PREVAILING-PARTY ATTORNEY FEES

Amendments to Michigan Court Rule 2.110

Issue

Should the Representative Assembly recommend that Michigan Court Rules, Chapter 2, Civil Procedure, be amended to include proposed subsection (D) to MCR 2.110?

Rule 2.110 Pleadings

(A) [Unchanged]

(B) [Unchanged]

(C) [Unchanged]

(D) Prevailing-Party Attorney Fees. If any party pleads a claim for prevailing-party fees, that puts prevailing-party fees at issue for all parties, and other parties need not plead a prevailing-party fee claim to seek such prevailing-party fees. "Prevailing-party fees" means attorney fees or costs for a prevailing party under contract, court rule, order, or statute.

Should the Representative Assembly recommend that Michigan Court Rules, Chapter 2, Civil Procedure, be amended to include a new subsection as MCR 2.501(E)?

Rule 2.501 Scheduling Trials; Court Calendars

(A) [Unchanged]

(B) [Unchanged]

(C) [Unchanged]

(D) [Unchanged]

(E) Subject to MCR 2.508, a prevailing-party fee claim must be decided in a post-judgment proceeding after the underlying claims are decided. This does not affect the finality of the judgment on the underlying claims. "Prevailing-party fee" means attorney fees or costs for a prevailing party under contract, court rule, order, or statute.

Proponent

The State Bar of Michigan Civil Procedure & Courts Committee.

Background

In civil litigation, a prevailing party may be entitled to attorneys' fees by virtue of a contract or a statute. In these situations, two difficulties arise:

First, Michigan law currently appears to require a defendant sued under a contract which contains a prevailing-party attorneys' fee provision to file a pleading in order to recover those fees.

- In *Fleet Bus Credit v Krapohl Ford Lincoln Mercury Co*, 274 Mich App 584, 591; 735 NW2d 644, 649 (2007), a contract contained a prevailing-party fee shift provision. A third-party defendant filed an answer which contained a statement that asked for a no cause and "and [to] allow Third–Party Defendant all reasonable court costs and attorney's fee[s] so unjustly incurred in defense of this matter." The case was tried to a jury; the third-party plaintiff prevailed; the Court of Appeals reversed. On remand, the third-party defendant filed a motion for fees as prevailing party, which was granted. The Court held that such a contractual fee-shifting provision is enforceable and that it is not "special damages" that must be specifically pled under MCR 2.112(I). As a result, fees in that instance were held to be recoverable even when no specific prayer for the recovery of fees was in the answer.

- In *Pransky v Falcon Group, Inc*, 311 Mich App 164 (2015), plaintiff sued on a contract which provided that, in the event of litigation under the contract, the prevailing party would be entitled to an award of attorneys' fees. Defendant prevailed and was awarded fees. On appeal, plaintiff argued that because defendant did not assert a counterclaim for breach of contract, it was not entitled to fees.[1] The Court of Appeals agreed, reasoning that because an award of fees under a contract constitutes a form of damages, a claim must be asserted. The Court did not attempt to explain how its ruling was consistent with *Fleet Bus Credit*.[2] As noted below, the Court of Appeals further declined to address whether a subsequent claim by the defendant against the plaintiff for fees was barred under *res judicata*, because that issue was premature.

- While the Supreme Court has not weighed in, the *Pransky* rule is now regularly regarded as the law in Michigan: a defendant who prevails but does not actually file a counterclaim is barred from recovering fees, even if the prevailing party. See, e.g., *Fitness Intl, LLC v Natl Retail Properties Ltd Pship*, unpublished opinion of the Court of Appeals, issued October 13, 2022 (Docket No. 358680), 2022 WL 7723954 ("Finally, defendant points out that its claim for attorney fees would not have been ripe at the initiation of the action, given that no prevailing party then existed. Notwithstanding that such a claim would not have been ripe, *Pransky* appears to require a prevailing party to file a counterclaim or complaint to enforce the lease after the circuit court entered its summary disposition order."). Moreover, the *Pransky* requirement of a pleading has been extended to apply to prevailing-party fee provisions as part of a statute that directed courts to award fees when provided for in condominium bylaws

[1] While it appears from the docket of the circuit court that defendant filed an answer to the complaint, there is no discussion in the appellate court's decision regarding whether the contents of defendant's answer may have constituted an undesignated counterclaim in its answer eligible for treatment as a properly asserted counterclaim pursuant to MCR 2.110(C)(2).

