STATE OF MICHIGAN

COURT OF APPEALS

G & V INC., L & Z PROPERTIES LLC, GEORGE DUZEY, ZIRKA DUZEY, VASYLY SHIBANOV, and LIDIA SHIBANOV,

Plaintiffs-Appellants/Cross-Appellees,

v

ABDULLAH AL-JUFAIRI, JUMANA JUDEH, JUDEH & ASSOCIATES, MUNTHER MAWWAS, NEW HAVEN PETRO MART LLC, SALEH D'ANDREA & MULLIN PLC, BUSINESS LOAN EXPRESS, and PATRICK HARRINGTON,

Defendants,

and

MULLIN & ASSOCIATES PLC and TURKIA AWADA MULLIN,

Defendants-Appellees/Cross-Appellants.

UNPUBLISHED
November 6, 2007

No. 271246
Macomb Circuit Court
LC No. 2003-000562-CZ

Before: Cavanagh, P.J., and Donofrio and Servitto, JJ.

PER CURIAM.

Plaintiffs appeal as of right from a jury verdict finding in their favor as to liability, but awarding them $0 in damages. Mullin & Associates PLC and Turkia Awada Mullin (hereinafter "defendants") cross-appeal, challenging the trial court's denial to award them costs as the prevailing party and asserting that in the event plaintiffs prevail on their appeal, plaintiffs should be precluded from presenting or relying upon certain evidence in a new trial. We affirm.

This matter arises out of a transaction involving the sale of a New Haven gas station to plaintiffs. Plaintiffs alleged that the various defendants (individually and together) misled them with respect to the profitability and value of the gas station. Plaintiffs also alleged that certain of

the defendants including Mullin and Mullin and Associates PLC (the Mullin defendants), who plaintiffs hired as legal counsel to represent their interests in the purchase of the gas station, committed malpractice and breached fiduciary duties owed to plaintiffs. According to plaintiffs, the combined actions of all defendants caused them to suffer damages as a result of their purchase. During the pendency of the action, plaintiffs settled with some defendants and others parties and claims were dismissed, leaving only plaintiffs' claim for professional negligence/malpractice against the Mullin defendants to be resolved at trial. At the close of trial, the jury returned a verdict finding that the Mullin defendants were professionally negligent, but that plaintiffs suffered no damages. These appeals followed.

On appeal, plaintiffs first contend that the trial court erred in admitting evidence of plaintiffs' settlement with other defendants at trial. A trial court's decision to admit evidence is reviewed for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). However, when the trial court's decision to admit evidence involves a preliminary question of law, the issue is reviewed de novo, and admitting evidence that is inadmissible as a matter of law constitutes an abuse of discretion. *Id.* An abuse of discretion occurs when the decision results in an outcome falling outside the range of principled outcomes. *Maldonado v Ford Motor Co,* 476 Mich 372, 388; 719 NW2d 809 (2006). That evidence is inadmissible for one purpose does not render it inadmissible for other purposes. See *People v Sabin (After Remand)*, 463 Mich 43, 56; 614 NW2d 888 (2000).

In a motion in limine prior to trial, plaintiffs sought to exclude testimony concerning plaintiffs' sale of the gas station in 2004. The trial court denied the motion and apparently verbally indicated the evidence could be admitted on the issue of the amount of damages to which plaintiffs would be entitled. During trial, the court indicated that the 2004 price plaintiffs received for the property could be referenced in connection with the price they paid for the gas station in 2001.

Plaintiffs argue that the 2004 sale was part of a negotiated settlement with defendants Business Loan Express (BLX) and Patrick Harrington and is not only irrelevant to the issues of liability and damages, but also inadmissible as evidence pursuant to MRE 408. According to plaintiffs, the settlement was based on negotiations exclusively with BLX and Harrington and plaintiffs did not know who the buyer was until closing. Plaintiffs also assert that defendants offered no evidence showing an appraisal connected with the sale, nor any other evidence that would establish that the 2004 sale price represented the fair value of the business.

Defendants, however, insist that BLX and Harrington used the *prospect* of a potential buyer for the gas station to settle their claims with plaintiffs. According to defendants, because BLX and Harrington did not purchase the gas station from plaintiffs to settle their claims, the actual sale was a transaction distinguishable from the settlement and thus not subject to MRE 408. To decide this issue requires that we start with the preliminary question of whether plaintiffs' sale of the gas station to a third party qualifies as an element of their settlement with other defendants.

