STATE OF MICHIGAN

COURT OF APPEALS

JULIUS DUTHLER,

Plaintiff-Appellee,

and

BRETON MEADOWS, L.L.C.,

Intervening Plaintiff-Appellee,

v

HARVEY A. DUTHLER,

Defendant-Appellant.

UNPUBLISHED
December 21, 2004

No. 242317
Kent Circuit Court
LC No. 95-003310-CK

JULIUS DUTHLER,

Plaintiff-Appellant/Cross-Appellee,

and

BRETON VENTURES, L.L.C.,

Intervening Plaintiff,

v

HARVEY A. DUTHLER,

Defendant-Appellee/Cross-Appellant.

No. 252942
Kent Circuit Court
LC No. 95-003310-CK

Before: O'Connell, P.J., Bandstra and Donofrio, JJ.

PER CURIAM.

In Docket No. 242317, defendant Harvey A. Duthler (Harvey) appeals as of right from a judgment, following a bench trial, awarding plaintiff Julius Duthler (Julius) $1,368,949 as the

amount owed, including statutory interest, under the terms of the parties' Breton Meadows Development Limited Partnership agreement, less a setoff of $254,295 owed to Harvey in connection with the enforcement of a November 2, 1994, judgment in an earlier case, resulting in a net judgment to Julius of $1,114,654. Harvey also challenges an earlier order granting summary disposition in favor of intervening plaintiff, Breton Ventures, L.L.C. (Breton Ventures). Because we are not persuaded by any of Harvey's arguments regarding either the ultimate judgment in the 1995 case, or the grant of summary disposition in favor of Breton Ventures, we do not disturb either order, except we do remand the case to the trial court for the limited purpose of modifying the statutory interest award.

In Docket No. 252942, Julius appeals as of right and Harvey cross appeals from the trial court's order awarding Julius case evaluation sanctions of $79,714.57. With regard to Julius' challenge to the trial court's disallowance of $9,859 for attorney services we remand this case for a determination of whether Julius met his burden of establishing that the disputed charges related to the 1995 case and, if so, the reasonableness of the requested attorney fees. Concerning the cross appeal, given our decision to remand this case for modification of the statutory interest awarded for the money judgment in the 1995 case in Docket No. 242317, we conclude that should the modified interest award affect Julius' entitlement to case evaluation sanctions, Harvey may bring an appropriate motion for redetermination of Julius' entitlement to case evaluation sanctions under MCR 2.403 on that basis only.

We affirm in part, reverse in part, and remand for limited further proceedings.

I. Facts and Proceedings

Julius and Harvey are brothers who were involved in a number of business ventures together, including the Breton Partnership and Duthler Realty Company, Inc. (Duthler Realty). Duthler Realty's assets included the property upon which Julius operated an automobile dealership. The Breton Partnership assets also consisted of real property, including one parcel known as the Breton Meadows strip mall.

In 1988, Harvey and Duthler Realty filed a civil action against Julius concerning the rent paid to Duthler Realty for the automobile dealership and requesting appropriate relief, including the dissolution of Duthler Realty (hereafter the "1988 case"). The 1988 case culminated in the entry of a judgment on November 2, 1994, dismissing the complaint, but granting relief in connection with Julius' counterclaim for breach of a settlement agreement, effective in 1989, with the exception of arbitration provisions contemplated by the settlement agreement. The relief included awarding Julius the property on which the automobile dealership was located. Harvey was awarded the Breton Meadows strip mall, and the judgment provided that any sale of the strip mall before November 2, 1994, was deemed confirmed by the judgment, with Harvey being entitled to receive "all consideration from said sales." Duthler Realty was to be dissolved upon the consent of its shareholders, Harvey and Julius, but in the event that either shareholder failed to consent, the consenting shareholder was entitled to a distribution of a share of Duthler Realty's assets.

In July 1995, Julius filed the instant action, seeking partnership distributions and an accounting from Harvey under the terms of their agreement for the Breton Partnership (hereafter the "1995 case"). On October 13, 1995, Harvey distributed the Breton Partnership assets

consisting of two parcels of land to himself. At the time of the distribution, Harvey assigned values of $250,000 to Parcel 1 and $370,000 to Parcel 2.

