, 439, this Court vacated an award of attorney fees and remanded for rehearing and redetermination because, among other reasons, the trial court did not properly apply *Smith*. The trial court "did not comply with the first step in the *Smith* analysis, which is to determine the fee customarily charged in the locality for similar legal services. Though the trial court discussed the evidence presented regarding the fee customarily charged in the locality for similar legal services, it did not conclude that $500 an hour was the fee customarily charged." *Id*. at 426. "[T]he trial court apparently failed to credit the Michigan Bar Journal in its calculus of the appropriate hourly rate. The Michigan Bar Journal article not only ranks fees by percentile, it differentiates fee rates based on locality, years of practice, and fields of practice." *Id*. at 427. Although the trial court in *Augustine* found that $500 was a reasonable fee, it "did not find that $500 per hour was the *fee customarily charged in the locality for similar legal services.*" *Id*. at 427-428 (emphasis in original). Further, after multiplying the $500-an-hour rate by the number of hours reasonably expended, the trial court failed to determine "whether an upward or downward adjustment was appropriate on the basis of the *Wood* and MRPC 1.5(a) factors as our Supreme Court discussed in *Smith* . . . ." *Augustine*, 292 Mich App at 428.

In addition, the *Augustine* Court concluded that "[n]ot only did the trial court fail to make specific findings consistent with *Smith* generally, but it also failed to make findings regarding each attorney whose fees plaintiff sought to recover." *Id*. at 428. This Court "direct[ed] the trial court to make specific findings, consistent with *Smith*, for each attorney whose fees plaintiff sought to recover." *Id*. at 439. This Court also found deficiencies in the trial court's finding regarding the number of hours expended, because of the meager state of the record. *Id*. at 434.

Here, the trial court failed to make adequate findings to aid appellate review, as required by *Smith* and *Augustine*. The trial court listed the *Wood* factors and then correctly cited *Smith* for the proposition that "[t]he first determination to be made is what the customarily charge [sic] fee is in the locality for similar legal services." However, as in *Augustine*, the trial court failed to state any findings regarding the customarily charged fee in the locality for similar legal services.

Instead, the court merely stated, in conclusory fashion: "After considering all of the evidence in this case, a reasonable fee for attorneys Simon, Zuccarini, Wassmann and Young is $400 per hour. The remaining attorneys shall be entitled to the fees requested." The trial court did not state any findings regarding the fees customarily charged in the community for similar legal services or indicate that the fees awarded represented the customary fees. The trial court also failed to cite any evidence to establish the customary fee for the locality, such as "testimony or empirical data found in surveys and other reliable reports." *Smith*, 481 Mich at 531-532. Mere anecdotal statements are insufficient. *Id*. at 532. In addition, the trial court did not explain why it was awarding the same hourly rate of $400 for Simon and three of the attorneys in his firm, given their differing levels of experience. We direct the trial court on remand to make specific findings consistent with *Smith* and *Augustine* regarding the customary fee in the locality for each attorney whose fees plaintiffs seek to recover.

The trial court's analysis regarding the number of hours expended was also insufficient to aid appellate review. The trial court stated:

> BCBSM argues that Plaintiff's request includes time spent pursuing the class action. Plaintiff has already reduced the request for attorney fees by the number of hours attributable to the [unsuccessful] class action lawsuit. It is difficult for the attorneys and the court to allocate the remainder of the fees to either the individual claim or the class action claim. For example, because BCBSM utilized an automated procedure for handling all emergency claims, the discovery sought by Plaintiff related to both BCBSM's handling of Plaintiff's individual emergency claims and BCBSM's handling of all other claims. The fact that the evidence necessary to prove Plaintiff's individual claims was the same evidence necessary to prove other claims does not change the fact that the discovery Plaintiff conducted supported Plaintiff's individual claim. For that reason, where the attorney fees can reasonably be associated with the individual claim, they will be awarded.