MRE 408 provides, in relevant part:

> Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or

> attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. . .This rule. . . does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness. . .

It is undisputed that BLX and Harrington agreed to and provided a third-party buyer for the gas station. Because providing a potential buyer for the gas station could be considered valuable consideration rendered by BLX and Harrington in exchange for the dismissal of plaintiffs' claims against them, providing a buyer was obviously an element of these parties' settlement. Not knowing the exact terms of these parties' settlement agreement, it is more difficult to establish whether the actual sale of the business and the price paid for the same were a specific condition or element of the settlement. There is, however, no claim or evidence that BLX or Harrington purchased the gas station from plaintiffs. Where neither BLX nor Harrington paid plaintiffs for the gas station, whether the price plaintiffs received for the 2004 sale was an actual element of the settlement is thus doubtful.

Even if the sale price were viewed as part of the settlement, we would nevertheless find that the trial court did not abuse its discretion in allowing this evidence to be admitted. MRE 408 does not require exclusion when evidence of the settlement of a claim is offered for a purpose other than proving "liability for or invalidity of the claim or its amount." Here, the evidence of the other defendants' settlement with plaintiffs was not being offered to prove BLX and Harrington's liability for or invalidity of plaintiffs' claim or the amount of plaintiffs' claim against them. The primary issues at trial were whether defendants were negligent, whether their negligence caused plaintiffs to suffer damages, and, if so, the amount of damages plaintiffs were entitled to recover. The evidence of the sale price was offered as evidence to support defendants' assertion that the purchase price paid in 2001 was consistent with the value of property and that plaintiffs thus suffered no damages. The 2004 sale price not being offered for a precluded purpose, it was not inadmissible under MRE 408.

Plaintiffs additionally assert that the amount they received for the sale was not relevant to the issue of damages, in part because the price they received for the gas station may not reflect the actual value of the business, but rather, the value of Harrington and BLX having their claims settled with plaintiffs. However, it cannot be ignored that plaintiffs negotiated with BLX and Harrington to sell the gas station to a third party. There would be no reason for plaintiffs to accept from a third-party (and a third-party to pay) an amount that plaintiffs knew/believed to not accurately reflect the value of the gas station.

In addition, plaintiffs' damages are comprised of two components: (1) the difference between what they paid for the gas station ($2.6 million) and what they claim the gas station was actually worth ($1.75 million); and, (2) lost wages. The 2004 price could conceivably be relevant to both. Lost wages would only be recoverable for that period that plaintiffs owned the gas station. The jury, then, had to be made aware that plaintiffs sold the gas station in 2004 and the question of whether plaintiffs were compensated in the sale for their lost wages would logically follow.

The jury was also made aware, through the testimony of an expert at trial that at least one method of valuing a business requires a review of the actual transactions for the purchase and sale of the business that had recently occurred. The price paid for the gas station in 2004 could

thus be relevant to the appropriate sale price for the gas station in 2001. To ensure that evidence of the 2004 sale was considered for that purpose only, the trial court gave the jury a cautionary instruction:

> Now, during the case you heard evidence regarding the 2004 sale of the New Haven gas station in connection with the Plaintiffs' settlement of claims with former Defendants. This evidence is relevant only as to the sole issue of whether or not the 2001 purchase price of 2.6 million was the actual market value at the time Plaintiffs purchased it. You are to make no credit or deduction to the amount of damages, if any, Plaintiffs are entitled to—are entitled to based on the 2004 sale.

