STATE OF MICHIGAN

COURT OF APPEALS

NORINE HOLDER and JAMES HOLDER, Plaintiff-Appellee,	UNPUBLISHED January 30, 2014
v RICHARD M SCHWARCZ, DDS, COMFORT FAMILY DENTAL, and COMFORT FAMILY DENTAL PLLC, Defendant-Appellant.	No. 307501 Macomb Circuit Court LC No. 2009-005043-NH

NORINE HOLDER and JAMES HOLDER, Plaintiff-Appellee,	
v RICHARD M SCHWARCZ, DDS, COMFORT FAMILY DENTAL, and COMFORT FAMILY DENTAL PLLC, Defendant-Appellant.	No. 309889 Macomb Circuit Court LC No. 2009-005043-NH

Before: GLEICHER, P.J., and BECKERING and SHAPIRO, JJ.

PER CURIAM.

Norine and James Holder (collectively "plaintiff) obtained a jury verdict in the amount of $67,500 in their dental medical malpractice action against defendants Dr. Richard Schwarcz, D.D.S., Comfort Family Dental, and Comfort Family Dental, P.L.L.C. (collectively "Schwarcz"). In docket number 307501, Schwarcz appeals by right from the jury verdict, asserting evidentiary and instructional error. In docket number 309889, Schwarcz appeals by right from the trial court's award of $151,555.70 in case evaluation sanctions. Because the trial court did not commit reversible evidentiary or instructional error, we affirm the judgment in favor of plaintiff. However, with regard to the case evaluation sanctions, we affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

I. FACTS

On August 2, 2007, Schwarcz performed a root canal on plaintiff Norine Holder's bottom left molar, tooth 19. While performing the procedure, Schwarcz fractured the tip of a metal file near the end of plaintiff's distal root.[1] The file fragment was 2.1 millimeters, or approximately 1/16 of an inch, in length. The experts who testified at trial generally agreed that there are three treatment options when a file breaks in a tooth: (1) try to retrieve the fragment, (2) seal the fragment in the tooth and monitor it, or (3) send the patient to a specialist who may be able to remove the fragment. Schwarcz did not remove the fragment from plaintiff's tooth; instead, he sealed the tooth with the fragment still lodged in the canal. He did not make any written notation of the broken file in plaintiff's chart, nor did he document any conversations that he had with plaintiff regarding the broken file. However, Schwarcz stated that, as a matter of practice and habit, he would have gone over the post-treatment x-ray with plaintiff and discussed the broken file and the need to monitor the tooth.

Approximately six months later, on February 20, 2008, plaintiff saw her regular dentist, Dr. Donn Hubbard, D.D.S., after she cracked a filling on a different tooth. While there, plaintiff complained of occasional pain in tooth 19. Hubbard referred plaintiff back to Schwarcz.

Plaintiff saw Schwarcz on February 22, 2008. Schwarcz took an x-ray of tooth 19 and determined that plaintiff had an infection in her gum line and in the root canal area. According to Schwarcz, the infection was in the mesial root, i.e., the root without the retained file fragment. He prescribed plaintiff antibiotics and told her to come in for a cleaning to help clear up the gum infection.

Plaintiff returned for a cleaning on February 25, 2008. Schwarcz's notes from that visit indicate that the antibiotics were helping, but that the infection was not cleared up. He told plaintiff to continue the antibiotics and return for a limited exam.

Plaintiff's final visit with Schwarcz occurred on March 12, 2008. Schwarcz's notes state: "Antibiotics seem to be helping the patient with infection in lower left. RMS would like to try another week of antibiotics along with Medrol[2] pack to see if we can clear up infection first before we try to re-treat the root canal in number 19. Patient agreed and will be back next week for follow up exam." Plaintiff was scheduled to return the next week, but she cancelled her appointment and never rescheduled.

Plaintiff did not see a dentist again for approximately 13 months. On April 21, 2009, plaintiff saw Hubbard after experiencing pain in her left lower jaw and was referred to Dr. Dominick Shoha, D.D.S. Shoha took an x-ray and discovered the retained file fragment in tooth 19. Plaintiff stated that this was the first time anyone informed her of the file fragment. Shoha

[1] Teeth typically have two roots – distal (back) and mesial (front).

