JOHN P. JACOBS, P.C., ATTORNEYS AND COUNSELORS AT LAW • THE DIME BUILDING • 719 GRISWOLD STREET, SUITE 600 • DETROIT, MI 48232-5600 • (313) 965-1900

IN THE SUPREME COURT

FOR THE STATE OF MICHIGAN

(ON APPEAL FROM THE MICHIGAN COURT OF APPEALS)

VALERIA HALIW and ILKO HALIW,

Plaintiffs/Appellants,

v

CITY OF STERLING HEIGHTS,

Defendant/Appellee.

Docket No: 125022

COA No: 237269

Macomb Circuit Court
No: 97-36-NO

BRIEF OF AMICUS CURIAE,
THE MICHIGAN DEFENSE TRIAL COUNSEL, INC.

PROOF OF SERVICE

John P. Jacobs, Esq.
JOHN P. JACOBS, P.C.
Attorney for Amicus Curiae
Michigan Defense Trial Counsel, Inc.
The Dime Building
719 Griswold, Suite 600
P.O. Box 33600
Detroit, MI 48232-5600
(313) 965-1900

RECEIVED
SEP 28 2004
CLERK SUPREME COURT

JOHN P. JACOBS, P.C., ATTORNEYS AND COUNSELORS AT LAW • THE DIME BUILDING • 719 GRISWOLD STREET, SUITE 600 • DETROIT, MI 48232-5600 • (313) 965-1900

IN THE SUPREME COURT

FOR THE STATE OF MICHIGAN

(ON APPEAL FROM THE MICHIGAN COURT OF APPEALS)

VALERIA HALIW and ILKO HALIW,

Plaintiffs/Appellants,

v

CITY OF STERLING HEIGHTS,

Defendant/Appellee.

Docket No: 125022

COA No: 237269

Macomb Circuit Court
No: 97-36-NO

Andrew J. Haliw, III (P14541)
Raymond L. Feul (P26538)
Haliw, Siciliano & Mychalowych, PLC
Attorneys for Plaintiffs/Appellants
37000 Grand River Ave., Suite 350
Farmington Hills, MI 48335
(248) 442-0510

Bert T. Ross (P39528)
O'Reilly, Rancilio, Nits, Andrews & Turnbull, P.C.
Attorneys for Defendant/Appellee
One Sterling Town Center
12900 Hall Road, Suite 350
Sterling Heights, MI 48313
(810) 726-1000

John P. Jacobs (P15400)
JOHN P. JACOBS, P.C.
Attorney for Amicus Curiae
The Michigan Defense Trial Counsel, Inc.
The Dime Building
719 Griswold, Suite 600
P.O. Box 33600
Detroit, MI 48232-5600
(313) 965-1900

Donald M. Fulkerson (P35785)
Attorney for Amicus Curiae
State Bar of Michigan Appellate Practice Section
P.O. Box 85395
Westland, MI 48185
(734) 467-5620

BRIEF OF AMICUS CURIAE,
THE MICHIGAN DEFENSE TRIAL COUNSEL, INC.

JOHN P. JACOBS, P.C., ATTORNEYS AND COUNSELORS AT LAW • THE DIME BUILDING • 719 GRISWOLD STREET, SUITE 600 • DETROIT, MI 48232-5600 • (313)965-1900

TABLE OF CONTENTS

INDEX OF AUTHORITIES i

STATEMENT OF INTEREST OF AMICUS CURIAE ii

STATEMENT OF JURISDICTION iv

COUNTER-STATEMENT OF QUESTION PRESENTED v

COUNTER-STATEMENT OF FACTS 1

ARGUMENT

THE STRAINED CONSTRUCTION OF THE COURT OF APPEALS MAJORITY THREATENS THE INDEPENDENT APPELLATE BAR. MCR 2.403 IS CLEARLY DELINEATED AS PERTAINING ONLY AS TO TRIAL ACTIVITIES. UNDER THE EXPLICIT TERMS OF THE RULE, AN ASSESSMENT OF APPELLATE ATTORNEYS' FEES AND COSTS CAN HAPPEN ONLY WHEN A JUDGMENT HAS BEEN ENTERED AS A RESULT OF A RULING ON A MOTION AFTER REJECTION OF THE CASE EVALUATION. GENERALIZED APPELLATE FEES AWARDED AS MCR 2.403 SANCTIONS ARE CLEARLY NOT PERMITTED HERE 2

