STATE OF MICHIGAN

COURT OF APPEALS

JULIUS DUTHLER,

Plaintiff-Appellant/Cross-Appellee,

and

BRETON VENTURES, L.L.C.,

Intervening Plaintiff,

v

HARVEY A. DUTHLER,

Defendant-Appellee/Cross-Appellant.

UNPUBLISHED
March 6, 2007

No. 265359
Kent Circuit Court
LC No. 95-003310-CK

Before: Fort Hood, P.J., and Smolenski and Murray, JJ.

PER CURIAM.

Plaintiff Julius Duthler ("Julius") appeals as of right the trial court's September 1, 2005, order applying a 12 percent judgment interest rate, rather than a variable interest rate, to the portion of an earlier judgment that was entered in favor of defendant Harvey Duthler ("Harvey"). Harvey cross appeals the trial court's order on the basis that the trial court erred in failing to calculate the 12 percent interest on the judgment from the date that the complaint was filed. Harvey also cross appeals the trial court's award of case evaluation sanctions to Julius. We affirm.

A portion of the underlying facts that are relevant to this appeal are summarized in this Court's earlier opinion, *Duthler v Duthler*, unpublished opinion per curiam of the Court of Appeals, issued December 21, 2004 (Docket Nos. 242317, 252942):

> 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,[1] Julius received a net judgment of $1,114,654.[2]
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> 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. [*Duthler, supra,* slip at 2-3.]

Julius and Harvey appealed the trial court's orders in the 1995 case. On appeal, this Court affirmed the judgment entered in favor of Julius, but also concluded that the trial court erred in applying a 12 percent interest rate, rather than the variable interest rate set forth in MCL 600.6013(8), to the money judgment in the 1995 case. Thus, the Court remanded the case to the trial court for the limited purpose of modifying the statutory interest award to conform with MCL 600.6013(8), as amended. *Duthler, supra,* slip at 3-4. Julius and Harvey also appealed the trial court's award of case evaluation sanctions to Julius. This Court remanded the case for a determination whether Julius met his burden of establishing that the disputed charges, including attorney fees, were related to the 1995 case and that the charges were reasonable. The Court declined to address Harvey's argument that equity itself afforded a basis for avoiding the award of case evaluation sanctions, but we concluded that, "should the modified interest award affect Julius' entitlement to case evaluation sanctions, Harvey may bring an appropriate motion for redetermination of Julius's entitlement to case evaluation sanctions under MCR 2.403 on that basis only." *Id.*, slip at 2. On remand, the trial court amended its previous order, increasing the award of case evaluation sanctions in favor of Julius. The trial court also ordered that the interest on the portion of the April 19, 2002, judgment pertaining to the 1995 case would be calculated at the variable interest rate set forth in MCL 600.6013(8), and the interest on the portion of the April 19, 2002, judgment pertaining to the 1988 case would remain at 12 percent.

Julius contends on appeal that the trial court erred in applying a 12 percent judgment interest rate, rather than the variable interest rate set forth in MCL 600.6013(8), to the portion of

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[1] We note that, on October 25, 1999, the parties entered a stipulation and order arising out of Julius's motion to enforce the November 2, 1994, judgment in the 1988 case. The stipulation and order stated in pertinent part:

> 2. The cash amount due to Harvey Duthler for liquidation of Duthler Realty is Two Hundred Two Thousand Seventy-one and 24/100 Dollars ($202,071.24) and Julius Duthler shall cause Duthler Realty Company, Inc. to pay this amount to Harvey Duthler. This amount includes the cash assets held by Duthler Realty Company, Inc. The parties are in disagreement as to when this amount is to be paid and either party may petition the Court for the Court to determine this issue.

[2] In arriving at the final, net judgment, the trial court applied a 12 percent judgment interest rate to the judgment in the 1995 case as well as the $202,071.24 offset.

the April 19, 2002, judgment pertaining to the 1988 case. Generally, "[a]n award of interest pursuant to MCL 600.6013 is reviewed de novo." *Angott v Chubb Group of Ins Cos*, 270 Mich App 465, 487; 717 NW2d 341 (2006). However, in *Duthler, supra*, this Court previously determined that the variable judgment interest rate set forth in MCL 600.6013(8) applied to the portion of the April 19, 2002, judgment pertaining to the 1995 case. MCL 600.6013(6). Thus, the Court remanded the case to the trial court with specific instructions to modify the judgment to conform with MCL 600.6013(8), as amended. This Court also specifically determined that it did not have jurisdiction to consider whether the trial court erred in computing the interest on the portion of the April 19, 2002, judgment pertaining to the 1988 case:

> 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). [*Duthler, supra*, slip at 4 (emphasis added).]