[2] Medrol is a steroid medication.

stated that the root canal on tooth 19 was failing; therefore, an apicoectomy[3] was necessary to remove the tip of the distal root where the fragment was retained. Shoha also informed plaintiff that there was a very unusual cut on tooth 20 and that tooth 20 required a root canal.

Shoha first performed the root canal on tooth 20 and then prepared tooth 19 for the apicoectomy. The procedure was successful and plaintiff returned to Shoha's office for a successful follow-up visit one week later. Plaintiff returned to Shoha in January 2010, at which time Shoha noted his concern that the mesial root in tooth 19 was fractured. Plaintiff was referred to Dr. Steven Wolf, D.D.S., an oral maxillofacial surgeon. On March 12, 2010, Wolf extracted tooth 19.

On November 9, 2009, plaintiff initiated the instant medical malpractice action against Schwarcz. Plaintiff alleged that Schwarcz violated the standard of care in his treatment by, among other things, (1) filing past the apex of tooth 19, (2) breaking a file at the end of the distal root of tooth 19, (3) sealing the fragment in plaintiff's tooth without telling her, and (4) negligently drilling into tooth 20 while performing the root canal procedure on tooth 19. After a week-long trial, the jury returned a verdict in favor of plaintiff in the amount of $67,500. Because Schwarcz had rejected the case evaluation award of $25,000, the trial court awarded plaintiff case evaluation sanctions of $151,555.70.

II. PRIOR ACTS EVIDENCE

Schwarcz first argues that the trial court erred by denying his motion in limine to exclude any reference of a consent order of discipline entered against him.

The order of discipline was the result of an administrative complaint filed by the Michigan Department of Community Health. The complaint, filed on January 23, 2007, related to Schwarcz's treatment of a different patient – patient AT – in September 2001. The complaint alleged that Schwarcz sedated AT and "performed root canal therapy and placed crowns on teeth #2, #3, #11 and #18, placed crowns on teeth #4 and #19, placed filings on teeth #7, #10, #12, #30 and #32, and extracted tooth #15." The complaint further alleged that the number of treatments exceeded the number that Schwarcz should have performed at one time and that he failed to take radiographs to ensure that the root canals were properly filled. Finally, the complaint alleged that Schwarcz failed to adequately document the treatment he provided.

On June 28, 2007, five weeks before he treated plaintiff, Schwarcz entered into a consent order and stipulation admitting that the allegations in the complaint were true and that he violated the Public Health Code. He was placed on probation for one year, ordered to complete ten hours of continuing education, and assessed a $5,000 fine. The probation went into effect five days before he performed the operation that resulted in the broken file.

[3] An apicoectomy is the "[s]urgical removal of a tooth root." *Stedman's Medical Dictionary, 28th Edition* (2006).

Schwarcz sought to exclude evidence of the consent order at trial, arguing that it was not relevant under MRE 402 and was more prejudicial than probative under MRE 403. The trial court denied Schwarz's motion in a written opinion,[4] stating:

> The Consent Order is relevant to establishing defendant Dr. Schwarcz's knowledge that his similar practices had violated the standard of care and, notwithstanding such knowledge, his apparent failure to correct his deficient practices. Such evidence will tend to refute defendants' general denial of liability and affirmative defense based on comparative negligence. Moreover, defendant Dr. Schwarcz's inability to recall significant details about this single prior disciplinary action during his deposition would allow the jury to weigh his credibility as a witness. See MRE 608.
>
> * * *
>
> Defendant may request a proper limiting instruction to minimize any potential prejudice from the Consent Order.

Despite this order, Schwarcz did not request a limiting instruction and, at the end of trial, indicated his satisfaction with the instructions as issued by the court.

A "trial court's decision whether to admit evidence is reviewed for an abuse of discretion, but preliminary legal determinations of admissibility are reviewed de novo; it is necessarily an abuse of discretion to admit legally inadmissible evidence." *Chouman v Home Owners Ins Co*, 293 Mich App 434, 436-437; 810 NW2d 88 (2011).