CONCLUSION AMD RELIEF SOUGHT 14

JOHN P. JACOBS, P.C., ATTORNEYS AND COUNSELORS AT LAW • THE DIME BUILDING • 719 GRISWOLD STREET, SUITE 600 • DETROIT, MI 48232-5600 • (313) 965-1900

INDEX OF AUTHORITIES

AUTHORITY **PAGE(S)**

CASE LAW

American Casualty Company v Costello, 174 Mich App 1, 435 NW2d 760 (1989) 3, 12, 13

Brown v Board of Education in the City of Topeka, 347 US 483, 74 S CT 686, 98 LEd 873 (1954) 10

Gianetti Bros Construction Co v City of Pontiac, 175 Mich App 1, 435 NW2d 760 (1989) 3, 12

Grace v Grace, 253 Mich App 357, 655 NW2d 595 (2002) 6, 12

Haliw v City of Sterling Heights, 257 Mich App 689, 669 NW2d 563 (2003) 2

Hyde v University of Michigan Regents, 226 Mich App 511, 575 NW2d 36 (1997) 3, 4, 13

In Re 1987-1988 Medical Doctor Provider Class Plan, 203 Mich App 707, 514 NW2d 471 (1994) 6, 12

Keiser v Allstate Ins Co, 195 Mich App 369,491 NW2d 581 (1992) 3, 4, 13

Leavitt v Monaco Coach Corp, 241 Mich App 288, 616 NW2d 175 (2002) 3, 7

Plessy v Ferguson, 163 US 537, 16 SCt 1138, 41 LEd 256 (1896) 10

CONSTITUTION

Michigan Constitution Article 1, §14 10

OTHER AUTHORITY

MCLA 600.6304 7

MCLA 600.6306 . . . . . 8, 12

MCR 2.403 . . . . . 4, 6, 7, 8

MCR 2.403(O)(6)(b) 2, 5

MCR 2.403(O)(2)(C) 3, 4, 8, 13

MCR 2.403(O)(3) 7

MCR 2.403 (O)(4)(2) (b) and (c) 7

MCR 2.403 (O)(8) 5, 8, 11, 13

MCR 7.216(C) 3, 12

JOHN P. JACOBS, P.C., ATTORNEYS AND COUNSELORS AT LAW • THE DIME BUILDING • 719 GRISWOLD STREET, SUITE 600 • DETROIT, MI 48232-5600 • (313) 965-1900

STATEMENT OF INTEREST OF AMICUS CURIAE

The Michigan Defense Trial Counsel, Inc. ("MDTC"), is an organization of the State Bar of Michigan dedicated to promoting and encouraging education among members of the judiciary as well as members of the public in connection with civil litigation. In addition, the MDTC strives to formulate ethical principles consonant with civil litigation both within Michigan and outside of the State of Michigan.

The Michigan Defense Trial Counsel, Inc., is comprised of approximately three hundred (300) law firms with roughly six hundred (600) individual members. Representing its membership, the MDTC has an active Amicus Curiae committee, the function of which is to identify important cases before the Michigan Supreme Court, Michigan Court of Appeals and the United States Court of Appeals for the Sixth Circuit, and to enter those cases on an intervening party basis in order to communicate to those courts that the issues before them are far broader and far more important than may initially appear when limited by the perspective of the immediate parties.

The Michigan Defense Trial Counsel, Inc., actively supports and opposes legislation in the Michigan Legislature, as well as the United States Congress, which is of interest to both defense-side and plaintiffs'-side civil litigants. The organization does not always or inexorably support a typical "defense" or "plaintiffs'" orientation. The organization has a much broader perspective for the jurisprudence of Michigan that includes supporting other views

when the justice of the cause so dictates.

The assessment of appellate fees and costs and exactly how that burden is allocated between parties are questions of immense jurisprudential interest to the Michigan Defense Trial Counsel, Inc. The resolution of these issues will affect whether both "defense-side" and "plaintiffs'-side" clients will exercise their constitutional and statutory rights to seek review of lower court decisions, and, additionally, will affect exactly how all members of the Bar practice law.

