STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

WILLIAM D. MCCARTHY, JR. and MEGHAN E. MCCARTHY, through their Next Friend, KATHRYN S. MCCARTHY,

Plaintiffs,

v

File No. 02-22536-NI
HON. PHILIP E. RODGERS, JR.

JEBEDIAH A. STONE and MAYNARD STONE,

Defendant.
/

Michael H. Dettmer (P12709)
Attorney for Plaintiffs

Mark R. Dancer (P47614)
Michael J. Daray (P56228)
Former Attorneys for Plaintiffs

Lyle A. Peck (P34259)
Attorney for Defendant Jebediah Stone

DECISION AND ORDER REGARDING FEES

Once again this Court will address a fee dispute between Plaintiffs' counsel in an effort to resolve the issue and provide guidance to members of our Bar Association concerning the appropriate division of fees. The substantive dispute between the parties was resolved and their settlement placed on the record at the close of all proofs and prior to jury deliberations. Mr. Michael Dettmer was trial counsel and began his representation of Plaintiffs approximately two weeks after their original counsel, Mr. Mark Dancer, had accepted their case. Succinctly stated, Plaintiffs' Next Friend, Kathryn S. McCarthy, brought her case to the law firm of Dingeman, Dancer & Christopherson. She signed a contingent fee agreement, some preliminary work was performed and a complaint drafted. There was a disagreement regarding who was to be sued, and Ms. McCarthy decided to change attorneys.

There is no suggestion that Mr. Dettmer inappropriately interfered with Ms. McCarthy's attorney/client relationship with the Dingeman, Dancer & Christopherson firm. In fact, Ms. McCarthy had a pre-existing attorney/client relationship with Mr. Dettmer who was handling other

matters for her. The disagreement was over the inclusion of Mr. Chad Tyson as a Defendant. Ms. McCarthy felt quite strongly that he should not be sued, and Mr. Dancer wished to name him as a party with the understanding that he could be dismissed later. Ms. McCarthy indicated in her affidavit that she was not fully satisfied with her lawyers' explanation of Mr. Tyson's status as a party and chose to terminate the relationship. She then approached Mr. Dettmer to determine if he would accept the case.

The issues associated with the dispute between counsel regarding the division of the contingent fee earned in this case have been fully briefed and subject to oral argument. The Court has reviewed the parties' written submissions and will now provide its legal conclusions. MCR 2.517.

Counsel recognize that an appropriate and ethical contingent fee is the subject of MCR 8.121. There is no dispute that the attorney's fee paid here is anything other than fair and reasonable. While the rule would allow a contingent fee up to one-third of the total recovery net of costs and expenses, the fee paid here was 25 percent or $27,964 after the deduction of $3,143 in costs. The case was settled in two phases. Prior to trial, $15,000 was paid on behalf of one minor Plaintiff and policy limits of $100,000 were paid for the second child at the conclusion of all proofs. Mr. Dancer argues that he should receive one-third of the fee just as if the case had been referred to Mr. Dettmer and cites *Petroskey, et al. v Syb, et al.*, Leelanau County Circuit Court File No. 94-3523-NO in support of his position.

Unlike the dispute between counsel in *Petroskey,* Mr. Dancer did not have a significant and meaningful investment of time and expense in this file when it was taken over by Mr. Dettmer. However, while Ms. McCarthy was free to change attorneys, the basis for her dispute with Mr. Dancer did not rise to the level of a discharge for legitimate cause. Therefore, similar to the dispute in *Petroskey* the Court finds that the discharge here was ethical but without cause. Dingeman, Dancer & Christopherson, then, are entitled to compensation not on the basis of their prior contingent fee agreement but pursuant to the doctrine of quantum meruit. *Morris v City of Detroit*, 189 Mich App 271, 278 (1991); and *Medbury v General Motors Corp*, 119 Mich App 351, 354-355 (1982).

In both *Morris, Medbury* and their predecessor, *Crawley v Schick*, 48 Mich App 728, 737; 211 NW2d 217 (1973), the Court of Appeals recognized the absence of a precise formula for assessing the reasonableness of an attorney's fees. Substantial discretion is provided to the trial

court. However, in *Morris, Medbury* and *Crawley* several nonexclusive factors were set forth for the trial court's determination. Those factors include the following:

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.