We agree that the trial court erred to the extent that it admitted the evidence under MRE 406 and MRE 408. However, we conclude that that error was harmless because the evidence was admissible under MRE 404(b)(1), which provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

MRE 404(b) applies in both civil and criminal cases, *Lewis v LeGrow*, 258 Mich App 175, 207; 670 NW2d 675 (2003), and "is consistent with an inclusionary, not exclusionary, theory of

[4] At oral argument, the trial court noted that Schwarcz's motion in limine was procedurally deficient because it was filed less than 14 days prior to the start of trial, in violation of the court's prior procedural order.

admissibility[,]" *People v Hoffman*, 225 Mich App 103, 105; 570 NW2d 146 (1997). This Court has stated:

> Other bad acts evidence may be admitted where: (1) the evidence is offered for some purpose other than character to conduct, or a propensity theory; (2) the evidence is relevant (having any tendency to make the existence of a fact more or less probable) and material (relating to a fact of consequence to the trial); (3) the trial court determines under MRE 403 that the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice; and (4) the trial court may provide a limiting instruction under MRE 105. [*Lewis*, 258 Mich App at 208 (citations omitted).]

If the sole purpose of offering the other act evidence is to show the person's propensity for particular conduct based on his character as inferred from other conduct, it is not admissible. See *People v Johnigan*, 265 Mich App 463, 465; 696 NW2d 724 (2005). The evidence is admissible, however, for other purposes, "such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident" if that purpose is material. MRE 404(b)(1).

In the present case, evidence that Schwarcz was on probation for inadequately filling three root canals was relevant to rebut his testimony that, although he did not remember plaintiff's visit, he would have gone over the post-treatment x-ray with plaintiff and told her about the broken file, as it was his practice to inform all patients of any complications. Plaintiff testified that Schwarcz did not tell her about the broken file and that she first became aware of it in April 2009 when she saw Shoha. That Schwarcz was on probation at the time he performed the root canal was therefore relevant to his claim that he would have told plaintiff about the complication. His probationary status was also circumstantial evidence of motive, i.e., because Schwarcz was on probation, he had a motive not to tell plaintiff that he filed past the apex and broke the file in the tooth. A reasonable juror could conclude that Schwarcz did not tell plaintiff about the broken file because he did not want to risk further disciplinary action. Thus, evidence of the consent order was relevant to show motive and to help the jury weigh Dr. Schwarcz's and plaintiff's credibility on this issue.

Moreover, the consent order was relevant to a material fact because it was directly related to Schwarcz's argument that plaintiff neglected her own dental health and otherwise failed to mitigate her damages. "Mitigation of damages is a legal doctrine that seeks to minimize the economic harm arising from wrongdoing." *Morris v Clawson Tank Co*, 459 Mich 256, 263; 587 NW2d 253 (1998). "'Where one person has committed a tort . . . it is incumbent upon the latter to use such means as are reasonable under the circumstances to avoid or minimize the damages.'" *Id*. at 263-264, quoting *Shiffer v Bd of Ed of Gibraltar Sch Dist*, 393 Mich 190, 197; 224 NW2d 255 (1974). In other words, "the injured party must make every reasonable effort to minimize damages suffered." *Williams v American Title Ins Co*, 83 Mich App 686, 697; 269 NW2d 481 (1978).

In the instant case, plaintiff's knowledge of her injury was directly related to the question of whether she made reasonable efforts to avoid or minimize her damages. If plaintiff had no

knowledge of this injury, she had no reason to take action to minimize her damages. Thus, by arguing failure to mitigate, Schwarcz put plaintiff's knowledge of her injury at issue.

Schwarcz further argues that the evidence of the consent order's prejudicial effect outweighed its probative value and therefore should have been excluded under MRE 403, which requires the exclusion of relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." The evidence at issue was certainly prejudicial. However, that fact alone is insufficient to require exclusion under MRE 403, because all relevant evidence is necessarily prejudicial. *People v Pickens*, 446 Mich 298, 336; 521 NW2d 797 (1994). The question is whether the evidence was unfairly prejudicial. "Unfair prejudice exists when there is a tendency that evidence with little probative value will be given too much weight by the jury." *People v McGhee*, 268 Mich App 600, 614; 709 NW2d 595 (2005).