In 1997, Breton Ventures intervened in the 1995 case, seeking relief with regard to a notice of lis pendens filed by Julius against Parcel 2 so that it could purchase the parcel from Harvey. The trial court lifted the lis pendens and ordered Harvey to execute closing documents to complete the sale of Parcel 2 to Breton Ventures. The sale proceeds were to be held in an interest-bearing escrow account.

In 1998, the trial court granted Harvey's motion to have the dispute with Breton Ventures concerning liability for a $43,511.55 hookup charge for water main and sewer improvements bifurcated from the dispute with Julius. After the trial court granted summary disposition in favor of Breton Ventures with respect to this liability issue, the Chief Judge of the Kent Circuit Court reassigned the portion of the 1995 case involving the dispute between Julius and Harvey to the same judge who decided the 1988 case, and the two cases were consolidated.

At the time of the consolidation, there was a pending postjudgment motion filed by Harvey to enforce the November 2, 1994, judgment in the 1988 case. Harvey subsequently filed an appeal as of right with this Court in Docket No. 217632 from the trial court's summary disposition order in the 1995 case, but it was dismissed for lack of jurisdiction because the bifurcation of the 1995 case did not eliminate the requirement that it be disposed of by a final judgment.

Following a bench trial that began in October 1999 with regard to Julius' and Harvey's partnership dispute in the 1995 case, the trial court entered a judgment on April 19, 2002, awarding Julius $1,368,949, inclusive of statutory interest, as the amount owed to Julius under the partnership agreement for the Breton Partnership. After the trial court allowed an offset of $254,295, for the amount owed by Julius to Harvey for the postjudgment dispute in the 1988 case, Julius received a net judgment of $1,114,654.

In July 2002, the trial court ordered that escrow funds from Harvey's sale of Parcel 2 to Breton Ventures be paid to Julius as partial satisfaction of the judgment. In December 2003, the trial court awarded Julius case evaluation sanctions in the 1995 case.

II. Docket No. 242317

On appeal, Harvey challenges the trial court's use of a twelve-percent interest rate for calculating statutory interest on the April 19, 2002, judgment in favor of Julius in the 1995 case. Harvey argues that the trial court should have used the variable interest rate for a money judgment rendered on a written instrument pursuant to MCL 600.6013(6) and (8), as amended by 2002 PA 77, effective March 21, 2002. We agree.

We find no merit to Julius' claim that he had a vested right to the twelve-percent interest rate. There is generally no vested rights in any particular remedy. *In re Certified Question (Fun 'N Sun RV, Inc v Michigan)*, 447 Mich 765, 778; 527 NW2d 468 (1994); *Detroit v Walker*, 445 Mich 682, 703; 520 NW2d 135 (1994). MCL 600.6013 is a remedial statute. *Gordon Sel-Way, Inc v Spence Bros, Inc*, 438 Mich 488, 510; 475 NW2d 704 (1991). Because the amended statute applies to the money judgment in the 1995 case, we remand this case to the trial court and direct

it to modify the judgment to conform with MCL 600.6013(8), as amended. Cf. *Shuler v Michigan Physicians Mut Liability Co*, 260 Mich App 492, 523-524; 679 NW2d 106 (2004); see also *Morales v Auto-Owners Ins Co*, 469 Mich 487, 490 n 4; 672 NW2d 849 (2003).

Next, Harvey claims that the trial court erroneously awarded interest on the escrow funds for Parcel 2 in the April 19, 2002, judgment. But our review of the record indicates that the April 19, 2002, judgment included an asset value for Parcel 2, along with Parcel 1, as of October 13, 1995, rather than using the escrow funds containing Harvey's sales proceeds from his later sale of Parcel 2 to Breton Ventures, to determine the fifty-percent distribution to be made to Julius under the terms of their partnership agreement. The escrow funds were applied in postjudgment proceedings as partial satisfaction for the April 19, 2002, judgment.