Additionally, the trial court did not rule that *all* information concerning the settlement between plaintiffs and BLX and Harrington was admissible. Rather the trial court only allowed evidence of the 2004 sale price to be admitted, and for the limited purpose of assisting in a determination of whether the plaintiffs overpaid for the gas station in 2001. Plaintiffs or defendants could, therefore, have elicited testimony that the property was sold in 2004 for a specific price, without delving into whether the sale was part of a settlement with other defendants or revealing the details of the settlement. Instead, it was plaintiffs' counsel, in his opening statement, who first referenced a settlement. Counsel stated, "Now, you will hear evidence that the plaintiffs sold the business in August 2004. The plaintiffs will tell you that came about as a result of a settlement with former defendants in this case." Plaintiffs' counsel then posed questions to plaintiff Vasyly Shibanov on direct examination which led to the jury being excused and an admonishment by the judge that he was not going to let counsel go into the details of the settling defendants' and plaintiffs' negotiations leading up to the sale of the property. Plaintiffs' counsel then continued to question Shibanov:

Q. With respect to the sale in August 2004, were there negotiations with Defendant Harrington?

A. Yes.

Q. Were you a participant in those negotiations?

A. Yes.

Q. Was an offer made to you to settle this case by Defendant Harrington?

A. Yes.

Q. As a result of the settlement offer from Mr. Harrington, was a buyer for the property produced?

A. Yes.

. . .

Q. For the business, how much was put down for the value of, how much did the buyers pick for the value of (inaudible)?

A. $2,150,000.00

Q. On top of that, did you get other money?

A. I think we got the money to pay the lawyer's fee. . .

Q. Did they pick up a liability on taxes?

A. Yes. Yeah, we'd been behind in the taxes, I believe it was about $60,000.00 and was part of agreement they gonna, they gonna pay. . .

Plaintiffs' counsel thereafter elicited further information from Shibanov regarding the details of the settlement. While appellate counsel contended at oral argument that he was allowed to introduce such information without waiving an appellate review of the same, the quotation provided by plaintiffs on this issue does not match the citing reference. Moreover, the settlement information was not elicited in rebuttal to any evidence provided by defendants, but was introduced by plaintiffs on direct examination.

"A party is not allowed to assign as error on appeal something which his or her own counsel deemed proper at trial since to do so would permit the party to harbor error as an appellate parachute." *Dresselhouse v Chrysler Corp,* 177 Mich App 470, 477; 442 NW2d 705 (1989). Accordingly, because plaintiffs' counsel elicited testimony concerning plaintiffs' settlement with BLX and Harrington that went far beyond the admission of the 2004 purchase price deemed admissible for a limited purpose by the trial court, plaintiffs cannot assert on appeal that the trial court should not have allowed admission of evidence concerning a term of the parties' settlement. The trial court did not abuse its discretion in allowing the 2004 sale price to be admitted into evidence.

Plaintiffs next contend that the trial judge erred in admitting the opinions of defendants' economic expert into evidence when there was no Daubert/Craig[1] inquiry, and where the opinions were purely subjective, not based on any recognized economic theory, and did not meet the admissibility requirements of Michigan law. We disagree.

Expert testimony is admitted pursuant to MRE 702, which states:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

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[1] *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579; 113 SCt 2786; 125 Led2d 469 (1993), and *Craig ex rel Craig v Oakwood Hosp, 471* Mich 67, 82; 684 NW2d 296 (2004).

Under MRE 702, the trial court has an independent obligation to review all expert opinion testimony in order to ensure that the opinion testimony is rendered by a "qualified expert," that the testimony would "assist the trier of fact," and that the opinion testimony meets the three criteria set forth in MRE 702. *Craig ex rel Craig v Oakwood Hosp, 471* Mich 67, 82; 684 NW2d 296 (2004). "While a party may waive any claim of error by failing to call this gate keeping obligation to the court's attention, the court *must* evaluate expert testimony under MRE 702 once that issue is raised." *Id.* The proponent of expert opinion testimony bears the burden of proving that the contested opinion is based on generally accepted methodology. *Gilbert v DaimlerChrysler Corp*, 470 Mich 749; 685 NW2d 391 (2004).

Plaintiffs' first assignment of error begins with the incorrect assumption that *Craig, supra*, requires a hearing every time an expert's opinion is contested. In determining whether a hearing regarding expert opinion was warranted, the *Craig* court stated:

> Therefore, a *Davis-Frye* hearing was more than justified in light of the information before the trial court when it ruled on defendant's motion in limine. The proponent of expert opinion testimony bears the burden of proving that the contested opinion is based on generally accepted methodology. Because there was no evidence to indicate that Dr. Gabriel's theory was anything *but* novel, the trial court was required to conduct the *Davis-Frye* inquiry requested by defendant.

Craig, then, stands for the proposition that if the proponent of expert opinion testimony does not meet its burden of providing evidence that the opinion meets the criteria in MRE 702, a hearing is justified.