Contrary to Schwarcz's argument, the consent order was highly probative, considering Schwarcz's assertion that, although he did not remember plaintiff's visit, he would have gone over the procedure with plaintiff and advised her of the broken file and the need to monitor it as a matter of normal practice. The consent order was also relevant because it showed that Schwarcz, due to his disciplinary status, had a motive to conceal the broken file and resulting complication from plaintiff. Under these circumstances, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice.

Lastly, failure to raise an objection at various points contributed to the allegedly unfair prejudicial effect of the consent order evidence. During the questioning of some witnesses, Plaintiff's counsel did attempt to improperly use the evidence as proof that Schwarcz negligently performed canal procedures. However, for the most part, when Schwarcz's counsel chose to object to this improper usage, the trial court sustained the objections.

Most significantly, any prejudicial effect could have been cured, or at least substantially ameliorated, by a limiting instruction given during and/or after the proofs. "[J]uries are presumed to understand and follow their instructions," *Lenawee Co v Wagley*, 301 Mich App 134, 159; 836 NW2d 193 (2013), and limiting instructions are "generally sufficient to cure the prejudice arising from improper remarks of counsel[,]" *Tobin v Providence Hosp*, 244 Mich App 626, 641; 624 NW2d 548 (2001). In the trial court's written order allowing the evidence to be introduced, defendant was invited to request a limiting instruction. The order stated: "Defendant may request a proper limiting instruction to minimize any potential prejudice from the Consent Order". Schwarcz cannot argue on appeal that the evidence was unfairly prejudicial when he waived the offered opportunity for an instruction designed to limit that exact prejudice. "To hold otherwise would contravene the longstanding rule against a party harboring error as an appellate parachute." *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 96-97; 693 NW2d 170 (2005) (quotation marks and citation omitted).

Evidence of the consent order was admissible under MRE 404(b)(1), and we will not reverse a trial court's ruling if it reached the right result, albeit for the wrong reason. *Miller-Davis Co v Ahrens Constr, Inc* (*On Remand*), 296 Mich App 56, 70; 817 NW2d 609 (2012).

Accordingly, we affirm the trial court's denial of Schwarcz's motion in limine to exclude evidence of the consent order.

III. INSTRUCTIONAL ERROR

Schwarcz next argues that the trial court erred by denying his request that it issue M Civ JI 10.04, which concerns plaintiff's duty to use ordinary care for her own safety, concluding that the instruction was not applicable to the facts of the case. The court did grant Schwarcz's requests to issue M Civ JI 11.01,[5] regarding comparative negligence, and M Civ JI 53.05,[6] regarding the mitigation of damages.

We review de novo claims of instructional error. *Taylor v Kent Radiology*, 286 Mich App 490, 500; 780 NW2d 900 (2009). "[W]hen requested by a party, a standard jury instruction must be given if it is applicable and accurately states the law." *Jackson v Nelson*, 252 Mich App 643, 647; 654 NW2d 604 (2002). The determination whether an instruction is accurate and applicable based on the characteristics of a case within the sound discretion of the trial court. *Stevens v Veenstra*, 226 Mich App 441, 443; 573 NW2d 341 (1997).

Schwarcz argues that the trial court erred by failing to instruct the jury regarding plaintiff's duty to use ordinary care, asserting that, without this instruction, the jury could not properly assess comparative negligence. M Civ JI 10.04 provides: "It was a duty of the plaintiff, in connection with this *occurrence*, to use ordinary care for [[*his/her*] *own safety/and/the safety of* [*his/her] property*]." (Emphasis added). The "occurrence" at issue in this case was Schwarcz's treatment of tooth 19 on August 2, 2007. Plaintiff's allegations of negligence did not involve any duty of ordinary care on her part. For example, the instant facts are unlike those in a premises liability case, where a plaintiff may have had an opportunity to see

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[5] M Civ JI 11.01 provides as follows:

> The total amount of damages that the plaintiff would otherwise be entitled to recover shall be reduced by the percentage of plaintiff's negligence that contributed as a proximate cause to [*his/her*] [*injury/property damage*].
>
> This is known as comparative negligence.
>
> *(The plaintiff, however, is not entitled to noneconomic damages if [*he/she*] is more than 50 percent at fault for [*his/her*] injury.)