The Michigan Defense Trial Counsel, Inc., in order to represent its members and clients appropriately, and to articulate the point of view that both defense lawyers and plaintiffs' lawyers wish the Supreme Court to know, appear before the Michigan Supreme Court to posit the relevant Michigan cases and the policies behind them to bring to the attention of the Justices the inequity that would result if MCR 2.403(O) case evaluation sanctions were levied for appellate sanctions, fees and expenses.

JOHN P. JACOBS, P.C., ATTORNEYS AND COUNSELORS AT LAW • THE DIME BUILDING • 719 GRISWOLD STREET, SUITE 600 • DETROIT, MI 48232-5600 • (313) 965-1900

JOHN P. JACOBS, P.C., ATTORNEYS AND COUNSELORS AT LAW • THE DIME BUILDING • 719 GRISWOLD STREET, SUITE 600 • DETROIT, MI 48232-5600 • (313) 965-1900

STATEMENT OF JURISDICTION

Amicus Curiae, the Michigan Defense Trial Counsel, Inc., concurs in the Statement of Jurisdiction in the Brief of Plaintiff-Appellants in this matter.

JOHN P. JACOBS, P.C., ATTORNEYS AND COUNSELORS AT LAW • THE DIME BUILDING • 719 GRISWOLD STREET, SUITE 600 • DETROIT, MI 48232-5600 • (313) 965-1900

COUNTER-STATEMENT OF QUESTION PRESENTED

I. **THE STRAINED CONSTRUCTION OF THE COURT OF APPEALS MAJORITY THREATENS THE INDEPENDENT APPELLATE BAR. MCR 2.403 IS CLEARLY DELINEATED AS PERTAINING ONLY AS TO TRIAL ACTIVITIES. UNDER THE EXPLICIT TERMS OF THE RULE, SHOULD AN ASSESSMENT OF APPELLATE ATTORNEYS' FEES AND COSTS HAPPEN ONLY WHEN A JUDGMENT HAS BEEN ENTERED AS A RESULT OF A RULING ON A MOTION AFTER REJECTION OF THE CASE EVALUATION?**

Plaintiffs-Appellants say: "No."

Defendant-Appellee says: "Yes."

Amici Curiae say: "No."

JOHN P. JACOBS, P.C., ATTORNEYS AND COUNSELORS AT LAW • THE DIME BUILDING • 719 GRISWOLD STREET, SUITE 600 • DETROIT, MI 48232-5600 • (313) 965-1900

COUNTER-STATEMENT OF FACTS

In the interest of avoiding any redundancy, the within brief of Amicus Curiae, the Michigan Defense Trial Counsel, Inc. ("MDTC"), adopts the statement of facts set forth in the brief of Amicus Curiae, the State of Bar Michigan Appellate Practice Section.

JOHN P. JACOBS, P.C., ATTORNEYS AND COUNSELORS AT LAW • THE DIME BUILDING • 719 GRISWOLD STREET, SUITE 600 • DETROIT, MI 48232-5600 • (313)965-1900

ARGUMENT

THE STRAINED CONSTRUCTION OF THE COURT OF APPEALS MAJORITY THREATENS THE INDEPENDENT APPELLATE BAR. MCR 2.403 IS CLEARLY DELINEATED AS PERTAINING ONLY AS TO TRIAL ACTIVITIES. UNDER THE EXPLICIT TERMS OF THE RULE, AN ASSESSMENT OF APPELLATE ATTORNEYS' FEES AND COSTS CAN HAPPEN ONLY WHEN A JUDGMENT HAS BEEN ENTERED AS A RESULT OF A RULING ON A MOTION AFTER REJECTION OF THE CASE EVALUATION. GENERALIZED APPELLATE FEES AWARDED AS MCR 2.403 SANCTIONS ARE CLEARLY NOT PERMITTED HERE.

The case of Haliw v City of Sterling Heights, 257 Mich App 689, 669 NW2d 563 (2003), is already being misread in the trial courts and in the intermediate appellate courts of this state to allow generalized MCR 2.403(O)(6)(b) attorneys' fees and costs on appeal.

A seismic event has subtly taken place here: Trial judges are now convinced that all appellate fees are recoverable under MCR 2.403(O)(6)(b) always and under all circumstances. Appellate attorneys across the state are finding it more difficult to convince clients to take appeals pursuant to their Article 1, §14 Constitutional Rights, because the clients are being intimidated by the threats of the appellees as temporary victors in the trial courts, who contend that Haliw will stand as a punishment for anyone who seeks to vindicate their rights on appeal at the end of the case.

