ANSWER TO QUESTION NO. 3

The general rule is that a party normally bears the cost of their own attorney. However, a court may order a party or counsel to pay for the other party's attorney fees if a statute or court rule allows, or if provided by the common law. *Smith v Khouri,* 481 Mich 519, 526 (2008).

Statutory authority exists for the award of attorney fees. MCL 600.2591. To come within the ambit of the statute, a claim or defense must be deemed frivolous. Not every losing claim or defense is automatically deemed frivolous. Rather, "frivolous" is defined in the statute as meaning that at least one of the following conditions is met: (1) the primary purpose of the party's action or defense was to harass, embarrass or injure the prevailing party; (2) the party had no reasonable basis to believe that the facts underlying the party's legal position were in fact true; or (3) the party's position was devoid of legal merit. Sanctions under the statute can be imposed against the party and the attorney.

The Michigan Court Rules also allow for the imposition of an attorney fee award. MCR 2.114(D), (E) and (F) allow an award against a party or their counsel for violation of MCR 2.114(D). Subsections (D)(2) and (3) provide that the attorney's signature constitutes a certification that to the best of the attorney's knowledge, information and belief, formed after reasonable inquiry, that the document is well grounded in fact, and is not interposed for any improper purpose. For a violation of these requirements, sanctions, including reasonable attorney fees, may be awarded under subsection (E). Additionally, under subsection (F), sanctions may be awarded for a frivolous claim or defense as provided under MCR 2.625(A) (2), which allows for the imposition of costs as provided by MCL 600.2591.

Applying the foregoing principles to the facts at hand, Chips could seek an attorney fee award against both Warbucks and its counsel. To prevail, however, Chips would have to establish that the Warbucks defense was frivolous and/or that Warbucks' lawyer signed the answer and response to the motion in violation of the court rule. This should not be too difficult to establish because Warbucks' counsel all but conceded at oral argument on the summary disposition motion that he did virtually nothing in the way of reasonable inquiry into his client's only defense, i.e., the recipe change. Accordingly, Warbucks' answer and response to the motion

could not be the product of a "belief well-grounded in fact," as MCR 2.114(D) (2) requires, for signature. Likewise, it appears the defense was frivolous as defined by statute.

Additionally, and irrespective of a finding of frivolousness, because the case went to case evaluation, MCR 2.403(0) applies. Chips accepted the case evaluation of $24,700. Warbucks rejected. Chips was awarded $28,800 by the trial court's granting its summary disposition motion. Because Warbucks did not better the case evaluation award by more than 10% and the evaluation was unanimous, Chips is entitled to attorney fees necessitated by Warbucks' rejection of the case evaluation. Under the facts provided, this would include the fees involved in preparing and arguing the motion for summary disposition. Under MCR 2.403, case evaluation sanctions are awarded only against the party, not the attorney. Lastly, MCR 2.403(0)(11) provides that where the "verdict" is the result of a motion as provided in MCR 2.403(0) (2)(c), the court may, "in the interest of justice" refuse to award actual costs. The facts presented, however, do not indicate that such a declination is called for. *Haliw v Sterling Heights, 266 Mich App 444 (2005).*

In sum, Chips has a very good chance to prevail in its efforts for reimbursement of attorney fees by arguing that Warbucks' defense should be deemed frivolous and because Warbucks defense was advance without adherence to 2.114. Chips also has an excellent chance of recovering a portion of the total attorneys' fee as case evaluation sanctions.