In their motion to exclude McAuliffe's testimony, plaintiffs asserted that McAuliffe's valuation of the gas station was flawed and his deposition testimony contains inconsistencies, which demonstrate the unreliability of his opinions. Plaintiffs indicated that the weighted average cost of capital approach was a proper method of valuation, but that McAuliffe used incorrect data and/or used the data improperly in using this method to reach his conclusions. Plaintiffs attached no exhibits that supported their assertions.

In their responsive motion, defendants addressed each flaw and inconsistency put forth by plaintiffs, attaching portions of McAuliffe's deposition testimony to support their response. The deposition transcripts detailed that McAuliffe had been a CPA since 1976 and he performs purchase investigations for companies seeking to acquire business, including determining the value of the businesses. McAuliffe testified at deposition that he has appeared in federal court as an expert and that he has provided opinions to clients with respect to the value of retail operations, including gas stations. McAuliffe identified in his deposition the method he used to value the gas station at issue (the weighted average cost of capital approach), and provided a line-by-line explanation of the figures he used in the valuation, where he obtained those figures, and why they were relevant.

The trial court opined that it could see nothing outrageous about McAuliffe's opinions that would justify excluding them. At a later hearing, the trial court stated that he felt there was enough information contained in the parties' briefs to make a determination regarding McAuliffe's testimony and that it appeared the issue was more in line with the weight of McAuliffe's testimony rather than its admissibility. The trial court, then, clearly reviewed the

challenged opinions, the data underlying the expert testimony, and the manner in which the expert interpreted and applied the data and concluded that the opinions were based upon reliable principles and methodology. Because defendants provided sufficient information to establish that McAuliffe's opinions were reliable, a hearing was not necessarily required in order for the trial court to perform its gate-keeping role with respect to expert testimony.

Moreover, given the evidence and the fact that the trial court properly reviewed the challenges to McAuliffe's testimony, we find no error in the court's implicit conclusion that McAuliffe's testimony was based on sufficient facts or data, was the product of reliable principles and methods, and that the principles and methods were applied reliably to the facts of the case. We find no error in the trial court's determination that the challenges to McAuliffe's testimony go to the weight, rather than the admissibility of the testimony and thus find that the trial court did not abuse its discretion in allowing McAuliffe's testimony.

Additionally, in their motion in limine, plaintiffs requested that McAuliffe be excluded from testifying or, alternatively, that plaintiffs be allowed to present the testimony of their stricken expert witness, Charles Esser, to testify in rebuttal to McAuliffe. As discussed below, Esser was permitted to testify as a rebuttal witness, thus providing plaintiffs with their alternatively requested relief. Were there any error in admitting McAuliffe's testimony, then, plaintiffs were provided adequate remedy in the form of an ability to challenge or discredit McAuliffe's testimony through their own expert.

Plaintiffs next contend that they were prejudiced by the trial court's refusal to allow them to add an expert witness after the witness list filing deadline, and are thus entitled to a new trial. We disagree.

This Court will not disturb a trial court's decision regarding whether to permit a witness to testify, after a party has failed to comply with a deadline for submission of a witness list, absent an abuse of discretion. *Carmack v Macomb County Community College*, 199 Mich App 544, 546; 502 NW2d 746 (1993). Among the factors that should be considered in determining the appropriate sanction for discovery violations are: (1) whether the violation was wilful or accidental, (2) the party's history of refusing to comply with discovery requests (or refusal to disclose witnesses), (3) the prejudice to the defendant, (4) actual notice to the defendant of the witness and the length of time prior to trial that the defendant received such actual notice, (5) whether there exists a history of plaintiff engaging in deliberate delay, (6) the degree of compliance by the plaintiff with other provisions of the court's order, (7) an attempt by the plaintiff to timely cure the defect, and (8) whether a lesser sanction would better serve the interests of justice. *Dean v Tucker*, 182 Mich App 27, 32-33; 451 NW2d 571 (1990).

MCR 2.401(I) provides, in part, "no later than the time directed by the court under subrule (B)(2)(a), the parties shall file and serve witness lists. . ."

> (2) The court may order that any witness not listed in accordance with this rule will be prohibited from testifying at trial except upon good cause shown.