Because Harvey has not established record support for his position that Julius was awarded the escrow funds in the April 19, 2002, judgment, we find that Harvey's claim that the trial court erroneously awarded interest to Julius on the escrow funds is not properly before us and we decline to address it. An appellant may not leave it to this Court to search for a factual basis to sustain or reject a position. *People v Norman*, 184 Mich App 255, 260; 457 NW2d 136 (1990). This Court may decline to address an issue that is given only cursory treatment in an appeal brief. *Eldred v Ziny*, 246 Mich App 142, 150; 631 NW2d 748 (2001).

Next, Harvey challenges the trial court's failure to compute interest under MCL 600.6013 on the portion of the April 19, 2002, judgment pertaining to the 1988 case, so as to commence interest as of the date of his complaint in 1988. We decline to address this issue for lack of jurisdiction. The portion of the April 19, 2002, judgment pertaining to the 1988 case is, in substance, a postjudgment order. Just as the trial court's "bifurcation" of the 1995 case between Breton Ventures and Julius did not afford Harvey an appeal as of right from the trial court's order granting summary disposition in favor of Breton Ventures before entry of a final order regarding his dispute with Julius, the trial court's consolidation of Harvey's dispute in the 1995 case with the 1988 case did not provide a basis for an appeal as of right from a postjudgment order in the 1988 case. Hence, this Court is without jurisdiction to consider this issue pertaining to the 1988 case. MCR 7.203(A)(1) and MCR 7.202(7)(a)(i).

Harvey next claims that the 1995 case constituted an impermissible collateral attack on the November 2, 1994, judgment. In particular, Harvey claims that Julius was erroneously allowed to relitigate which party was responsible for paying the mortgage for the Breton Meadows strip mall under the terms of the parties' 1989 settlement agreement, and to obtain a different result at the bench trial from the November 2, 1994, judgment. We disagree.

In reviewing this claim, we find it unnecessary to address the trial court's October 23, 1997, pretrial order in which it found the phrase "all consideration" in the November 2, 1994, judgment unambiguous, given that the trial court ruled in favor of Harvey on this issue. We find

no basis for Harvey's claim that the trial court modified this ruling at the bench trial.[1] The trial court was consistent in its decision that Harvey was entitled to "all consideration" from the sale of the strip mall property. Harvey's argument to the contrary unduly confuses two distinct contractual relationships, namely, his sales transaction with the purchaser of the Breton Meadows strip mall and his earlier settlement agreement with Julius.

The disputed "all consideration" language at issue in the pretrial proceeding was part of the equitable relief granted by the trial court in the November 2, 1994, judgment confirming Harvey's sale of the Breton Meadows strip mall between the time of the parties' settlement agreement, effective in 1989, and the entry of the November 2, 1994, judgment. The trial court's order provided that "with respect to any portion of the Breton Meadows strip mall which has previously been sold, such sales shall be deemed to have been confirmed by this judgment and Plaintiff Harvey Duthler shall be entitled to receive all consideration from said sales . . . ."

The meaning of a judgment may require clarification by a trial court if the language used is ambiguous. See *Beason v Beason*, 435 Mich 791, 806; 460 NW2d 207 (1990). In general, however,

> judgments are to be construed like other written instruments. The determinative factor is the intention of the court, not that of the parties, as gathered, not from an isolated part of the judgment, but from all parts of the judgment itself. Hence, in construing a judgment, it should be examined and considered in its entirety. Such construction should be given to a judgment as will give force and effect to every word of it, if possible, and make it as a whole consistent and reasonable. [46 Am Jur 2d, Judgments, § 94.]

In this case, the trial court found in its October 23, 1997, pretrial order, and the language of the November 2, 1994, judgment itself indicates, that the phrase "all consideration" is unambiguous. It plainly refers to the consideration that the purchaser of the Breton Meadows strip mall paid to Harvey under the terms of their sales agreement. Consideration is a legal term in a contractual relationship that refers to the inducement to contract. *Sands Appliance Services, Inc v Wilson*, 463 Mich 231, 241; 615 NW2d 241 (2000). "To have consideration there must be a bargained-for exchange." *General Motors Corp v Dep't of Treasury*, 466 Mich 231, 238; 644 NW2d 734 (2002).

