STATE OF MICHIGAN

COURT OF APPEALS

SUE JANICE BURRIS and WILBURN BURRIS,

Plaintiffs-Appellees,

v

RICHARD LARGO DIAZ and DELUXE CAB COMPANY, INC. OF TAYLOR,

Defendants-Appellants,

and

DENISE DARLENE BURKE and SMART[1],

Defendants.

UNPUBLISHED
November 5, 1999

No. 202857
Wayne Circuit Court
LC No. 94-416897 NI

Before: Zahra, P.J., and Saad and Collins, JJ.

PER CURIAM.

Defendants Richard Largo Diaz and Deluxe Cab Company, Inc. of Taylor (defendants) appeal as of right from a post-judgment order allowing a personal insurance protection benefit setoff for wage losses, which was entered after a jury returned a verdict in favor of plaintiff[2] in the amount of $60,000. We affirm in part, reverse in part, vacate in part, and remand for further proceedings consistent with this opinion.

This case arises from an automobile accident. Defendant Diaz was driving a taxicab on Eureka Road and stopped in the far right lane to let out a passenger. A pickup truck stopped behind the cab, and a van driven by plaintiff stopped behind the pickup truck. A SMART bus struck plaintiff's van from behind, causing a chain collision involving defendant Diaz's taxicab, the pickup truck, plaintiff's van, and the SMART bus. The jury returned a verdict in favor of plaintiff. They found that defendant Diaz was negligent and a proximate cause of plaintiff's injuries and that those injuries resulted in serious impairment of a bodily function. The jury awarded plaintiff $10,000 in non-economic damages to the

date of trial, $30,000 in wage loss, and $20,000 in future damages. The jury found against plaintiff's husband on his derivative claims.

Defendants first argue on appeal that the trial court erred in instructing the jury that it could award damages for plaintiff's wage loss, when no evidence of any wage loss was ever before the jury, and that the trial court further erred in failing to reduce the jury's award of $30,000 for wage loss when that award did not exceed the limitations established by the no-fault act. Plaintiff argues, however, that even if it was error to instruct the jury on wage loss damages and to include a space for wage loss damages on the verdict form, defendants cannot be heard to complain of an improper verdict that was the result of instructions and a verdict form to which they stipulated. Therefore, plaintiff argues, if this Court finds that the award for wage loss damages was erroneous, this Court should remand for a new trial on damages alone.

The record indicates that defendants objected repeatedly to the issue of wage loss damages going to the jury on the basis that no evidence to support such an award was ever before the jury. Indeed, it was plaintiff who argued that the court should instruct on wage loss damages, and it was plaintiff who suggested that, instead of instructing the jury with regard to no-fault benefits, the court could, post-verdict, reduce any award of wage loss damages pursuant to the appropriate no-fault limitations.[3] Moreover, the record does not show that defendants stipulated to instructions regarding wage loss or the verdict form.[4] Counsel for defendants later stated that, given the court's decision that the issue of wage loss was going to the jury, he did not object to the use of the language "wage loss damages" instead of "economic damages" on the verdict form. However, he stated that he still objected to the question of wage loss damages going to the jury in the first place.

It is error to instruct a jury on an issue not supported by the evidence. *Strach v St John Hosp Corp,* 160 Mich App 251, 282; 408 NW2d 441 (1987). Here, although plaintiff presented evidence that she was employed and that she had missed work as a result of the accident, the record does not show that evidence concerning plaintiff's wages was ever before the jury. Plaintiff argued for admission of a letter stating plaintiff's hourly wage and, after objection and argument by defendants, the court stated that the letter was admitted. However, plaintiff elicited no testimony with regard to the wage information in the letter. Further, after closing arguments, when the court asked counsel for both parties to identify all exhibits they wanted marked, the letter was not included. Indeed, when discussing jury instructions, the trial court acknowledged that there was no evidence concerning plaintiff's wages before the jury. The jury's award of $30,000 for wage loss damages was, therefore, predicated on speculation and conjecture. Moreover, the jury's award of $30,000 fell far short of the limitations established by Michigan's no-fault act, MCL 500.3101 *et seq.;* MSA 24.13101 *et seq.* See *Ouellette v Kenealy*, 424 Mich 83, 85-86; 378 NW2d 470 (1985) (wage loss resulting from an automobile accident may be recovered in a tort action if the wage loss exceeds the daily, monthly, and three year limitations set forth in MCL 500.3107; MSA 24.13107).[5] Because there was no evidence before the jury to support its $30,000 award for wage loss, let alone wage loss in excess of the statutory maximums, we vacate that portion of the jury's award.

Defendants next argue that the trial court erred in failing to set off the jury's verdict by the amount plaintiff received from SMART and Burke for settling her claims against them. We agree.