[2] A subsequent attempt to harmonize these rulings was made in *Atlas Indus Contractors v Ross*, unpublished opinion of the Court of Appeals, issued February 17, 2022 (Docket No. 356179), 2022 WL 495072, p 3, but unconvincingly and, in any event, in an unpublished opinion.

(*Highfield Beach at Lake Michigan v Sanderson*, 331 Mich App 636; 954 NW2d 231 (2020)(holding that *Pransky* controlled over contrary earlier case law and that, when read as a whole, the party's pleading contained allegations requesting attorney's fees "even though they are not specifically contained in a count identified or labeled as a contract claim"); see also *id.* at 678 (concurring opinion noting plaintiff's request for an order awarding fees in its prayer for relief even though not labeled a contract claim for fees); a consent judgment (*Schneider v City of Orchard Lake Vill*, unpublished opinion of the Court of Appeals, issued May 26, 2022 (Docket No. 357380), 2022 WL 714515)(disclosure: a subcommittee member was counsel to a party in *Schneider*); and an arbitration provision (*Atlas Indus Contractors v Ross*, unpublished opinion of the Court of Appeals, issued February 17, 2022 (Docket No. 356179), 2022 WL 495072).

Putting aside one's opinion of the *Pransky* rule, to require the non-pleader (or responding party) to file its own pleading, just in case it is ultimately adjudicated the prevailing party, creates potential inefficiencies. Normally, courts eschew hypothetical questions, yet under *Pransky* the issue needs to be asserted in an actual pleading. A defendant who does not file a pleading but instead responds to a complaint solely through a motion for summary disposition risks losing the entitlement to fees it would otherwise be eligible to collect if it filed an answer seeking such fees, even if not explicitly designated a counterclaim. A defendant could potentially move to amend post-judgment and assert a counterclaim once it is adjudicated to be a prevailing party, or assert the claim in a separate lawsuit, but that raises at least two sets of issues: (1) whether such a pleading or claim would be allowed (*Pransky* raised but did not decide whether res judicata would bar such a move[3]); and (2) whether all of that extra procedure is efficient and necessary.

On the other hand, parties are in control of their own pleadings, and there may be sound reasons for a party to forgo a prevailing-party fee counter claim. Furthermore, the courts may wish to hold parties to their chosen litigation positions and not award fees to a prevailing party who would otherwise be entitled to such fees as a matter of contract but for their failure to ask for them.

The Committee's proposed solution to ameliorate this issue is to add a new subsection (D) to MCR 2.110 that makes entitlement to prevailing-party fees available to all parties if put at issue by any one party.

Second, the other implication of *Pransky* is that because prevailing-party fees constitute a claim, when a jury is the finder of fact, it must determine whether to award fees and in what amount.[4]

- Long before *Pransky,* this was the law in Michigan. *Citizens Nat Bank of Cheboygan v Mayes*, 133 Mich App 808, 813; 350 NW2d 809 (1984) ("Plaintiff should have presented [its claim for contractual attorneys' fees] to the jury during its presentation of evidence on the damages issue so that the jury could determine whether or not plaintiff was entitled to such attorney fees

[3] In a different context, *In re Estate of Carlsen*, 339 Mich App 483, 493; 984 NW2d 788 (2021), app dis sub nom. *In re Carlsen Estate*, 980 NW2d 59 (Mich, 2022), suggests that the non-suing party's claim to fees does not accrue until the verdict is delivered.