The trial court further indicated that it had reduced plaintiffs' requested fee by 309 hours for excessive time on various tasks, including attendance at and preparation for motions, drafting pleadings and orders, preparation of a trial outline, book, and exhibits when no trial was scheduled, and attorney conferences. The court also stated that Lebenbom's fee request was "significantly reduced" because of a lack of detail in his request, but the court offered no further explanation regarding the reduction. The court then stated that plaintiffs were awarded $655,000 in attorney fees but did not explain precisely how it reached that figure.

We conclude that the trial court did not explain adequately how the hours for which it was awarding a fee were reasonably expended in pursuit of plaintiffs' individual claim. Again, "[th]e fee applicant bears the burden of supporting its claimed hours with evidentiary support." *Smith*, 481 Mich at 532. Defendant was entitled to contest the reasonableness of the hours submitted. *Id*. As discussed above, defendant was deprived of a fair opportunity to contest the hours expended because the trial court erroneously refused to complete the evidentiary hearing. Further, the trial court did not explain why the substantial time devoted to discovery efforts in federal court were reasonably necessary to establish plaintiffs' individual claim as opposed to the unsuccessful class-action claim. Given that plaintiffs bore the burden of providing evidentiary

support for their claimed hours, it was not sufficient for the trial court to state that plaintiffs had already reduced the request by the number of hours attributable to the class-action effort or to state that it was "difficult for the attorneys and the court to allocate the remainder of the fees to either the individual claim or the class action claim." Although the trial court later indicated that it had awarded fees where they were "reasonably associated with the individual claim," and that the evidence necessary to prove the individual claims was necessary to prove other claims, the court's explanation for this conclusion did not suffice to aid meaningful appellate review.

Finally, the trial court failed to explain adequately why it was reasonable for plaintiffs to have multiple lawyers "on the clock" in this case. The court stated that the use of more than one lawyer on the same general task is not necessarily excessive, that effective preparation often involves collaboration, and that "[i]n several instances, the court deems reasonable the use of more than one attorney in this case." The court stated that it reduced the number of hours to a more reasonable figure when deemed excessive. The court offered no specific findings explaining on what grounds it had concluded that multiple attorneys were required to perform specific tasks. The trial court should address this issue more fully on remand.

Accordingly, we direct the trial court to make more specific findings, consistent with *Smith* and *Augustine*, regarding the customary fee in the locality for each attorney whose fees plaintiffs seek to recover, the reasonable number of hours expended by each attorney, and the reasonableness of having multiple attorneys working on the same general task. The trial court should make its findings following a completed evidentiary hearing on remand.

Finally, defendant argues that the trial court improperly relied on a so-called "catalyst" theory (involving an analysis regarding whether defendant changed its conduct favorably as a result of the litigation) to support its fee award. We agree. In assessing whether plaintiffs' baseline attorney fees were excessive in light of the size of the monetary judgment, the trial court abused its discretion in considering defendant's voluntary changes to its emergency-claims procedures.

As discussed, after a trial court determines a baseline attorney-fee award on the basis of the reasonable hourly rate multiplied by the reasonable hours expended, the court should then "consider the other factors and determine whether they support an increase or decrease in the base number." *Id*. at 533. "The trial court may in its discretion adjust fees upward or downward." *Augustine*, 292 Mich App at 437. Among the other factors that should be considered are "the amount involved and the results obtained." *Smith*, 481 Mich at 530, quoting MRPC 1.5(a); *Wood*, 413 Mich at 588.[4] "In its discussion of *Wood* factor 3 ('the amount in