Read very closely, Haliw is not materially different from those comparatively rare cases in which there is an appeal that results in a complete reversal of the underlying verdict,

JOHN P. JACOBS, P.C., ATTORNEYS AND COUNSELORS AT LAW • THE DIME BUILDING • 719 GRISWOLD STREET, SUITE 600 • DETROIT, MI 48232-5600 • (313) 965-1900

overturning the original trial result. See Keiser v Allstate Ins Co, 195 Mich App 369, 374-75, 491 NW2d 581 (1992); Hyde v University of Michigan Regents, 226 Mich App 511, 526, 575 NW2d 36 (1997). Haliw, simply put, is the latest case in a comparatively rare series of cases that result in post-appeal reversals on grounds that, "[I]t is the ultimate verdict that the parties are left with after appellate review is complete that should be measured against a mediation evaluation to determine whether sanctions should be imposed on a rejecting party pursuant to MCR 2.403(O)." Keiser, supra, 195 Mich App at 374-75.

Assuming, for the moment, that a vindictive attempt to punish parties for their exhausting constitutional rights to appeal can be read as authorized within the explicit four corners of MCR 2.403(O)(2)(c), it is absolutely and nevertheless clear that **appellate attorneys' fees, as a general rule, will not be imposed as a matter of global policy and by the explicit terms of the court rule itself.**

From the very beginning, the Appellate Courts of Michigan have monolithically construed MCR 2.403(O) as **not** authorizing appellate attorneys' fees in no uncertain terms. This is so, in no small measure, because MCR 2.403, by its very terms, was clearly trial oriented and, additionally, because MCR 7.216(C) called for attorneys' fees **only** in cases of frivolous appeals. See American Casualty Company v Costello, 174 Mich App 1, 435 NW2d 760 (1989); Gianetti Bros Construction Co v City of Pontiac, 175 Mich App 1,

JOHN P. JACOBS, P.C., ATTORNEYS AND COUNSELORS AT LAW • THE DIME BUILDING • 719 GRISWOLD STREET, SUITE 600 • DETROIT, MI 48232-5600 • (313) 965-1900

435 NW2d 760 (1989); Leavitt v Monaco Coach Corp, 241 Mich App 288, 312 fn 4, 616 NW2d 175 (2002).

What, then, upset this delicate balance, shifting the focus of MCR 2.403 fees away from appellate activity as protected speech? In 1992, Keiser decided that a post-appeal appellate result could, indeed, trigger appellate sanctions if there was a complete reversal. Frankly, under the explicit terms of MCR 2.403(O), that original result was, in the explicit language of the court rule, somewhat dubious. However, as the majority in Haliw points out, the 1997 amendments to the court rule added language that required "a judgment entered as a result of a ruling or a motion after rejection of the case evaluation" within the definition of what constituted a "verdict." On their face, however, the 1997 amendments did not pertain to a blanket authorization of appellate fees.

In plain language terms, what is now being suggested here is not necessarily authorizing sanctions for an **appeal** as that word itself is never used in the rule. MCR 2.403(O)(2)(c). The phrase **"motion"** contained in that rule is, obviously, a Motion for Judgment Notwithstanding the Verdict or a Motion for Directed Verdict or Summary Disposition - not any **appeal** that may relate to said motions. Given a strict construction of the rule, Keiser may have been wrongly decided and the case that followed it, Hyde v University of Michigan Regents, 226 Mich App 511, 575 NW2d 36 (1998), may also have been in error as being far too expansive.

To the extent that Keiser and Hyde can be read as correctly

JOHN P. JACOBS, P.C., ATTORNEYS AND COUNSELORS AT LAW • THE DIME BUILDING • 719 GRISWOLD STREET, SUITE 600 • DETROIT, MI 48232-5600 • (313) 965-1900

decided, by virtue of their focus upon "verdict," a complete overturning of the lower court "verdict" by the ultimate appellate result could, indeed, alter the imposition of **trial** sanctions. But, in fairness, there is utterly nothing to justify imposing appellate sanctions when, in particular, what is being permitted is the nunc pro tunc imposition of trial sanctions, being all those that can be awarded no later than 28 days after the entry of the judgment. See MCR 2.403(O)(8).