[4] These issues do not typically arise in the federal courts due to Fed.R.Civ.P. 54(d)(2). Caselaw decided under that rule regularly holds that prevailing-party fees are awarded post-judgment under that rule, and that no specific pleading is required. See, e.g., *Specialty Retailers, Inc v Main St NA Parkade, LLC*, 804 F Supp 2d 68, 73 (D Mass, 2011); *Capital Asset Research Corp v Finnegan*, 216 F3d 1268 (CA 11, 2000); Wright & Miller, § 2680 Procedure for the Award of Attorney's Fees, 10 Fed. Prac. & Proc.Civ. § 2680 n.2 (4th ed.).)

and, if entitled, could determine the amount of the fees."). In a jury case, a directed verdict dismissing plaintiff's claims for fees was upheld where plaintiff failed to present evidence during the case-in-chief as to the reasonableness of the fees. *Zeeland Farm Servs., Inc v JBL Enterprises, Inc*, 219 Mich App 190, 196; 555 NW2d 733 (1996).

- Following *Pransky,* there is some authority for the proposition that because a contractual award of fees is akin to damages, the jury should determine the reasonableness of those fees as part of the primary case. In *Barton-Spencer v Farm Bureau Life Ins Co of Michigan*, unpublished opinion of the Court of Appeals, issued March 22, 2016 (Docket No. 324661), 2016 WL 1125968, this was held to be the case even when the defendant asserted a counterclaim asking for fees if and when it was determined to be a prevailing party. *Barton-Spencer* was reversed on appeal on a separate issue.

- While *Pransky* and *Barton-Spencer* suggest that the amount of fees needs to be adjudicated simultaneously with the underlying case, in *Power Play Inter, Inc v Reddy*, unpublished opinion of the Court of Appeals, issued July 26, 2016 (Docket No. 325805), 2016 WL 4062864, plaintiff requested contractual attorneys' fees as a prevailing party, but the court did not submit that question to the jury, instead holding a separate hearing post-verdict to determine the quantum of those fees. The Court of Appeals affirmed. It first distinguished the "unpublished" opinion relied upon by the defendants – which, while not named, is believed to be *Barton-Spencer* – because that portion of the opinion was not adequately supported. The Court went on to hold:

> In this case, plaintiffs could not prove at trial that they were entitled to attorney fees or the reasonableness of those fees, where the contract explicitly states that a party cannot recover attorney fees until they prevail in the action to enforce the agreement. Plaintiffs did not prevail in the action to enforce the agreement until the jury decided the issue of damages. In *Zeeland [Farm Services, Inc v JBL Enterprises, Inc*, 219 Mich App 190; 555 NW2d 733 (1996)] the credit agreement permitted the plaintiff to recover its attorney fees if defendant breached the agreement, *id.* at 199, which is different from this case, where the contract allows either party to recover attorney fees if they prevail in an action to enforce the agreement. Had defendants in this case been the prevailing party, they could have sought attorney fees under the agreement, but, as discussed, this could not be determined until after the jury decided the case. Therefore, the trial court did not err by holding an evidentiary hearing regarding the reasonableness of plaintiffs' attorney fees, and subsequently granting plaintiffs' post-judgment motion for contractual attorney fees.

The *Pransky* logic is that a plaintiff can only be held liable for a legal claim; a defendant's entitlement to fees under a contract is a legal claim; and therefore, defendant must assert a claim via a pleading. And under that logic, that would also mean that a jury (if asked for and where not barred by contract) would also have to decide the entitlement to fees under the contract, as well as the amount (just as a jury otherwise determines the amount of damages for a breach of contract). Again putting aside one's opinion on the merits of this logic, the practical effect is problematic.