This Court's opinion in *Duthler, supra,* constitutes the law of the case on this issue:

> Under the law of the case doctrine, 'if an appellate court has passed on a legal question and remanded the case for further proceedings, the legal questions thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case where the facts remain materially the same.' *CAF Investment Co v Saginaw Twp*, 410 Mich 428, 454; 302 NW2d 164 (1981). The appellate court's decision likewise binds lower tribunals because the tribunal may not take action on remand that is inconsistent with the judgment of the appellate court. *Sokel v Nickoli*, 356 Mich 460, 465; 97 NW2d 1 (1959). Thus, as a general rule, an appellate court's determination of an issue in a case binds lower tribunals on remand and the appellate court in subsequent appeals. *Webb v Smith (After Second Remand)*, 224 Mich App 203, 209; 568 NW2d 378 (1997); see, generally, 5 Am Jur 2d, Appellate Review, § 605, p 300. [*Grievance Administrator v Lopatin*, 462 Mich 235, 259; 612 NW2d 120 (2000).]

The trial court was bound, on remand, by the ruling of this Court and was prohibited from taking any action on remand that was inconsistent with the judgment of this Court. *Grievance Administrator, supra; Sumner v Gen Motors Corp (On Remand)*, 245 Mich App 653, 661; 633 NW2d 1 (2001). "[W]hen an appellate court gives clear instructions in its remand order, it is improper for a lower court to exceed the scope of the order." *K & K Const, Inc v Dep't of Environmental Quality*, 267 Mich App 523, 544; 705 NW2d 365 (2005). The trial court properly followed the law of the case established in the prior appeal when it applied the variable interest

rate to the portion of the April 19, 2002, judgment pertaining to the 1995 case. If the trial court applied the variable interest rate to the portion of the April 19, 2002, judgment pertaining to the 1988 case, as Julius contends that it should have, the trial court would have improperly exceeded the scope of this Court's order. *Id.* Further, under the law of the case doctrine, we are bound by our previous determination that it did not have jurisdiction to consider whether the trial court erred in calculating the judgment interest on the portion of the April 19, 2002, judgment pertaining to the 1988 case. *Grievance Administrator, supra.* Therefore, we do not have jurisdiction to consider the issue presented by Julius in this appeal. And, in reaching our conclusion, we note that Julius has not demonstrated that we have now acquired jurisdiction over the issue pertaining to the 1988 case.

Harvey contends on cross-appeal that the trial court erred in calculating the judgment interest on the $202,071.24 from the date that the stipulation and order was entered, and not from the date the complaint was filed in the 1988 case. "As a general rule, prejudgment interest runs from the date the complaint is filed." *Morales v Auto-Owners Ins Co*, 469 Mich 487, 492 n 5; 672 NW2d 849 (2003). See MCL 600.6013(8). However, Harvey raised this same issue in the prior appeal, and this Court declined to address the issue for lack of jurisdiction. Under the law of the case doctrine, we are bound by this Court's previous determination that it lacked jurisdiction to consider this issue. *Grievance Administrator, supra* at 259. We do not have jurisdiction to consider the same issue in this subsequent appeal.

Harvey also contends on cross appeal that the trial court erred in awarding case evaluation sanctions to Julius. Generally, a party who rejects a case evaluation award is subject to sanctions under MCL 2.403 if the party does not improve its position at trial. *Rohl v Leone*, 258 Mich App 72, 75; 669 NW2d 579 (2003). The purpose of the case evaluation sanction rule is to encourage settlement and deter protracted litigation by placing the burden of litigation costs on the rejecting party who caused the case to proceed toward trial. *Id.*

In this case, Julius accepted the case evaluation of $626,515; Harvey rejected it. After the trial court entered the April 19, 2002, judgment, awarding Julius a net judgment of $1,114,654, Julius moved for case evaluation sanctions under MCR 2.403. After conducting an evidentiary hearing, the trial court awarded case evaluation sanctions to Julius in the amount of $79,714.57. Harvey moved for relief from the trial court's order, arguing that it was "inequitable" to assess case evaluation sanctions. Harvey asserted that, at the time the parties attended the case evaluation hearing, the Breton Partnership was liable for the Breton Meadows Strip Mall mortgage. In the April 19, 2002, judgment, the trial court ordered Harvey to pay the mortgage, which increased the net judgment in favor of Julius by $585,763.50.

In the prior appeal, however, this Court declined to consider Harvey's argument that, under the guise of equity, the case evaluation sanctions should not have been awarded in this case. However, the Court provided Harvey with an opportunity to raise that precise issue on remand:

> 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. [*People v*] *Kevorkian*, [248 Mich App 373,

> 389; 639 NW2d 291 (2001)]. 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* [*v Ziny*, 246 Mich App 142, 150; 631 NW2d 748 (2001)]. 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*. [*Duthler, supra,* slip op at 11; (emphasis added).]

On remand, and in this appeal, Harvey maintained that Julius was not entitled to case evaluation sanctions under the interest of justice exception set forth in MCR 2.403(O)(11). Although we do not discount Julius' argument that whether equity precluded case evaluation sanctions is a separate argument from whether case evaluation sanctions should have been denied under the interest of justice exception, we conclude that Harvey is not entitled to invoke the exception as a matter of law. The interest of justice exception only applies if the verdict was a result of a ruling on a motion occurring after case evaluation, MCR 2.403(O)(11); *Habour v Correctional Medical Services, Inc*, 266 Mich App 452, 466; 702 NW2d 671 (2005), and that was not the case here.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Michael R. Smolenski
/s/ Christopher M. Murray