Statutory interpretation is a question of law that we review de novo. *Abbott v John E Green Co,* 233 Mich App 194, 198; 592 NW2d 96 (1998). We review the trial court's findings of fact for clear error. *Andrews v Pentwater Twp,* 222 Mich App 491, 493; 563 NW2d 713 (1997).

As an initial matter, we find that the trial court clearly erred in concluding that the release signed by plaintiff as part of her settlement with SMART and Burke did not cover all of plaintiff's claims against SMART and Burke. After reviewing the terms of the release, we conclude that it released SMART and Burke from all claims arising out of the accident at issue in the present case. The release specifically states that SMART and Burke were to be released from any claims set forth in plaintiff's complaint or that could have been set forth in the complaint. A review of plaintiff's complaint reveals that plaintiff did in fact claim that she had lost earnings and earning capacity. Further, the release specifically states that SMART and Burke were to be released from any claim of loss of compensation that may accrue in the future.

The plain language of MCL 600.2925d(b); MSA 27A.2925(4)(b) requires that an amount paid for a release by one tortfeasor reduces an award rendered against other tortfeasors by the amount paid. See *Smith v Childs,* 198 Mich App 94, 101; 497 NW2d 538 (1993). Although plaintiff contends that defendants were not entitled to a setoff because MCL 600.2925d(b); MSA 27A.2925(4)(b) was repealed by the Legislature, according to the the notes following the statute, the amendment repealing MCL 600.2925d(b); MSA 27A.2925(4)(b) only applies to cases filed on or after the effective date of March 28, 1996. Because plaintiff filed her complaint on May 26, 1994, nearly two years prior to the effective date for the amendment to MCL 600.2925d; MSA 27A.2925(4), defendants were entitled to the setoff. Accordingly, on remand, the trial court must set off the amount of the settlement against the jury's verdict, minus the award for wage loss.

Defendants next claim that the trial court erred in awarding plaintiff mediation sanctions. A trial court's decision to grant mediation sanctions is reviewed de novo by this Court. *Braun v York Properties, Inc,* 230 Mich App 138, 149; 583 NW2d 503 (1998). MCR 2.403 sets forth the rules concerning mediation. Pursuant to MCR 2.403(O), a defendant who rejects a mediation award must pay the plaintiff's actual costs, including attorney fees, unless the defendant improved its position with regard to the mediation award by more than ten percent. *McCarthy v Auto Club Ins Ass'n,* 208 Mich App 97, 102; 527 NW2d 524 (1994). Here, defendants rejected a mediation evaluation in the amount of $40,000. Because the jury verdict was $60,000, the court concluded that defendants had not improved their position and were, therefore, subject to mediation sanctions. However, when determining whether an award of mediation sanctions is appropriate, the relevant verdict to be measured against the mediation evaluation is the ultimate verdict left after appellate review. *Hyde v Univ of Michigan Bd of Regents,* 226 Mich App 511, 526; 575 NW2d 36 (1997). Because we have vacated the jury's award of $30,000 for wage loss, the verdict in plaintiff's favor, before adjustment to include assessable costs and interest pursuant to MCR 2.403(O)(3), is $30,000. In order for defendants to avoid mediation sanctions, the adjusted verdict must be less than $36,000. See MCR 2.403(O). On remand, the trial court must determine the amount of the adjusted verdict and impose mediation sanctions only if the adjusted verdict exceeds $36,000.[6]

Defendants next argue that the trial court erred because it did not grant them offer of judgment sanctions. Defendants argue that after setoffs, the adjusted verdict in this case is zero, which is less favorable to plaintiff than defendants' $2,500 offer to settle. Interpretation and application of court rules is a question of law that this Court reviews de novo. *McAuley v GMC,* 457 Mich 513, 518; 578 NW2d 282 (1998); *Gallagher v Keefe,* 232 Mich App 363, 366; 591 NW2d 297 (1999). The interpretation of a court rule is subject to the same principles applicable when interpreting a statute. *McAuley, supra; FMB-First Michigan Bank v Bailey,* 232 Mich App 711, 725; 591 NW2d 676 (1998).

MCR 2.405(D) states in relevant part:

> (D) Imposition of Costs Following Rejection of Offer. If an offer is rejected, costs are payable as follows:
>
> (1) If the adjusted verdict is more favorable to the offeror than the average offer, the offeree must pay to the offeror the offeror's actual costs incurred in the prosecution or defense of the action.
>
> (2) If the adjusted verdict is more favorable to the offeree than the average offer, the offeror must pay to the offeree the offeree's actual costs incurred in the prosecution or defense of the action. However, an offeree who has not made a counteroffer may not recover actual costs unless the offer was made less than 42 days before trial.