The framers of the court rule expressed only, no more than that, that a **motion** after rejection of the case evaluation, such as a Judgment Notwithstanding the Verdict, Motion for Directed Verdict or Summary Disposition, could result in mediation sanctions as the definition of "verdict" was expanded. So be it. Nothing in the text of the rule as drafted makes it open season with appellate sanctions for the typical appellate case.

From there, the Haliw Court of Appeals majority extrapolated, somewhat wildly, that this included all aspects of the appeal and, predictably, trial judges and clients and other counsel are now suggesting that **all appeals** will inexorably engender case evaluation sanctions as a matter of course as "a reasonable attorney fee based upon a reasonable hourly or daily rate as determined by the trial court for services necessitated by the rejection of the case evaluation under MCR 2.403(O)(6)(b)."

Frankly, to this Amicus Curiae, the Court of Appeals' Opinion is not a credit to scholarship as it cheerfully concedes, "the plain language of the rule neither allows nor disallows appellate

JOHN P. JACOBS, P.C., ATTORNEYS AND COUNSELORS AT LAW • THE DIME BUILDING • 719 GRISWOLD STREET, SUITE 600 • DETROIT, MI 48232-5600 • (313) 965-1900

attorneys' fees." That is correct and a significant concession. Michigan does not embrace the "British Rule," which authorizes the assessment of actual attorneys' fees and costs **unless** there is explicit court rule or statutory authority to such effect. In Re 1987-1988 Medical Doctor Provider Class Plan, 203 Mich App 707, 514 NW2d 471 (1994). The blithe assessment by the Haliw Court of Appeals majority that the judges below are free to construe the rules to permit imposition of attorneys' fees when such is not clearly specified in the rule, is both a radical and vast departure from the traditional rule that carefully circumscribes exactly what fees are paid and precisely by whom and under what specific circumstances.

The Michigan Defense Trial Counsel, Inc., requests that Haliw be reversed to declare that appellate attorneys' fees are **not** automatically included within MCR 2.403(O), as the concept of appellate fees as part of global sanctions are nowhere mentioned there. While the Court of Appeals paid lip service to the general rule that attorneys' fees are not recoverable unless they are **expressly** authorized by statute or court rule,[1] the Court construed the elimination by the 1997 amendments of the word "trial" in favor of "verdict" coupled with the analysis of the "verdict" under Keiser, to mean that appellate attorneys' fees could be recovered.

Since the appellate attorneys' fees are not explicitly within the four corners of MCR 2.403(O) in any capacity whatsoever, what

---

[1] See Grace v Grace, 253 Mich App 357, 370-71, 655 NW2d 595 (2002).

JOHN P. JACOBS, P.C., ATTORNEYS AND COUNSELORS AT LAW • THE DIME BUILDING • 719 GRISWOLD STREET, SUITE 600 • DETROIT, MI 48232-5600 • (313) 965-1900

is afoot here is judicial legislation for docket control and all components of the Appellate Bar vigorously oppose it.

To be frank, the construction by Keiser and Hyde may be a philosophical "reach" in and of themselves because, in looking at the global implications of MCR 2.403(O), the cited court rule clearly pertains to trial work, not appellate work in any way.

The general rule in Michigan has been for many years (at least since 1989) that appellate fees are not part of case evaluation/mediation sanctions. See Leavitt v Monaco Coach Corp, 241 Mich App 288, 312 fn 4, 616 NW2d 175 (2002). There matters peaceably lay until Judge Markey decided to construe the rule by adding judicial gloss where no such appellate intendment exists. Now the independent appellate bar is threatened.

The Civil Appellate Bar would argue that MCR 2.403(O) does not pertain to appellate fees in the slightest as the entire focus of that rule is trial work, and trial work only. MCR 2.403(O)(2) relates to jury verdicts, and judgments by the court after a non-jury trial, of course. Appeals are not even a remote concept as to what is recoverable.

Under MCR 2.403(O)(3) a "verdict" is adjusted at the time of the trial court's entry of the judgment as provided by MCLA 600.6306, something which has utterly nothing to do with appeals.

At MCR 2.403(O)(4)(a), (b) and (c), the assessments of components of joint and several liability, aggregate evaluation of the verdict, and MCLA 600.6304-allocable tort fault all relate exclusively to trial results and trial proceedings.