A party is only entitled to an award of reasonable attorneys' fees. The Court has adopted the so-called *Smith/Pirgu* analysis to evaluate reasonableness of fees:

> Attorney fees awarded under a contract rather than as an imposition of costs must be reasonable. See *Zeeland Farm Servs., Inc. v. JBL Enterprises*, Inc., 219 Mich. App. 190, 195-196; 555 N.W.2d 733 (1996). The party seeking attorney fees has the burden of proving the reasonableness of the attorney fees sought. *Smith v. Khouri*, 481 Mich. 519, 528-529; 751 N.W.2d 472 (2008) (TAYLOR, C.J.); see also *Zeeland Farm Services*, 219 Mich. App. at 195-196. Although *Smith* did not involve attorney fees arising out of the parties' contract as in this case, the framework set forth by our Supreme Court in *Smith*, and reiterated in *Pirgu [v United Servs Auto Ass'n*, 499 Mich 269; 884 NW2d 257 (2016)], remains the standard for determining the reasonableness of requested attorney fees.
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> Our Supreme Court in *Smith* instructed that when determining the reasonableness of an attorney fee, the trial court should first determine the fee customarily charged in the locality for similar legal services, which can be established "by testimony or empirical data found in surveys and other reliable reports." *Smith*, 481 Mich. at 531-532. To determine the fee customarily charged in the locality, "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 trial court must then multiply that rate by the reasonable number of hours expended in the case to arrive at a baseline figure." *Pirgu*, 499 Mich. at 281. It is important to use objective data, such as the State Bar survey, to arrive at a baseline figure. See *Smith*, 481 Mich. at 530. "The number produced by this calculation should serve as the starting point for calculating a reasonable attorney fee." *Id.* at 531.
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> After arriving at a baseline figure, the trial court then must consider several factors to determine whether an upward or downward adjustment to the baseline number is appropriate. Building on the Court's decision in *Smith*, and to simplify the analysis, the Court in *Pirgu* combined the six factors cited in *Wood v. Detroit Auto. Inter-Ins. Exch.*, 413 Mich. 573, 588; 321 N.W.2d 653 (1982), and the eight factors listed in listed in Rule 1.5(a) of the Michigan Rules of Professional Conduct. See *Pirgu*, 499 Mich. at 281. Specifically, the trial court must consider the following non exhaustive factors:
>
> (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, and

(8) whether the fee is fixed or contingent. [*Pirgu*, 499 Mich. at 282.]

To facilitate appellate review, the trial court "should briefly discuss its view of each of the factors above on the record and justify the relevance and use of any additional factors." *Id.* at 282. When a trial court fails to follow the analysis articulated in *Pirgu*, it errs. *Powers v. Brown*, 328 Mich. App. 617, 624; 939 N.W.2d 733 (2019).

De Simone v Barberio, unpublished opinion of the Court of Appeals, issued July 1, 2021 (Docket No. 351424), 2021 WL 2774142, p *3–4. Notably, while sometimes juries are called upon to determine whether requested fees are reasonable (such as in a fee-collection case; e.g., *Keywell & Rosenfeld v Bithell*, 254 Mich App 300; 657 NW2d 759 (2002)), the standard jury instruction (CSJI 180.03) cites only the *Wood* factors and not the full *Smith/Pirgu* framework.

This sort of detail required by *Smith/Pirgu* often results in an evidentiary hearing. Principal among the witnesses are trial counsel. Experts are sometimes called. Legal invoices are admitted as evidence and lawyers are cross-examined on the tasks revealed therein.

The folly of adding, as part of a trial on whether a contract was breached, a side-show on the reasonableness of fees, is apparent. The prospect of litigating the amount and reasonableness of fees as part of the main case is hypothetical, distracting, and simply odd (i.e., when more worried about an underlying claim, the parties would have to distract the finder of fact by putting on considerable testimony, including experts and the testimony of the trial lawyers themselves, as to the reasonableness of the fees sought). Moreover, as noted by the Court in *Power Play*, taking evidence on the amount of fees is the cart before the horse given that liability has not been determined.