The term "verdict," as defined by MCR 2.405(A)(4), includes "(a) a jury verdict, (b) a judgment by the court after a nonjury trial, (c) a judgment entered as a result of a ruling on a motion after rejection of the offer of judgment." An "adjusted verdict" is "the verdict plus interest and costs from the filing of the complaint through the date of offer." MCR 2.405(A)(5).

MCR 2.405 makes no mention of applying setoffs when calculating an adjusted verdict, although it expressly provides that the applicable interest and costs are added. The maxim "expressio unius est exclusio alterius," the expression of one thing is the exclusion of another, means that the express mention of one thing in a statute implies the exclusion of other similar things. *Alcona Co v Wolverine Environmental Production, Inc,* 233 Mich App 238, 247; 590 NW2d 586 (1998). Because MCR 2.405 expressly allows for a verdict to be adjusted by interest and costs, but does not mention setoffs, we conclude that the "adjusted verdict" does not include setoffs. Accordingly, when determining whether the trial court erred in denying defendants offer of judgment sanctions, we do not take into consideration the setoff required by MCL 600.2925d(b); MSA 27A.2925(4)(b). Thus, even after the jury's wage loss award is deducted, the adjusted verdict in this case clearly exceeds defendants' $2,500 offer of judgment. Therefore, the trial court did not err in denying defendants offer of judgment sanctions.

Defendants' next claim is that the trial court erred in allowing Sergeant Dennis David to testify that, in his opinion, when defendant Diaz stopped to let a passenger out of his taxicab, he was in

violation of an ordinance prohibiting taxicabs from stopping in the middle of the road. Defendants contend that David should not have been allowed to testify since he was not listed as an expert witness, and that because he was allowed to testify, the trial court erred in not allowing defendants to call a rebuttal expert witness. We disagree. We review a trial court's evidentiary rulings for an abuse of discretion. *Allen v Owens-Corning Fiberglas*, 225 Mich App 397, 401; 571 NW2d 530 (1997). An abuse of discretion occurs when the result is so palpably and grossly violative of fact and logic that it evidences perversity of will or the exercise of passion or bias rather than the exercise of discretion. *Id.*

Defendants' argument hinges on their contention that David was admitted as an expert witness. However, our review of the trial transcript reveals that David was properly allowed to testify about his opinions, pursuant to MRE 701, as a lay witness. Therefore, he did not need to be listed as an expert witness. Further, the trial court did not abuse its discretion in failing to allow defendants to call an expert rebuttal witness because the scope of rebuttal in a civil case is within the trial court's discretion, and there was no expert testimony to rebut. *Taylor v Blue Cross & Blue Shield of Michigan*, 205 Mich App 644, 655; 517 NW2d 864 (1994).

The final issue raised by defendants on appeal is that the trial court erred in refusing to order a court officer to return cash seized from defendants. Again, statutory interpretation is a question of law which this Court reviews de novo. *Abbott, supra.*

After the conclusion of trial in this case, plaintiff obtained an ex parte order appointing Nathaniel Helton as a special court officer and empowering him to seize and sell non-exempt property of defendant Deluxe Cab. Helton proceeded to seize $8,331 in cash from Deluxe Cab, in addition to three taxicabs. After the seizure, defendants obtained a stay of proceedings, an order vacating the appointment of Helton as a special court officer, and an order requiring that all seized property be immediately returned. The taxicabs were returned; however, Helton kept $3,180 in fees. The Certificate of Writ of Execution Satisfied in Full/Part reveals the breakdown of the $3,180. The balance due from defendants was $89,667.50. Helton kept the $29 statutory flat fee,[7] $16 for mileage, $45 for notice of sale fees, $200 in expenses, which included towing and storage, and $2,890 for his fee based on the percentage of the receipts. After a hearing on the matter, the trial court allowed Helton to keep the $3,180 in fees.

With regard to services such as those performed by Helton, MCL 600.2559(1)(j)-(k); MSA 27A.2559(1)(j)-(k), set forth the following compensation schedule:

> (j) For levy under a writ of execution, $27.00 plus mileage, plus the actual and reasonable expense for taking, keeping, and sale, plus, if the judgment is satisfied prior to sale, 7% of the first $5,000.00 in receipts and 3% of receipts exceeding the first $5,000.00.
>
> (k) For sale on levy in a case of execution, 7% of the first $5,000.00 in receipts and 3% of any receipts exceeding the first $5,000.00.

We conclude that, under the statutory provisions, Helton was entitled to the flat fee, the fees for mileage and notice of sale, and the $200 in expenses, because the statutes only required a levy under a writ of execution, pursuant to which Helton acted, to collect these fees. However, Helton was not entitled to keep the remaining $2,890 fee based on the percentage of receipts.