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[1] Even if the trial court had modified its ruling, this would not alone afford a basis for relief. A trial court is empowered to revise its orders before entry of a final judgment to reflect a more correct adjudication of the parties' rights and obligations. See MCR 2.604(A); *Meagher v Wayne State Univ*, 222 Mich App 700, 718; 565 NW2d 401 (1997).

The trial court's October 23, 1997, pretrial order therefore entitled Harvey to all of the purchaser's consideration for the Breton Meadows strip mall. The pretrial order did not decide the distinct question of whether Harvey assumed full responsibility for the mortgage when he acquired the strip mall under the terms of Harvey and Julius' earlier settlement agreement in the 1989 case. Hence, the trial court acted consistently with its pretrial order by addressing this issue. Indeed, we note that Julius and Harvey stipulated that this question could be argued at trial. Although Harvey did not stipulate that Julius' arguments had any legal or factual merit, Harvey stipulated that Julius expressly reserved the right to argue that "under the terms of the February 1989 Settlement Agreement adopted and specifically enforced by the Court in its November 2, 1994 judgment, Harvey Duthler was responsible to pay the underlying mortgage on the Breton Strip Mall . . . ."

"A party cannot stipulate a matter and then argue on appeal that the resultant action was error." *Chapdelaine v Sochocki*, 247 Mich App 167, 177; 635 NW2d 339 (2001). Hence, the dispositive question before us does not concern the trial court's October 23, 1997, pretrial ruling that Harvey was entitled to "all consideration" from his sale of the Breton Meadows strip mall, but rather its decision, following the trial, that resolved Julius' reserved issue. A trial court's findings of fact at a bench trial are reviewed for clear error and its conclusions of law de novo. *Ambs v Kalamazoo Co Rd Comm*, 255 Mich App 637, 651-652; 662 NW2d 424 (2003).

We conclude that Harvey has failed to show that the trial court committed factual or legal error in determining that the parties' settlement agreement intended that he would assume responsibility for the full mortgage. In general, a collateral attack on the validity of a judgment is not permitted unless the court did not have jurisdiction over the person or subject matter. *Edwards v Meinberg*, 334 Mich 355, 358; 54 NW2d 684 (1962). A trial court speaks through its judgments and orders. *Miskinis v Bement*, 325 Mich 404, 405-406; 38 NW2d 897 (1949). But settlement agreements that are incorporated into a judgment, but not merged, may be enforced pursuant to the usual contract remedies that are accorded contracts. See *Grace v Grace*, 253 Mich App 357, 364; 655 NW2d 595 (2002).

In the case at bar, it is plain from the November 2, 1994, judgment that it did not merge the parties' settlement agreement into the judgment, but rather granted Julius' counterclaim for breach of the settlement agreement and equitable relief (except as to arbitration provisions in the settlement agreement) in accordance with the court's findings of fact and conclusions of law. Having referenced, without merging, the settlement agreement into the November 2, 1994, judgment, the trial court was free to look beyond the four corners of the November 2, 1994, judgment to determine the terms of the settlement agreement that it agreed to enforce. Because Harvey has not established any basis for disturbing the trial court's finding, we uphold its decision that he was fully responsible for the mortgage.[2]

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[2] Although Harvey also refers to the doctrines of collateral estoppel and res judicata, he has not shown that either doctrine barred the trial court from determining the terms of the settlement (continued…)

We decline to address Harvey's additional claim that Julius should share equally in the closing costs of his sale of the Breton Meadows strip mall because this issue is given only cursory treatment in Harvey's appeal brief. *Eldred, supra* at 150. Also, the various evidentiary issues raised by Harvey, as well as his claim that the trial court entered a judgment without a basis, are insufficiently briefed to invoke appellate review. *Id.*; see also *Norman, supra* at 260. Hence, apart from remanding this case for the limited purpose of modifying the statutory interest award, we affirm the April 19, 2002, judgment in the 1995 case.

Turning to Harvey's challenge to the trial court's grant of summary disposition under MCR 2.116(C)(10) in favor of Breton Ventures with respect to the water main and sewer charges of $43,511, our review is de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion under MCR 2.116(C)(10) tests the factual support for a claim. *Id.* at 120. "[A] trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion." *Id.* If the proffered admissible evidence fails to establish a genuine issue of material fact, the moving party is entitled to judgment as a matter of law. *Id.* at 120-121.