Morris, supra, p 279.

The *Morris* Court noted that the trial court may also consider that the attorney originally agreed to render services on a contingency basis. *Id.* Such an attorney may appropriately be awarded a percentage of the total recovery so long as the combined attorney fees do not exceed that fee allowable under MCR 8.121.

The Court takes judicial notice of the fact that referral fees may be ethically received so long as they comply with the conditions of the Michigan Rules of Professional Conduct, specifically 1.5(e).

> (e) A division of a fee between lawyers who are not in the same firm may be made only if:
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> (1) the client is advised of and does not object to the participation of all the lawyers involved; and
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> (2) the total fee is reasonable.
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> cf, RI-32 (October 6, 1989) and R-11 (July 26, 1991).

In both of the above-cited rulings, the State Bar Board of Commissioners has consistently found that the total fees assessable by counsel may not exceed the one reasonable fee sanctioned by the Court rules.

In the instant case, had Dingeman, Dancer & Christopherson referred the case to Mr. Dettmer, they might very well had negotiated an agreement where they would received 25 percent of Mr. Dettmer's 25 percent fee. Such an arrangement would certainly have generated a very significant recovery relative to the firm's modest investment in time and expense. In this case,

however, there was not a referral but the loss of a significant fee generating opportunity when a client who had concurrent relationships with two different law firms chose to remove her business from one firm in favor of another. There is no suggestion that Mr. Dettmer encouraged Ms. McCarthy to make this decision or was approached to accept the case until after Mr. Dancer's firm had been discharged.

Mr. Dancer, however, understandably points to the *Petroskey v Syb* opinion as strong support for the proposition that his firm receive a standard referral fee. Mr. Dancer argues that he has paid such fees to other counsel, discourages clients from abandoning other local counsel with whom they have existing relationships and highlights this Court's comment in the *Petroskey* opinion that, "There seems to be little benefit in promoting a fee sharing scheme which would be more economically beneficial to the successor firm who wins the client away rather than one predicated upon the civil and ethically sharing of fees and responsibility pursuant to a cooperative referral relationship." *Id.* at p 8.

The Court provided a substantial fee to the Bishop & Heintz firm in *Petroskey* but the fee fell somewhat short of a full one-third. The Court's rationale in *Petroskey* was predicated upon quantum meruit and an analysis of the *Crawley* factors. While the *Petroskey* opinion speaks for itself, it was evident that Bishop & Heintz made a substantial investment of both time and expense before the case was lost to a successor firm due to no fault of their own. Here, the *Crawley* factors must also be analyzed.

Both Mr. Dancer and Mr. Dettmer enjoy high professional standing within the local community and have substantial experience in the prosecution of plaintiffs' personal injury cases. Mr. Dancer has tried several such matters successfully over the last several years and has settled a number of others quite favorably on behalf of his clients.

Similarly, Mr. Dettmer enjoys a high reputation both locally and statewide. He has represented injured persons in courts throughout the state for many years and served the State Bar Association as a commissioner and president. Prior to his return to active practice in Grand Traverse County, he spent eight years as U.S. Attorney for the Western District of Michigan.

The case was a straight forward third-party no-fault claim where the Defendant admitted liability. It was not complex but required significant time and labor due to an intransigent insurance

carrier. Due to the limited insurance proceeds available, there was no windfall to Plaintiff's counsel as there was in *Petroskey,* - - only a reasonable fee for a thorough effort.[1]

Due to the failure of the Defendant's insurance carrier to make a reasonable offer, the case was not quickly or simply resolved by the successor firm. Mr. Dettmer was required to obtain and review medical records, take depositions and preserve medical evidence. He also participated in case evaluation, a final settlement conference and completed all but closing arguments in the trial on the merits. The Court had not only received all the proofs but had completed its conference with counsel and jury instructions and a verdict form had been prepared and agreed upon. Everything in the trial had been concluded short of the actual presentation of closing arguments. This is a fee dispute, then, where one party provided 99 percent of the effort and another provided 1 percent.