MCL 600.2559(1)(j); MSA 27A.2559(1)(j) provides that the person conducting the seizure is entitled to a percentage of the receipts "if the judgment is satisfied prior to sale." Nothing in the record demonstrates, nor does either party contend, that the judgment in this matter has been satisfied. Therefore, Helton is not entitled to the fee under MCL 600.2559(1)(j); MSA 27A.2559(1)(j). Neither can Helton prevail under MCL 600.2559(1)(k); MSA 27A.2559(1)(k), because no sale on the property levied against has occurred. Because there was no statutory basis for the fees, the trial court erred when it allowed Officer Helton to keep the $2,890 percentage of receipt fee. See *In re Fees of Court Officer*, 222 Mich App 234, 254; 564 NW2d 509 (1997).

Defendants also argue that they are entitled to recover the $2,310 in revenue lost during the time Helton had three of defendant Deluxe Cabs' taxicabs in his possession. Defendants rely upon MCL 600.2559(7); MSA 27A.2559(7), which states, "[a]ny sheriff or other officer who, after the fees specified by this section have been tendered, neglects or refuses any of the services required by law shall be liable to the party injured for all damages which the party sustains by reason of that neglect or refusal." Under the plain language of the statute, for liability to attach, Helton must have neglected a service required by law or refused a service required by law. Because there is no evidence of such neglect or refusal, defendants may not recover under this section for lost revenue.

Affirmed in part, reversed in part, vacated in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Brian K. Zahra
/s/ Henry William Saad
/s/ Jeffrey G. Collins

[1] SMART is an acronym for Suburban Mobility Transit Authority for Regional Transportation.

[2] Because plaintiff Wilburn Burris' claims are derivative of plaintiff Sue Janice Burris' claims, the term plaintiff in this opinion refers only to plaintiff Sue Janice Burris.

[3] The following exchange took place between plaintiff's counsel and the court:

> *[PLAINTIFF'S COUNSEL]:* I think what the Court does, I think, your Honor, is if they give damages for work loss before the three years are up, I think they just subtract that and they don't bother the jury with that.
>
> *THE COURT:* Okay, how about we'll just stipulate to that. The first three years, if they award an amount in excess of the benefits, will be this work loss amount during the first three years in excess of no-fault.

So I'm just simply going to say, damages suffered by the plaintiff, including work loss, all work loss—we'll just say work loss.

And you agree that, can we get a stipulation that if the amount exceeds what the insurance would cover, that it comes under this work loss during the first three years in excess of the no-fault benefits.

[PLAINTIFF'S COUNSEL]: That's fine with me.

[4] Counsel for defendants stated as follows:

I hear what the Court is saying, but I'm not going to agree to anything about wage loss. I don't think there's any proof of wage loss.

* * *

So I can't really stipulate to anything because I don't want it to be used, to sound like I agree—I think no wage loss has—I've already made my point, your Honor.

[5] MCL 500.3107(1)(b); MSA 24.13107(1)(b) states that the maximum amount of PIP benefits payable for work loss "shall be adjusted annually to reflect changes in the cost of living under rules prescribed the commissioner. . . ." The historical and statutory notes following that section reference Insurance Bureau Bulletin 98-03, wherein the $1,000 wage loss limitation set forth in § 3107(1)(b) is adjusted for the rate of inflation. Plaintiff's accident occurred on January 26, 1994. According to the bulletin, plaintiff would be subject to a monthly maximum benefit in wage losses of $3,267 for the period from October 1, 1993 to September 30, 1994, $3,349 for the period from October 1, 1994, to September 30, 1995, $3,450 for the period from October 1, 1995 to September 30, 1996, and $3,545 for the period from October 1, 1996 to September 30, 1997. Thus, plaintiff's maximum no-fault wage loss benefits payable from the date of her accident to expiration of the three-year limitation would total approximately $121,859, and the maximum no-fault wage loss benefits payable from the date of her accident to the date of the verdict would total approximately $104,355.

[6] Post-trial reductions of a verdict made pursuant to statute are not considered when calculating the adjusted verdict for purposes of determining whether mediation sanctions are warranted. See *Hall v Citizens Ins Co*, 141 Mich App 676, 689; 368 NW2d 250 (1985). Therefore, the trial court should not apply the setoff required by MCL 600.2925d(b); MSA 27A.2925(4)(b) when calculating the adjusted verdict.

[7] MCL 600.2559(2); MSA 27A.2559(2) allowed for a $1 increase of the statutory flat fee in 1995 and 1996. Therefore, the maximum that could be collected for the statutory flat fee was $29.