To address this issue, the Committee proposes the amendment of MCR 2.501 by adding a new subsection (E) to specify that prevailing-party fees are decided in a post- judgment proceeding:

> Subject to MCR 2.508, a prevailing-party fee claim must be decided in a post-judgment proceeding after the underlying claims are decided. This does not affect the finality of the judgment on the underlying claims. "Prevailing-party fee" means attorney fees or costs for a prevailing party under contract, court rule, order, or statute.

Note that this proposal does not squarely address the issue of whether the jury must make a finding that the defendant is a prevailing party and, as such, is entitled to fees. Nor does the amendment address whether quantification of fees is a judge or jury issue. The rule also does not conflict with court rulings that a requesting party must present *some* evidence during the case-in-chief that it incurred reasonable fees due to the claimed breach. It simply leaves the fee issues to a post-judgment proceeding.

The proposed MCR 2.501(E) specifies that a prevailing-party fee proceeding is a post- judgment proceeding that doesn't affect the finality of the underlying judgment. This is consistent with the final

order definition in MCR 7.202(6)(a), which distinguishes between a final merits order (MCR 7.202(6)(a)(i)) and a post-judgment fee order (MCR 7.202(6)(a)(iv)). But MCR 7.202(6)(a)(i) could be read as delaying appellate finality until after a prevailing-party claim is decided, because it requires disposition of "all the claims…of all the parties." If a prevailing-party fee request is considered a "claim," than the rule could be read to require decision on that claim before there is an appealable final order. That is not consistent with the general practice of treating post-judgment fee requests separately. To remove any doubt, the proposed language here makes clear that a post-judgment prevailing-party fee claim does not delay the appellate finality of a judgment on the underlying claims.

Opposition

No opposition is known.

Prior Action by Representative Assembly

The following is a list of prior actions by the Representative Assembly regarding prevailing-party attorney fees:

- September 16, 1976: Approved a recommendation that the prevailing party in civil cases should under certain limited circumstances be entitled to reasonable fees at the discretion of the trial court, under guidelines and limitations provided by Rule.

- September 21, 1978: Adopted a proposal that the Supreme Court of Michigan be requested to adopt a rule providing that in every civil action except domestic-relations cases, the prevailing party shall be awarded, in addition to other costs, a reasonable attorney fee if the trial court finds that the action was brought or was defended without foundation, vexatiously, frivolously, or in bad faith.

- May 11, 1985: Defeated a proposal to recommend to the Michigan Supreme Court that MCR 2.625 be amended to provide that in any civil action in which a final disposition is rendered the prevailing party shall be entitled to reimbursement for its actual attorney fees reasonably incurred, in addition to the relief awarded and the costs otherwise provided by the Rule.

Fiscal and Staffing Impact on State Bar of Michigan

None known.

STATE BAR OF MICHIGAN POSITION
By vote of the Representative Assembly on April 20, 2024

Should the Representative Assembly recommend that Michigan Court Rules, Chapter 2, Civil Procedure, be amended to include proposed subsection (D) to MCR 2.110?

Rule 2.110 Pleadings

> (D) Prevailing-Party Attorney Fees. If any party pleads a claim for prevailing-party fees, that puts prevailing-party fees at issue for all parties, and other parties need not

plead a prevailing-party fee claim to seek such prevailing-party fees. "Prevailing-party fees" means attorney fees or costs for a prevailing party under contract, court rule, order, or statute.

(a) Yes
or
(b) No

Should the Representative Assembly recommend that Michigan Court Rules, Chapter 2, Civil Procedure, be amended to include a new subsection as MCR 2.501(E)?

Rule 2.501 Scheduling Trials; Court Calendars

(E) Subject to MCR 2.508, a prevailing-party fee claim must be decided in a post-judgment proceeding after the underlying claims are decided. This does not affect the finality of the judgment on the underlying claims. "Prevailing-party fee" means attorney fees or costs for a prevailing party under contract, court rule, order, or statute.

(a) Yes
or
(b) No