Id.

Here, the trial court extended the dates by which the parties were required to file their witness lists and the discovery cut-off date on several occasions. The last extension with respect to witness lists provided that plaintiffs' witness list was to be filed by July 16, 2004. Plaintiffs

filed several witness lists throughout the course of this matter, but filed a fourth amended witness list on January 14, 2005, adding several experts they intended to call at trial. This witness list was clearly filed beyond the date set by trial court and, in fact, beyond the scheduled discovery cut-off date of December 15, 2004. The trial court ruled that the newly added expert witnesses were not going to be allowed to testify at trial and their names were stricken from plaintiffs' witness list.

While striking a plaintiff's experts is generally a harsh sanction, we can find no abuse of the court's discretion under the present circumstances. At the hearing on defendants' motion to strike, plaintiffs indicated that only two of the experts on the untimely witness list were "new": Mr. Bornsdorf (identified as an "additional" legal malpractice expert, as plaintiffs listed a legal malpractice expert in their timely filed witness lists), and Charles Esser. Defendants asserted at the hearing that they based decisions as to how to handle the case on the witnesses listed on the prior, timely filed witness lists. Defendants further asserted that it appeared that plaintiffs were now going to rely on the testimony of one particular expert listed on the untimely witness list, Charles Esser, to establish an entirely new theory for damages. The trial court clearly took the above into account and implicitly found that defendants would be prejudiced if these untimely identified witnesses were allowed to testify. In addition, plaintiffs have provided no explanation whatsoever, let alone good cause, for failing to identify these experts in prior witness lists.

More importantly, despite the trial court's ruling, it nevertheless allowed plaintiffs to call Esser as a rebuttal witness. Esser testified extensively as to his credentials and the proper methods for valuing a business, and provided testimony refuting that of defendants' experts concerning plaintiffs' claimed damages. Plaintiffs have thus not shown any prejudice suffered by virtue of the trial court's written order striking their experts' testimony.

Plaintiffs next claim that they are entitled to a new trial because the jury's verdict was based on passion or prejudice. Plaintiffs contend that this is the only reasonable conclusion, given that the jury found that defendants were professionally negligent, but awarded plaintiffs no damages. Plaintiffs devote only two short paragraphs to this argument, providing little analysis and citing no binding authority to support their claim. It is not enough for an appellant to simply announce a position or assert an error in his brief and then leave it up to this Court to discover and rationalize the basis for his claims, or elaborate for him his arguments, and then search for authority either to sustain or reject his position. *Yee v Shiawassee Co Bd of Comm'rs,* 251 Mich App 379, 406; 651 NW2d 756 (2002).

Briefly addressing this claim despite plaintiffs' failure to adequately address the issue, we note that there is no legal requirement that a jury award damages simply because liability was found. *Kelly v Builders Square, Inc,* 465 Mich 29, 34; 632 NW2d 912 (2001). Indeed, the plaintiff bears the burden of proving damages, and a jury is free to accept or reject such proofs. *Id.* at 172-173. Moreover, a jury's verdict is to be upheld, even if it is arguably inconsistent, "[i]f there is an interpretation of the evidence that provides a logical explanation for the findings of the jury." *Granger v Fruehauf Corp,* 429 Mich 1,7; 412 NW2d 199 (1987). In deciding whether to grant a new trial, a circuit court must "make every effort to reconcile the seemingly inconsistent verdicts." *Lagalo v Allied Corp,* 457 Mich 278, 282; 577 NW2d 462 (1998). Further, such an effort "requires a careful look, beyond the legal principles underlying the

plaintiff's causes of action, at how those principles were argued and applied in the context of this specific case." *Id.* at 284-285.

Here, the jury could have found defendants professionally negligent for several reasons. They could have, for example found the testimony that Mullin did not adequately disclose her relationship with Al-Jufairi to plaintiffs and that her relationship with Al-Jufairi negatively impacted her ability to properly represent plaintiffs in the gas station purchase convincing. The jury could also have found the testimony that defendants were negligent in failing to disclose information about the stability of the gas station to plaintiffs credible. There is adequate evidence in the record, however, that would nevertheless allow the jury to find that plaintiffs' claimed damages were not incurred as a result of defendants' negligence.