JOHN P. JACOBS, P.C., ATTORNEYS AND COUNSELORS AT LAW • THE DIME BUILDING • 719 GRISWOLD STREET, SUITE 600 • DETROIT, MI 48232-5600 • (313) 965-1900

By the time the reader gets to MCR 2.403(O)(8), the fate of those who would impose appellate attorneys' fees is sealed. In no uncertain terms, there are time deadlines to the filing of case evaluation/mediation sanctions which destroy any view that appeals can be included. This is so because, according to that time deadline, immediately following the trial and before any appeals are taken:

> A request for costs under this subrule **must be filed and served** within 28 days after the entry of the judgment or entry of an order denying a timely motion for a new trial or to set aside the judgment.

If appellate attorneys' fees were truly to be encapsulated, then this absolute deadline which only exists **after** the **trial** would not exist in the rule and the focus would not be upon trial work, which is precisely the intention expressed by the rule.

How then are appellate attorneys' fees to be taxed and assessed if the time for application so expires? Under MCLA 600.6306, the judgment becomes final for all sanctions because of the "Order of Judgment" statute that encompasses such allowable costs, but only such sanctions as exists as of the results immediately following the **trial**. This validates the view of the Appellate Bar under MCR 2.403(O)(2)(c) that the "motion" which may result in a different ruling after rejection of the case evaluation relates to those recognized by MCR 2.610, Motions for Judgment Notwithstanding the Verdict, or Directed Verdict under MCR 2.515, or, possibly, a late-added Summary Disposition Motion under MCR 2.611. Since the word **"appeal"** is never used in MCR 2.403(O) in

JOHN P. JACOBS, P.C., ATTORNEYS AND COUNSELORS AT LAW • THE DIME BUILDING • 719 GRISWOLD STREET, SUITE 600 • DETROIT, MI 48232-5600 • (313) 965-1900

any authorizing capacity, the inference is strong--extremely strong--that appellate work was never intended to be included in **any** capacity whatsoever. Again, this conclusion is made even stronger by the reference to MCR 2.403(O)(8) as the only sanctions to be taxed are those following the **trial**.

There is an immense inference in these rules as cited above that, since they are trial-oriented, that should be the outer circumscription of what is allowed.

There are pragmatic problems with having trial judges evaluate appellate services, in any event. How does a trial judge ascertain the value of appellate services, whether they have been "churned" and whether opposing counsel is simply "piling on" once the verdict result is known and the feeding frenzy starts because, after all, if the appeal taken by the Appellant is unsuccessful, then there is guaranteed "gold in them thar hills," as an additional payday.[2]

Has the Supreme Court considered the extremely negative impact

---

[2] The vast majority of cases are affirmed on appeal, of course. There is grave danger here and the Supreme Court should recognize it. The trial result is already known. The appellee is highly motivated to "pile on" with unnecessary work and wild amounts of "churning" so that, if the odds favor the appellee, as they do, and the result is affirmed, there is a delicious payday to enjoy, all of which is accomplished with comparative certainty, as opposed to trial work, where the mediation takes place with virtual uncertainty. What is going to take place, we predict, is a proliferation of appellee/appellate work to enjoy attorneys' fees which are presently being taxed under MCR 2.403 at $400-$600 per hour. This scenario makes it clear that attorneys' fees and costs are clearly trial-oriented because awarding appellate attorneys' fees will do precisely the opposite of what was intended, i.e., energize people to do unnecessary appellate work to have an even bigger payday.

JOHN P. JACOBS, P.C., ATTORNEYS AND COUNSELORS AT LAW • THE DIME BUILDING • 719 GRISWOLD STREET, SUITE 600 • DETROIT, MI 48232-5600 • (313)965-1900

that penalizing appellate activity would engender? Putting aside that counsel for appellees will be highly motivated to complicate, obfuscate, gyrate and enlarge appellate litigation because it is in their financial interest to do so, as Haliw is being read, the appellants who are foolhardy enough to brave the British Rule are being penalized for the finest tradition of American Appellate law, attempting to change the law, or to obtain a clarification of an existing rule of law, or simply challenging an injustice.

While docket concerns of the Michigan Court of Appeals may motivate appellate judges to impose appellate sanctions, the duty of the Supreme Court is to step in and to protect the appellate system that is guaranteed by the Michigan Constitution Article 1, §14. The ability of the public to challenge inappropriate trial court decisions, make new law, challenge assumed legal shibboleths has given us the abrogation of Plessy v Ferguson, 163 US 537, 16 SCt 1138, 41 LEd 256 (1896) in favor of Brown v Board of Education in the City of Topeka, 347 US 483, 74 S CT 686, 98 LEd 873 (1954).