[6] M Civ JI 53.05 provides as follows:

> A person has a duty to use ordinary care to minimize his or her damages after [he or she/his or her property] has been [injured/damaged]. It is for you to decide whether plaintiff failed to use such ordinary care and, if so, whether any damage resulted from such failure. You must not compensate the plaintiff for any portion of [his/her] damages which resulted from [his/her] failure to use such care.

and assess a risk prior to encountering it. There may well be an obvious risk associated with a root canal procedure; however, it is not the type of risk that can be avoided through the exercise of ordinary care.

Schwarcz asserts that M Civ JI 10.04 is applicable in this case, stating that "in a case involving a claim of medical malpractice, a patient's failure to follow a healthcare professional's medical/dental advice is also directly relevant to the question of liability." Schwarcz is correct in his assertion. However, plaintiff's alleged failure to exercise ordinary occurred after the root canal procedure at issue, i.e., the occurrence referred to in M Civ JI 10.04. The initial injury, if there was one, had already occurred. Thus, plaintiff's duty was to use ordinary care to mitigate her damages, which was addressed by M Civ JI 53.05. M Civ JI 53.05 accurately conveyed to the jury that plaintiff had a duty to use ordinary care to minimize her damages after she was injured. Therefore, the trial court did not err by refusing to issue M Civ JI 10.04.

IV. CASE EVALUATION SANCTIONS

Schwarcz next challenges the amount of the case evaluation sanctions awarded by the trial court.

"A trial court's decision whether to grant case-evaluation sanctions under MCR 2.403(O) presents a question of law, which this Court reviews de novo." *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008). However, the parties do not dispute that plaintiff was entitled to case evaluation sanctions under MCR 2.403(O)(1). Rather, Schwarcz disputes the amount of fees and costs awarded, a question we review for an abuse of discretion. *Smith*, 481 Mich at 526.

Under MCR 2.403(O)(1), Schwarcz, as the rejecting party, was required to pay plaintiff's "actual costs." "Actual costs" are defined as "those costs taxable in any civil action," MCR 2.403(O)(6)(a), and "a reasonable attorney fee based on a reasonable hourly or daily rate as determined by the trial judge for services necessitated by the rejection of the case evaluation[,]" MCR 2.403(O)(6)(b). The trial court awarded plaintiff $27,435.70 in taxable costs and $124,120 in reasonable attorney fees for a total of $151,555.70. Schwarcz argues that both sums were ordered in error.

A. TAXABLE COSTS

The trial court awarded plaintiff $27,435 in taxable costs, including expert witness fees, costs associated with obtaining medical records and exhibits used during trial, and costs incurred in taking five depositions.

Schwarcz first challenges the deposition costs. MCR 2.625(A)(1) provides in part: "Costs will be allowed to the prevailing party in an action, unless prohibited by statute or by these rules[.]" MCL 600.2549 provides:

> Reasonable and actual fees paid for depositions of witnesses filed in any clerk's office and for the certified copies of documents or papers recorded or filed in any public office shall be allowed in the taxation of costs only if, at the trial or when damages were assessed, the depositions were read in evidence, except for impeachment purposes, or the documents or papers were necessarily used.

Schwarcz does not dispute that all five depositions were filed with the clerk's office; rather, he argues that the depositions were not taxable because they were not read into evidence at trial. This argument is unpersuasive as it relates to Shoha and Wolf's video depositions. MCL 600.2549 provides for reasonable and actual fees paid for depositions of witnesses if "the documents or papers were necessarily used." The two video depositions were played at trial. Therefore, the costs of taking the video depositions, as well the costs for their use in evidence, were taxable. See *Guerrero v Smith*, 280 Mich App 647, 670; 761 NW2d 723 (2008); see also MCR 2.315(I).