We agree with Breton Ventures that Harvey's failure to adequately brief his claim that he had an enforceable option agreement precludes appellate review of this issue. *Eldred, supra* at 150. We also deem abandoned Harvey's claim that he did not effectively accept the land contract, because it is insufficiently briefed. *Id.* Limiting our review to Harvey's challenge to the trial court's interpretation of the land contract, we uphold the trial court's decision.

In the context of a summary disposition motion, a trial court may only determine the meaning of a contract if the terms are not ambiguous. *D'Avanzo v Wise & Marsac, PC*, 223 Mich App 314, 319; 565 NW2d 915 (1997). The law presumes that the parties understood the import of the written contract and had the intentions expressed therein. *Zurich Ins Co v CCR & Co (On Rehearing)*, 226 Mich App 599, 604; 576 NW2d 392 (1997). When a contract is unambiguous, its meaning may not be impeached with extrinsic evidence. *Id.* A contract is ambiguous if it is susceptible to two or more reasonable interpretations. *D'Avanzo, supra* at 319. The mere fact that both parties attach materially different meanings to a phrase does not render a contract ambiguous. *Henderson v State Farm Fire & Casualty Co*, 460 Mich 348, 355 n 3; 596 NW2d 190 (1999). The tools available to a court in determining the meaning of a phrase include the "common understandings of which the court can take notice, as well as other sources such as specialized dictionaries." *Id.* at 357. But the circumstances of the parties can potentially give a completely different meaning to seemingly straightforward and unambiguous terminology, without a resort to extrinsic evidence regarding the parties' intent. *Zurich Ins Co, supra* at 609. Further, words used in a phrase must be given a contextual understanding, considering the phrase as a whole rather than a mechanical parse of each word in the phrase. *Henderson, supra* at 357.

(…continued)

agreement that it agreed to enforce. See generally *Dart v Dart*, 460 Mich 573, 586-587; 597 NW2d 82 (1999), and *Storey v Meijer, Inc*, 431 Mich 368, 373 n 3; 429 NW2d 169 (1988).

The land contract provision at issue here states:

> All general real property taxes and *all special assessments (including all unpaid installments, development assessments, or deferred assessments)*, levied upon, placed upon, assessed against, *identified by the municipal authority* or becoming due and payable on the Property prior to this date shall be paid by the Seller . . . . [Emphasis added.]

We agree with Harvey that the phrase "special assessment" has a peculiar meaning in the law, at least with respect to analyzing a municipality's actions. "Special assessment" has been defined as "a levy upon property within a specified district" and "a special levy designed to recover the costs of improvements that confer local and peculiar benefits upon property within a defined area." *Kadzban v Grandville,* 442 Mich 495, 500; 502 NW2d 299 (1993). It is one means, but not the only means, that a municipality may use to pay for an improvement. *Graham v Kochville Twp*, 236 Mich App 141, 156; 599 NW2d 793 (1999). The "special assessment" can be limited by the amount by which it increases a property's value. *Id.*

The parties' dispute in this case does not require a determination of how the water main and sewer charges would be characterized for purposes of analyzing a municipality's actions or the validity of its charges. Rather, the material question is whether the land contract obligated Harvey to pay for the charges. Had the parties merely used the phrase "special assessments" in the land contract and language indicating that it involved levies against property, then, looking to the commonly understood meaning of this phrase, in a contextual setting, it would be reasonable to conclude that the parties intended that it apply to special assessments in the same technical sense used to evaluate a municipality's actions. But the land contract specifically states that "special assessments" include "unpaid installments, development assessments, or deferred assessments." Further, the type of circumstances applied to the assessments is not limited to levies against property, but rather it is sufficient that the municipal authority identified an assessment for the property.

Giving effect to every word and phrase in the land contract, to the extent practical, we do not agree with Harvey's claim that the maxim *expressio exclusio alterius*, i.e., that an express mention of one thing generally implies the exclusion of things that were not mentioned, is applicable. See *Houghton Lake Area Tourism & Convention Bureau v Wood*, 255 Mich App 127, 151; 662 NW2d 758 (2003) (applying this doctrine to an issue of statutory construction). Rather, the pertinent question is how to construe the parties' own definition of "special assessments" as including development assessments or deferred assessments. Upon de novo review, we agree with the trial court's determination that the parties were entitled to define "special assessments" other than in a manner that might be applied in evaluating a municipality's actions.