[4] The lead opinion in *Smith* concluded that "the amount in question and the results achieved" should not be considered in determining a reasonable attorney fee for case-evaluation sanctions. *Smith*, 481 Mich at 534 n 20. The lead opinion noted that the purpose of such sanctions was to encourage serious consideration of case-evaluation awards and to penalize a party that rejected an evaluation. *Id*. The lead opinion concluded that it would be inconsistent with that purpose to reduce attorney fees on the basis of the amount in question or the results achieved. *Id*. We conclude that this aspect of the lead opinion's analysis is limited to the context of case-

question and the results achieved'), in assessing attorney fees, this Court has stated that a reasonable fee is proportionate to the results achieved." *Augustine*, 292 Mich App at 436-437. The trial court must evaluate "the results obtained *in the context of the claim presented*." *Id*. at 437 (emphasis added). Moreover, the statutory provision at issue, MCL 550.1402(11), states: "If successful *on the merits*, the member shall be awarded actual monetary damages or $200.00, whichever is greater, together with reasonable attorneys' fees." (Emphasis added.) The statutory reference to "the merits" suggests that it is the judicially-sanctioned result achieved in the case itself, rather than any collateral or indirect effects of the litigation, that should be considered in determining a reasonable fee.

A somewhat analogous conclusion was reached by the United States Supreme Court in *Buckhannon Bd and Care Home, Inc v West Virginia Dep't of Health and Human Resources*, 532 US 598; 121 S Ct 1835; 149 L Ed 2d 855 (2001). In that case, the Court held that a plaintiff was not a "prevailing party" for the purposes of federal attorney-fee provisions where it failed to secure a judgment on the merits but the lawsuit brought about a voluntary change in the defendant's conduct. *Id*. at 600. The Court reasoned that an enforceable judgment on the merits or a court-ordered consent decree was necessary to create the material alteration of the legal relationship of the parties necessary to award attorney fees. *Id*. at 604. "A defendant's voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial *imprimatur* on the change." *Id*. at 605 (emphasis in original). The Court stated that it had never "awarded attorney's fees for a nonjudicial alteration of actual circumstances." *Id*. at 606 (internal quotation marks omitted). The Court also noted that adoption of a so-called "catalyst" theory for awarding attorney fees could create a disincentive for a defendant to voluntarily change its conduct because "the possibility of being assessed attorney's fees may well deter a defendant from altering its conduct." *Id*. at 608. Finally, a "catalyst" theory would require a highly fact-intensive inquiry regarding the defendant's subjective motivation for changing its conduct, contravening the goal of avoiding a second major litigation regarding attorney fees. *Id*. at 609.

Plaintiffs are correct that *Buckhannon* is not directly controlling because plaintiffs here obtained a judgment on the merits. However, we find the reasoning in *Buckhannon* convincing. It lends further support to our conclusion, on the basis of *Augustine* and MCL 550.1402(11), that the results achieved should be considered in the context of the claim presented, i.e., the substantive merits of the case, rather than a change in the defendant's conduct that the trial court did not order.

Defendant voluntarily changed its emergency-claims procedures. The trial court did not order defendant to make the change. Indeed, plaintiffs acknowledge that defendant effectuated the change in 2001, i.e., years before the trial court granted summary disposition to plaintiffs on the merits of their individual claim in 2005. Thus, defendant's voluntary change in its conduct was not a judicially-sanctioned result obtained in this litigation. Accordingly, in assessing whether the amount in question or the results achieved warrant an upward or downward

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evaluation sanctions and does not apply here. Moreover, we note that a majority of justices did not concur with this aspect of the lead opinion.

adjustment of the baseline fee, the trial court on remand shall confine its analysis to the trial court's judgment on the merits.

We do not suggest, however, that the fee awarded must necessarily be less than the monetary damages. Indeed, defendant acknowledges that "[s]tatutory fees make it possible to pursue small claims and in some cases a fee award might be several times the actual damages recovered." Moreover, the text of MCL 550.1402(11) suggests that the purpose of the attorney-fee provision is to allow recovery of small claims. By stating that a plaintiff may recover as little as $200 *and* an attorney fee, the statutory language plainly reflects that an attorney fee may in some cases exceed the amount of the monetary recovery. Nonetheless, in applying the results-obtained factor, the degree or ratio by which the attorney fee exceeds the monetary damages in a particular case may be a relevant consideration in determining whether an adjustment of the baseline fee is warranted.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher
/s/ Patrick M. Meter
/s/ Pat M. Donofrio