The costs of the remaining three depositions were not taxable. Plaintiff argues that these depositions were taxable because they were used to prepare for trial. MCL 600.2549, however, allows the taxation of deposition costs "only if, at the trial or when damages were assessed, the depositions were read in evidence, except for impeachment purposes, or the documents or papers were necessarily used." Trial preparation necessarily comes before trial. Therefore, because the depositions were only used for trial preparation and not during trial or at the time damages were assessed, they were not taxable.

Plaintiff also argues that Schwarcz's deposition was taxable because plaintiff used it to respond to Schwarcz's motion in limine. In support, plaintiff relies on *Portelli v IR Constr Prods Co*, 218 Mich App 591, 605-606; 554 NW2d 591 (1996), where this Court stated that costs for depositions were taxable pursuant to MCL 600.2549 because they were "necessarily used" in the context of the defendant's motion for summary disposition. Plaintiff's argument is unpersuasive. In *Portelli*, the depositions were taxable because they were used in the defendant's successful motion for summary disposition, i.e., "when damages were assessed." In the present case, Schwarcz's deposition was used to respond to a motion in limine, not when damages were assessed. Thus, Schwarcz's deposition was not taxable.

Schwarcz next challenges the award of costs associated with obtaining medical records and exhibits used at trial. Plaintiff argues that these costs are taxable under MCL 600.2549 because the medical records and exhibits were filed with the clerk's office and used at trial. Plaintiff presumably relies on MCL 600.2549's reference to costs for "certified copies of documents or papers recorded or filed in any public office" used at trial. This language, however, only authorizes costs for certified copies of documents filed in any public office and used at trial. It does not authorize costs for all documents filed in any public office. None of the costs associated with obtaining medical records and exhibits used at trial were taxable, regardless of whether they were filed in the clerk's office. See *Guerrero*, 280 Mich App at 672-673.

Schwarcz next challenges the trial court's award of $21,475 for expert witness fees. "Expert-witness fees qualify as 'actual costs' under MCR 2.403(O)." *Campbell v Sullins*, 257 Mich App 179, 203-204; 667 NW2d 887 (2003); see also MCL 600.2164(1).[7] This Court has explained that:

[7] MCL 600.2164(1) provides as follows:

> An expert is not automatically entitled to compensation for all services rendered. Conferences with counsel for purposes such as educating counsel about expert appraisals, strategy sessions, and critical assessment of the opposing party's position are not regarded as properly compensable as expert witness fees. Experts are properly compensated for court time and the time required to prepare for their testimony. In addition, the traveling expenses of witnesses may be taxed as costs[.] [*Van Elslander v Thomas Sebold & Assocs*, 297 Mich App 204, 218; 823 NW2d 843 (2012) (quotation marks, brackets, and citations omitted).]

Schwarcz first challenges the trial court's award of $11,475 for costs associated with the expert's trial preparation – 25.5 hours at $450 per hour. Schwarcz argues that 25.5 hours for trial preparation was excessive and that plaintiff's bill of costs includes time that had nothing to do with trial preparation. A review of the record reveals that the expert's time notations were for activities such reviewing pleadings, affidavits, depositions and other standard activities that medical malpractice experts must undertake in order to adequately testify. Though not specifically described as "trial preparation" in plaintiff's bill of costs, these actions were properly attributable to trial preparation.

Schwarcz also argues that the trial court erred by awarding $10,000 for the expert's attendance at trial for two full days. Schwarcz argues that the expert is only entitled to compensation for his actual testimony, which took less than four hours. However, an expert may be compensated for "court time," *id.*, a term not necessarily synonymous with "testifying time." It is immaterial that the expert testified for less than four hours; he was present at trial for two full days.[8] Further, the expert testified that he lost between $4,000 and $5,000 each day he was out of his office. Schwarcz presented no evidence that $5,000 per day was unreasonable. Under these circumstances, the trial court did not abuse its discretion by awarding plaintiff $10,000 for the expert's presence at trial for two days.

B. REASONABLE ATTORNEY FEES

Schwarcz next challenges the trial court's award of reasonable attorney fees.

