

STATE OF MICHIGAN
COURT OF APPEALS

MAXINE JOHNSON,

Plaintiff-Appellant,

v

KLCO INBODY INSURANCE,

Defendant/Cross-Plaintiff,

and

JOHN WARJU,

Defendant/Cross-Defendant-
Appellee.

UNPUBLISHED

April 23, 2002

No. 226534

Tuscola Circuit Court

LC No. 97-016425-CK

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

PER CURIAM.

Plaintiff sued defendant John Warju for negligence in connection with a fire that was started on Warju's property and spread to plaintiff's property, burning a barn. Plaintiff was awarded \$6,000 following a jury trial. The trial court ultimately denied plaintiff's post-trial request for mediation sanctions (now known as case evaluation sanctions), and also refused to tax as costs a witness fee for plaintiff's appearance at trial. Plaintiff appeals as of right. We reverse and remand.

Plaintiff first argues that the trial court erred in denying her request for mediation sanctions under MCR 2.403(O). A trial court's decision to grant or deny a motion for mediation sanctions is reviewed de novo. *Cheron, Inc v Don Jones, Inc*, 244 Mich App 212, 218; 625 NW2d 93 (2000). The issue in this case turns on what constitutes the "verdict" for purposes of MCR 2.403(O).

MCR 2.403(O)(2) and (3) provide:

(2) For the purpose of this rule "verdict" 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 case evaluation.

(3) For the purpose of subrule (O)(1), a verdict must be adjusted by adding to it assessable costs and interest on the amount of the verdict from the filing of the complaint to the date of the case evaluation, and, if applicable, by making the adjustment of future damages as provided by MCL 660.6306; MSA 27A.6306. After this adjustment, the verdict is considered more favorable to a defendant if it is more than 10 percent below the evaluation, and is considered more favorable to the plaintiff if it is more than 10 percent above the evaluation. If the evaluation was zero, a verdict finding that a defendant is not liable to the plaintiff shall be deemed more favorable to the defendant.

Under MCR 2.403(O)(2), the jury's verdict of \$6,000 constitutes the "verdict" for purposes of MCR 2.403(O). The only adjustments to the verdict involved the addition of interest and taxable costs. It is clear that this verdict, as adjusted, is more than ten percent above the mediation evaluation of \$2,000. MCR 2.403(O)(2) and (3). Therefore, under MCR 2.403(O)(1), plaintiff was entitled to an award of mediation sanctions.

We disagree with defendant's argument that the verdict should be further adjusted and reduced by the payment that plaintiff received from her insurer. Plaintiff received \$7,980 in insurance proceeds, but later agreed to repay \$3,500 out of the proceeds of any verdict she was awarded from defendant at trial. Defendant's argument lacks merit, first, because defendant never joined the insurer as a party in these proceedings. Under MCR 2.403(O)(2) and (3), only the jury's verdict or the final judgment entered by the court may constitute the "verdict" for purposes of MCR 2.403(O)(1). The verdict in this case should reflect only the action between plaintiff and defendant because defendant opted not to add plaintiff's insurer as a party. See *Cheron, supra* at 214, 219-221 (holding that the trial court erred in using a posttrial setoff to adjust the verdict under the plain language of MCR 2.403(O)). Cf. *Marketos v American Employers Ins Co*, 465 Mich 407; 633 NW2d 371 (2001) (where the trial court agreed that a setoff should be made to the jury verdict and the insurance company defendant was a party to the action). The fact that defendant believed he would face a subsequent subrogation claim has no bearing on the application of MCR 2.403(O) where the insurer was not a party to these proceedings. Because the trial court denied defendant's motion to adjust the jury's verdict to reflect the insurance payment, the final verdict for purposes of MCR 2.403(O) consists of the jury's verdict of \$6,000, together with the addition of interest and taxable costs. Accordingly, we conclude that the trial court erred in denying plaintiff's request for mediation sanctions. The case is remanded for determination of the appropriate amount of mediation sanctions due under MCR 2.403.

Plaintiff also argues that the trial court erred in not awarding her a witness fee of \$14.80 as part of her taxable costs. Defendant does not contest this issue. We agree with plaintiff that nothing in MCL 600.2405(1) or MCL 600.2552 bars a party from recovering a witness fee for the party's testimony. See also MCR 2.625(G)(3). Accordingly, on remand, plaintiff shall be awarded a witness fee for the day she testified.

Reversed in part and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Brian K. Zahra

/s/ Janet T. Neff

/s/ Henry William Saad