Indeed, the word "assessment" is not necessarily the equivalent of a levy against property in a specified district. See *Hill v Farmers' Mut Fire Ins Co*, 129 Mich 141; 88 NW 392 (1901) ("assessment" found to have the same meaning as "premium," as used in an insurance policy, i.e., consideration for the policy). The commonly understood meanings of "assessment" include:

> 1. the act of assessing; appraisal; evaluation. 2. an official valuation of property, used a basis for levying a tax. 3. an amount assessed as payable. [*Random House Webster's College Dictionary* (1997).]

As a matter of law, we conclude that the language in the parties' land contract is broad enough to include assessments, that is, amounts assessed as payable by the municipality for development on a deferred basis, even if the law would treat the assessments as "user fees," rather than "special assessments," for purposes of characterizing the municipality's actions. Hence, while extrinsic evidence was necessary to determine the character of the $43,511 charge payable to the municipality for the water main and sewer improvements and it did not become payable until a property owner hooked up to the improvements, extrinsic evidence was unnecessary to determine that the parties' intended for Harvey to be liable for the charge. Accordingly, we uphold the trial court's grant of summary disposition in favor Breton Ventures on this issue.

III. Docket No. 252942

Both parties challenge the trial court's order awarding Julius $79,714.57 as a result of Harvey's rejection of the case evaluation in 1997. We review the trial court's interpretation and application of MCR 2.403 de novo as a question of law. *Campbell v Sullins*, 257 Mich App 179, 198; 667 NW2d 887 (2003). We generally apply the version of MCR 2.403 that was in effect at the time of the case evaluation.[3] *Haliw v Sterling Heights*, 257 Mich App 689, 695; 669 NW2d 563 (2003).

With regard to Julius' challenge to the trial court's disallowance of $9,859 for attorney services related to "setoff, interest, appeals, and bonds," we conclude that the trial court correctly applied the law to the extent that it intended to disallow charges causally related to postjudgment proceedings in the 1988 case. Under MCR 2.403(O)(6)(b), reasonable attorney fees must be "necessitated by the rejection of the case evaluation." This phrase has been construed as intending a temporal demarcation so as to permit reasonable fees incurred after the case evaluation was rejected. *Campbell, supra* at 198-199. Also, a causal nexus must be established between the services performed and the particular party's rejection of the case evaluation. *Ayre v Outlaw Decoys, Inc*, 256 Mich App 517, 526; 664 NW2d 263 (2003). The party seeking case evaluation sanctions has the burden of proving his entitlement to requested fees. *Campbell, supra* at 201.

Because the case evaluation sanctions in this case pertain only to the 1995 case, it follows that attorney services related to the postjudgment proceedings in the 1988 case were not recoverable. But the trial court misapplied MCR 2.403 to the extent that it determined that the

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[3] The particular section of MCR 2.403 underlying Julius' claims on appeal has been essentially unchanged since 1997, except that the term "mediation" has been replaced by "case evaluation."

full sum of $9,859 was for time spent on issues for which Julius' attorney would have provided services, regardless of Harvey's rejection of the case evaluation sanctions. It is apparent from the record that at least some of the disallowed attorney services involved the 1988 case.

On the other hand, the record presents significant questions regarding whether Julius presented sufficient proofs for the trial court to allocate Julius' requested charges between the 1995 and 1988 cases. The deficiency in Julius' proofs is also evident from Julius' claim that some of the requested "appeal" charges did not actually pertain to services related to appeal issues. We recognize that a trial court exercises discretion in determining the reasonableness of requested attorney fees. *Haliw, supra* at 694. But because the trial court's decision is unclear with regard to whether it correctly applied the law in disallowing the disputed charges of $9,859, we remand this case for a determination of whether Julius met his burden of establishing that the disputed charges related to the 1995 case and, if so, the reasonableness of the requested attorney fees.