Shall we thus penalize the appellants who dare to question the legal system? The law as a whole does well when there is the possibility of a challenge to trial judges, who have their focus re-examined by appellate judges with a state-wide emphasis and with an error-correction orientation. Without an appellate system, trial judges become absolutist martinets. The legislature becomes all-powerful if judges are deprived of the ability to articulate the common law with the reasoned framework that interlaces existing legislation, if there be legislation. All of this is being

JOHN P. JACOBS, P.C., ATTORNEYS AND COUNSELORS AT LAW • THE DIME BUILDING • 719 GRISWOLD STREET, SUITE 600 • DETROIT, MI 48232-5600 • (313) 965-1900

jeopardized by an economic feeding frenzy for appellate sanctions that has no point.

Putting aside the purposelessness of the Haliw decision, it is absolutely contrary to the existing, four-square, word-for-word import of MCR 2.403(O). It is judicial legislation at its least attractive.

The policy implications are staggering. We have trial court judges evaluating appeals when appellate court judges themselves are loathe to do so. We predict that we are going to see a proliferation of post-appeal motions, probably in the Michigan Court of Appeals, at least begging for remand on the subject. More importantly, once a party has won (or lost) the case, appellate activity is undertaken at great risk and peril as the other party **knows** that if the appeal is unsuccessful, there is a huge potential and additional payday to increase the yield.

In truth, there is not a single shred of court rule authority under MCR 2.403 that harkens the reader back to a view that anything other than fees for **trial**-level services are to be awarded under the rule. In fact, the explicit time-deadline, which is absolute, cuts off the ramifications of the rule for **trial**-oriented services. Furthermore, MCR 2.403(O)(8) states that the request for costs must be filed and served within 28 days after the entry of the judgment or the post-trial motions decisions. As a pragmatic and absolute matter, that cuts all attorneys' fees off at the trial court level as a legal and pragmatic inexorability.

JOHN P. JACOBS, P.C., ATTORNEYS AND COUNSELORS AT LAW • THE DIME BUILDING • 719 GRISWOLD STREET, SUITE 600 • DETROIT, MI 48232-5600 • (313) 965-1900

The Appellate Bar should dread the effects that this will have on our clients as they contemplate appellate relief. Appellate mediation sanctions will, almost certainly, chill attempts to make, narrow, or broaden the law, right injustices, and simply challenge results deemed to be unfair, because of financial considerations that were never part of the process.

The system was **never** broken; there was never any reason to fix it. Both Costello and Gianetti Bros made it clear that abuses of appeals could be comfortably dealt with by MCR 7.216(C) and by the appellate judges who know the ropes. Punishing litigants for attempting to disagree with trial courts, with jury verdicts, summary dispositions, and with lower court rulings is directly inimical to the function of the appellate system, which is to fix errors. If the net effect of Haliw is to re-establish the British Rule for appellate activity, Haliw is wrong. Under the American Rule, unless the court rule or statute explicitly authorizes attorneys' fees, they are not to be taxed. This is explicitly the Michigan Rule, Grace v Grace supra, and In Re: Provider Class Plan, supra. There is not a single word in MCR 2.403 that justifies an appellate focus. The totality of the cited rule is trial-oriented. The interplay with the Order of Judgment statute, MCLA 600.6306, makes the assessment of attorneys' fees those that took place **as of the trial**.

What is the **real** subtext here? What is **really** at work? The Court of Appeals is swimming in cases, no doubt. The Court of

JOHN P. JACOBS, P.C., ATTORNEYS AND COUNSELORS AT LAW • THE DIME BUILDING • 719 GRISWOLD STREET, SUITE 600 • DETROIT, MI 48232-5600 • (313)965-1900

Appeals would like to engage in docket control by any means necessary. A strange construction, which constitutes virtual judicial legislation, to impose a layer of sanctions that cannot be read into the rule is simply wrong. Strict judicial construction requires a rejection of attorneys' fees on appeal in this case, and, globally, for all other cases. Keiser and Hyde are punitory cases that latch upon the 1997 rule change, virtually as an afterthought. To repeat: MCR 2.403(O)(2)(c) holds that attorneys' fees are to be connected with "a judgment entered as a result of a ruling or a motion after rejection of the case evaluation." We know what that means: that is a Judgment Notwithstanding the Verdict; or, that is a Directed Verdict; or, that is a last Summary Disposition; but, it is not an **appeal** that relates to those motions. That is what Keiser and Hyde ruled. Even if those cases, Keiser and Hyde, were correct and appeals relating to post-trial decisions could justify overturning the matter and imposing sanctions, it is only **trial** sanctions that apply.