Plaintiffs claimed essentially two categories of damages: (1) the difference between the price they paid for the gas station and the actual value of the business; and, (2) lost profits. Testimony at trial established that the $2.6 million price plaintiffs paid for the gas station was negotiated/agreed to between plaintiffs and Al-Jufairi prior to plaintiffs ever meeting defendants. Testimony also established that defendants other than the Mullin defendants made certain representations to plaintiffs as to the profitability and value of the business, and that plaintiffs paid a significant deposit to Al-Jufairi and applied for financing to purchase the business before defendants became involved. While plaintiffs testified that defendants told them the gas station was a good deal and was profitable, defendants essentially denied making such assurances to plaintiffs. The jury was free to believe defendants' testimony and conclude that while defendants may have been professionally negligence, it was not the professional negligence that led to plaintiffs' claimed damages.

Plaintiffs not being entitled to a new trial, the only issue on cross-appeal requiring resolution is defendants' assertion that the trial court erred in determining that they were not the prevailing parties under MCR 2.625 and were therefore not entitled to costs or alternatively, that the trial court abused its discretion in refusing to award costs to defendants in this matter. We disagree.

The determination whether a party is a "prevailing party" under MCR 2.625 is a question of law. *Klinke v Mitsubishi Motors Corp*, 219 Mich App 500, 520-521; 556 NW2d 528 (1996). This Court reviews legal questions de novo. *Id.*

MCR 2.625(A)(1) provides:

> Costs will be allowed to the prevailing party in an action, unless prohibited by statute or by these rules or unless the court directs otherwise, for reasons stated in writing and filed in the action.

MCR 2.625(B)(2) further provides guidance in determining the prevailing party:

> In an action involving several issues or counts that state different causes of action or different defenses, the party prevailing on each issue or count may be allowed costs for that issue or count. If there is a single cause of action alleged, the party who prevails on the entire record is deemed the prevailing party.

MCR 2.403(O)(6)(b) (governing case evaluation) maintains that for purposes of determining taxable costs under that subrule and MCR 2.625, the party entitled to recover actual costs under MCR 2.403 is to be considered the prevailing party. The party entitled to recover actual costs under MCR 2.403 is provided for at MCR 2.403(O)(1):

> If a party has rejected an evaluation and the action proceeds to verdict, that party must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than case evaluation. However, if the opposing party has also rejected the evaluation, party is entitled to costs only if the verdict is more favorable to that party than the case evaluation.

According to *Forest City Enterprises, Inc v Leemon Oil Co*, 228 Mich App 57, 81; 577 NW2d 150 (1998), MCR 2.625(B)(2) and MCR 2.403(O)(6) are to be read together such that the party entitled to actual costs under the case evaluation rule for a cause of action shall also be deemed the prevailing party under MCR 2.625(B)(2) on the entire record.

Here, it is undisputed that the case evaluation award was $96,500.00 in favor of plaintiffs and against defendants. It is also undisputed that plaintiffs accepted the award, while defendants rejected the award. Determining whether either is the prevailing party proves to be difficult, however, as the case evaluation award was rendered when plaintiffs had several active claims against defendants. The case evaluation award encompassed all of the active claims against defendants as a whole, with no division of the award into specific amounts applicable to each claim. The only claim that proceeded to trial and was thus the subject of the jury verdict, though, was the professional negligence/legal malpractice claim, as the remaining claims were settled or otherwise disposed of prior to and during the course of trial.

The above being true, it is impossible to determine whether the verdict was more favorable to the defendants than the case evaluation award such that they could be deemed the prevailing party for purposes of MCR 2.403. It is plausible that none of the case evaluation award was attributable to the malpractice claim, which would result in defendants not bettering their position at trial and thus not being considered the prevailing party. It is equally possible that the award was entirely for plaintiffs claim of legal malpractice, in which case, an award of no damages in the jury verdict would be more favorable to defendants and thus allow them to recover their costs. Taking into account that the award of costs under MCR 2.625 is discretionary (". . . the award of taxable costs to the prevailing party is within the trial court's discretion," *Allard v State Farm Ins Co*, 271 Mich App 394, 403; 722 NW2d 268 (2006)), we find no error or abuse of discretion in the trial court's refusal to award costs under the circumstances.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Pat M. Donofrio
/s/ Deborah A. Servitto