> No expert witness shall be paid, or receive as compensation in any given case for his services as such, a sum in excess of the ordinary witness fees provided by law, unless the court before whom such witness is to appear, or has appeared, awards a larger sum, which sum may be taxed as a part of the taxable costs in the case. Any such witness who shall directly or indirectly receive a larger amount than such award, and any person who shall pay such witness a larger sum than such award, shall be guilty of contempt of court, and on conviction thereof be punished accordingly.

[8] Indeed, the expert was actually present at trial for three days and plaintiff requested $5,000 for each day. The trial court, however, reduced the number of days to two, concluding that the expert's presence at trial for three days was a luxury.

As noted above, "actual costs" includes "a reasonable attorney fee based on a reasonable hourly or daily rate as determined by the trial judge for services necessitated by the rejection of the case evaluation."

"The party requesting an award of attorney fees bears the burden of proving the reasonableness of the fees requested." *Adair v Michigan* (*On Third Remand*), 298 Mich App 383, 391; 827 NW2d 740 (2012). While there is no precise formula for assessing the reasonableness of an attorney fee, *In re Temple Marital Trust*, 278 Mich App 122, 138; 748 NW2d 265 (2008), relevant factors include:

> (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. [*Smith*, 481 Mich at 529 (citation omitted).]

A trial court should also consider the overlapping factors listed in the Michigan Rules of Professional Conduct:

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
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> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
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> (3) the fee customarily charged in the locality for similar legal services;
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> (4) the amount involved and the results obtained;
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> (5) the time limitations imposed by the client or by the circumstances;
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> (6) the nature and length of the professional relationship with the client;
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> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
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> (8) whether the fee is fixed or contingent.
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> [*Smith*, 481 Mich at 529-530, 751 NW2d 472, quoting MRPC 1.5(a).]

Our Supreme Court has outlined the following approach to determine reasonable attorney fees in the context of case evaluation sanctions:

> 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.]

In the present case, the trial court started its analysis by determining the fee customarily charged in the locality. Relying and data and survey evidence, the trial court found a median hourly rate of $250 for attorneys in the area. The trial court departed upward from the median rate and awarded plaintiff's attorney R. Gittleman and hourly rate of $400. While the trial court did not discuss all of the factors listed above, it did consider the professional standing and experience of the attorney, the skill involved, and the results achieved. The court noted that attorney Gittleman is a preeminent Michigan dental malpractice attorney and obtained an extremely favorable result. The $67,500 verdict was more than double the $25,000 case evaluation. The trial court attributed the favorable result to Gittleman's skills as a litigator, noting that Schwarcz believed that he had done nothing wrong and refused to settle. In light of these considerations, the trial court did not abuse its discretion by awarding plaintiff a rate of $400 per hour for attorney R. Gittleman's services.

Schwarcz also disputes the reasonableness of the number of hours awarded by the trial court, arguing that plaintiff's attorneys' time records revealed inflated services and thus required a reduction in the total hours awarded. A trial "court must determine the reasonable number of hours expended by each attorney." *Smith*, 481 Mich at 52. To aid in this determination, the requesting party 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*.

Our review of the record indicates that plaintiff's attorneys met their burden of supporting the requested hours. The attorneys submitted an itemized summary that detailed the number of hours each worked on the case. Further, during an evidentiary hearing, attorney T. Gittleman submitted the attorneys' hand written time records that were used to create the itemized summary. Schwarcz challenged several items contained in the time records and cross-examined attorneys R. Gittleman and Matthews during the evidentiary hearing. However, Schwarcz did not present any other evidence at the hearing nor call any witnesses to question the reasonableness of the requested hours. The trial court ultimately awarded 207 hours to attorney R. Gittleman, 82 to attorney T. Gittleman, and 102.6 to attorney Matthews. The trial court's award is adequately supported by the record and, therefore, did not constitute an abuse of discretion.

V. CONCLUSION

We affirm the judgment in favor of plaintiff in the amount of $67,500. With regard to the award of case evaluation sanctions, we affirm in part, reverse in part, and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher
/s/ Jane M. Beckering
/s/ Douglas B. Shapiro