Defendant is challenged here to come up with a single instance, in any capacity, where appellate sanctions are authorized by this rule. In fact, again, under MCR 2.403(O)(8), the only time for the submission of attorneys' fees is within twenty-eight (28) days after the entry of the judgment or the entry of an order denying a new trial or to set aside a judgment. That fixes, in concrete, for all time, **trial** fees.

Docket control devices are good. However, punishing people for appellate activity was explicitly rejected by Costello and

JOHN P. JACOBS, P.C., ATTORNEYS AND COUNSELORS AT LAW • THE DIME BUILDING • 719 GRISWOLD STREET, SUITE 600 • DETROIT, MI 48232-5600 • (313) 965-1900

Gianetti Bros.

Justice Marilyn J. Kelly's statement to the 2000 amendment rule has this prescient statement:

> It is my fear that mandatory mediation will present insurmountable financial obstacles to low income litigants and could provoke challenges based on a violation of due process principles. I am concerned that in some heavily burdened courts, judges may use the new rules, not as an option for the parties, but as a docket control mechanism for the court.

It is not pretty, and it is not nice, but Judge Markey's decision is a strained attempt to jettison undesirable appellate cases by punishing the parties who bring them to the court.

The defense bar abjures this. The Michigan Defense Trial Counsel, Inc., stands in total opposition to imposing appellate sanctions, on a generalized basis, based upon Judge Markey's construction which relates to Keiser and Hyde, both cases which, themselves, struggled to obtain a result based upon a wild reading of "verdicts."

CONCLUSION AND RELIEF

The Haliw Court of Appeals decision strains mightily to construe the 1997 amendments relating to "verdicts" as justifying appellate attorneys' fees (albeit in the context of a summary disposition after remand), and it does so by placing meanings into the words of MCR 2.403(O)(2)(c) that do not patently appear there. Keiser and Hyde make it clear that this rule can be construed in a fashion that leads to unintended results. What should be done?

After much reflection and consideration, the Michigan Defense Trial Counsel, Inc., proposes that this Court issue a clarifying

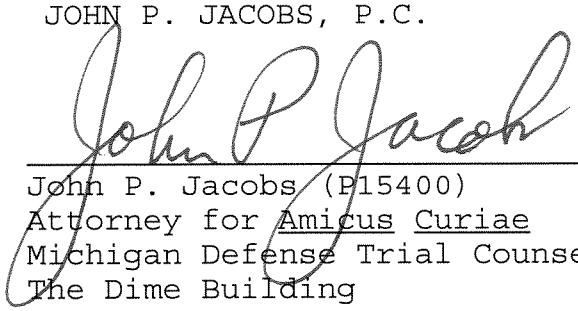
and amendatory rule change entitled "MCR 2.403(O)(12)" which reads as follows:

> (12) any award of actual costs and attorneys' fees under this subrule shall not be awarded for appellate proceedings.

From the foregoing analysis, it would be difficult, indeed, to conclude that MCR 2.403(O) and all of its subparts have ever intended appellate attorneys' fees and costs to be a part of case evaluation sanctions that have now been awarded for appellate activity. With the rule change, the clear intent of the rule, as originally framed, will be re-articulated and there will no longer be any question about whether appellate attorneys' fees and costs can be taxed as a mediation sanction under MCR 2.403(O). The rule change is necessary to end this debate once and for all.

Respectfully submitted,

JOHN P. JACOBS, P.C.



John P. Jacobs (P15400)
Attorney for Amicus Curiae
Michigan Defense Trial Counsel, Inc.
The Dime Building
719 Griswold, Suite 600
P.O. Box 33600
Detroit, MI 48232-5600
(313) 965-1900

Dated: September 24, 2004.

JOHN P. JACOBS, P.C., ATTORNEYS AND COUNSELORS AT LAW • THE DIME BUILDING • 719 GRISWOLD STREET, SUITE 600 • DETROIT, MI 48232-5600 • (313) 965-1900