As was true in *Petroskey* where Mr. Dancer obtained a very favorable result for his client, so did Mr. Dettmer here. The case was settled at the conclusion of proofs for policy limits which were tendered on behalf of Defendants who did not have collectable assets in excess of those limits. It was a complete victory and no discount from available insurance was provided.

In consideration of the *Crawley* factors, the Court finds that both counsel enjoy similar professional standing and experience in the presentation of a third-party no-fault case, that the case was straight forward and simple from the perspective of experienced counsel. Skill, time and labor involved were grossly disproportionately provided by Mr. Dettmer who did achieve complete victory. Finally, Mr. Dettmer did have a pre-existing relationship with the client and one that continues to this date. Mr. Dancer's firm had a relationship with the client of approximately two weeks duration.

This case is similar to *Petroskey* in that both counsel who appeared in the case were well equipped to prosecute it to a conclusion and prior counsel was ethically replaced but not for legitimate cause. The cases are similar in that quantum meruit provides the basis for fair and reasonable compensation. They are quite dissimilar in that Mr. Dancer's firm did not provide the significant and meaningful investment of time and expense into the case that predecessor counsel did in *Petroskey.* This is certainly not because Mr. Dancer was unwilling to do so. Indeed, his firm had acted aggressively within the short time period that the case was his responsibility.

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[1]Indeed, for the length of the trial and the work involved in the case, the fees generated by Mr. Dettmer would be less than those generated by a reasonable hourly rate for an attorney of his experience practicing in this part of Michigan.

Further, the Court recognizes the tension between a quantum meruit recovery where a dissatisfied client has changed firms versus the payment of a referral fee. If a referral fee is the basis for compensation, there is still an economic incentive to accept a case from another attorney but one does so with the knowledge that it is impressed with a meaningful lien and, as the Court wrote in the *Petroskey* opinion, ".... active participation in the loss of another's significant business opportunity by lawful recruitment of that opportunity in one's own economic self-interest will likewise be mitigated with the knowledge that the ethical and competent predecessor counsel will share proportionately in the fruits of victory."

The Court reiterates its belief that there is a delicate balance between the promotion of a fee sharing scheme which is more economically beneficial to a successor firm than one predicated upon an ethical sharing of fees pursuant to a cooperative referral relationship. Quantum meruit is the basis of recovery in such disputes and both policy and equity require a proportionate sharing of the fees generated when the discharge is without good cause. However, given the limited nature of the work performed in this case by Mr. Dancer's firm relative to that of Mr. Dettmer and the very brief time the case was in Mr. Dancer's office, the Court does not find that a proportionate sharing of fees should be substantially equal to that in a referral relationship as it did in *Petroskey*. Mr. Dancer's firm invested 16.5 hours of time and claims $1,071 in expenses.

With regard to the expenses, only two items are disputed. $133.90 was incurred in travel expenses on December 11, 2002 in an effort to obtain information from the Secretary of State that Mr. Dancer says was unavailable on the computer. The travel expense was incurred due to a rapidly approaching statute of limitations on a potential claim by Kathryn McCarthy personally. The other $836.64 in expenses were attributed to computerized legal research. The Court does not find the computerized legal research charge to be the client's responsibility. This was an unsuccessful search for Secretary of State information and it led to the trip to Lansing. Accordingly, the $133.90 of travel costs may be reimbursed but not the $836.64 in legal research expenses. The expenses to be awarded Mr. Dancer's firm total $234.85. After all expenses incurred by both firms are deducted, the fee to Mr. Dancer's firm shall be 15 percent of that fee received by Mr. Dettmer.[2]

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[2]Hypothetically, if Mr. Dettmer's fee would have been $25,000, Mr. Dancer would receive $3,750 and Mr. Dettmer $21,500 for a total of $25,000.

Mr. Dettmer is directed to present an order to this Court which sets forth the expense and fee calculations and the funds to be paid to each firm. Such an order should be noticed for entry within seven days of the date signed below.

IT IS SO ORDERED.

HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: 2/26/04