We conclude, however, that there is no ambiguity with the trial court's decision to disallow expert witness fees based on Julius' failure to meet his burden of proof. The trial court's decision also indicates that it was aware of and correctly applied the law, which provides for the inclusion of expert witness fees as part of case evaluation sanctions as an item of taxable costs under MCL 600.2164. See *Elia v Hazen,* 242 Mich App 374, 380-381; 619 NW2d 1 (2000), and MCR 2.403(O)(6)(a).

MCL 600.2164 has been construed as meaning that "the trial court is empowered in its discretion to authorize expert witness fees, including preparation fees." *Fireman's Fund American Ins Cos v General Electric Co,* 74 Mich App 318, 329; 253 NW2d 748 (1977). But such matters as conferences to educate counsel, strategy sessions, and assessing an opposing party's position have been rejected as compensable items of expert witness fees. See *Detroit v Lufran Co,* 159 Mich App 62, 67-68; 406 NW2d 235 (1987). Also, MCL 600.2164(3) states that the "provisions of this section shall not be applicable to witnesses testifying to the established facts, or deductions of science, nor to any other specific facts, but only to witnesses testifying to matters of opinion." An appellate court reviews a trial court's assessment of expert witness fees for an abuse of discretion. *Haberkorn v Chrysler Corp,* 210 Mich App 354, 380; 533 NW2d 373 (1995). Julius had the burden of proving his entitlement to costs in the case. *Giannetti Bros Construction Co v Pontiac,* 175 Mich App 442, 449-450; 438 NW2d 313 (1989).

Giving deference to the trial court's superior opportunity to evaluate the witnesses who testified at the evidentiary hearing regarding Julius' request for case evaluation sanctions, we find no basis for disturbing the trial court's decision to accord no weight to the billing information exhibit provided by Julius and to award no expert witness fees for Julius' accounting witness, Elmer Dieterman. Although the trial court could have taken notice that Dieterman testified at trial and also considered its own familiarity with the case for the purpose of awarding at least a de minimus fee for the time that Dieterman actually spent testifying as an expert at trial, in light of the complexity of the case and the length of time that elapsed between the trial and the proceedings to determine case evaluation sanctions, it was not unreasonable for the trial court to expect Julius to produce specific, credible evidence upon which it could base its decision. Hence, giving deference to the trial court's finding that there was a lack of specific, credible evidence, we uphold its decision denying expert witness fees, because, as the trial court articulated in its opinion, "[w]ithout the [billing information provided by Julius], plaintiff has no

evidence to support an award of any actual expert witness fees. . . . Therefore, this Court has no method by which to determine an appropriate fee."

We express no opinion regarding whether ordinary witness fees should have been ordered, because Julius does not address this issue. *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001). Also, we decline to address Julius' request for an award of $2,500 to $3,000 for "additional evidentiary post hearing actual costs," given that this claim is not set forth in the statement of the question presented and that Julius fails to cite record support for this claim. See MCR 7.212(C)(5), *Meagher v McNeely & Lincoln, Inc*, 212 Mich App 154, 156; 536 NW2d 851 (1995), and *Amorello v Monsanto Corp*, 186 Mich App 324, 330; 463 NW2d 487 (1990).

Finally, we decline to consider Harvey's claim in his cross appeal that equity requires that case evaluation sanctions not be awarded. We deem any challenge to the trial court's rejection of Harvey's claim under MCR 2.403(O)(5), on the ground that it did not order equitable relief, abandoned because Harvey has not briefed the trial court's decision. *Kevorkian, supra.* Harvey's newly raised claim that equity itself affords a basis for not awarding case evaluation sanctions is insufficient to invoke appellate review. A party may not merely announce a position and leave it to this Court to discover and rationale the basis of the claim. *Eldred, supra.* But given our decision to remand this case for modification of the statutory interest awarded for the money judgment in the 1995 case, should the modified interest award affect Julius' entitlement to case evaluation sanctions, Harvey may bring an appropriate motion for redetermination of Julius' entitlement to case evaluation sanctions under MCR 2.403 on that basis only.

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

/s/ Peter D. O'Connell
/s/ Richard A. Bandstra
/s/ Pat M. Donofrio