STATE OF MICHIGAN

COURT OF APPEALS

PATRICIA SCOTT-MASON,

Plaintiff-Appellant,

v

ANTHONY DE BARI, M.D.,

Defendant-Appellee,

and

COVENANT HEALTHCARE SYSTEM d/b/a COVENANT MEDICAL CENTER INC. and ORTHOPAEDIC CENTER OF MID-MICHIGAN,

Defendants.

UNPUBLISHED
October 7, 2008

No. 278516
Saginaw Circuit Court
LC No. 04-053078-NH

PATRICIA SCOTT-MASON,

Plaintiff-Appellant,

v

ANTHONY DE BARI, M.D.,

Defendant-Appellee,

and

COVENANT HEALTHCARE SYSTEM d/b/a COVENANT MEDICAL CENTER INC. and ORTHOPAEDIC CENTER OF MID-MICHIGAN,

Defendants.

No. 279958
Saginaw Circuit Court
LC No. 04-053078-NH

Before: Cavanagh, P.J., and Jansen and Kelly, JJ.

PER CURIAM.

In Docket No. 278516, plaintiff appeals as of right from the judgment in favor of defendant following a jury trial. The jury, by special verdict, found defendant not to be professionally negligent. In Docket No. 278516, plaintiff appeals as of right from the order taxing costs and offer of judgment sanctions. We affirm.

I. Basic Facts

Plaintiff alleged that defendant, an orthopedic surgeon, failed to identify, isolate and protect the saphenous nerve during surgery to remove a lipoma from her right leg, resulting in damage to the nerve. Following a non-unanimous case evaluation, defendant submitted an offer of judgment. MCR 2.405. Plaintiff rejected the offer of judgment and submitted a counter-offer of judgment which defendant then rejected.

Following trial, the case was submitted to the jury on a special verdict. The jury found no professional negligence, never reaching the issues of proximate cause, injury or damages. Based upon the special verdict, the trial court entered a judgment of no cause for action. Plaintiff filed a timely claim of appeal.

After the claim of appeal was filed, defendant moved for taxation of costs, MCR 2.625, and offer of judgment sanctions, MCR 2.405(D). The trial court granted defendant's motion and entered an order taxing costs and assessing offer of judgment sanctions in the amount of $59,148. Plaintiff timely filed a claim of appeal. The appeals were consolidated.[1]

II. Harmless Error

Plaintiff argues the trial court erred in precluding her expert from testifying that her back injuries were proximately caused by defendant's negligence and that defendant's expert was improperly permitted to inconsistently testify on whether or not plaintiff had suffered injury to her saphenous nerve. She further argues that the trial court improperly instructed the jury on Lost Opportunity for Better Result, M Civ JI 30.20. However, any error was harmless, as the jury, by special verdict, never reached the issues of proximate cause, injury or damages. MCR 2.613(A)[2]. Where a special verdict form is used at trial, the parties and the courts are able to see what the jury actually decided. *Sudul v City of Hamtramck*, 221 Mich App 455, 458; 562 NW2d

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[1] *Scott-Mason v de Bari*, unpublished order of the Court of Appeals, entered August 29, 2007 (Docket Nos. 278516, 279958).

[2] MCR 2.613(A) provides:

> An error in the admission or exclusion of evidence, an error in a ruing or order, or an error or defect in anything done or omitted by the court or by the parties is not ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take this action appears to the court inconsistent with substantial justice.

478 (1997). A special verdict enables errors to be localized so that only potentially unsound portions of the verdict are subject to redetermination at a new trial. *Id.* at 459.

In an action alleging medical malpractice, the plaintiff bears the burden of proving: (1) the applicable standard of care, (2) breach of that standard by defendant, (3) injury, and (4) proximate causation between the alleged breach and the injury. *Failure to prove any one of these elements is fatal.*" *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 492; 668 NW2d 402 (2003) (emphasis added), quoting *Wischmeyer v Schanz*, 449 Mich 469, 484; 536 NW2d 760 (1995); MCL 600.2912a(2).

The precluded testimony of plaintiff's expert addresses the causation element[3] of plaintiff's malpractice claim. In addition, the testimony of defendant's expert that plaintiff assigns error to addresses whether or not the plaintiff was injured by defendant's negligence and the extent of the injuries. Because the jury reached neither proximate cause nor injury, we conclude that error by the trial court, if any, was harmless. MCR 2.613(A).

We also conclude that while the trial court erred in giving M Civ JI 30.20 (lost opportunity for better result) to the jury, any error was likewise harmless. When requested by a party, a standard jury instruction must be given if it is applicable and accurately states the law. MCR 2.516(D)(2); *Chastain v General Motors Corp (On Remand)*, 254 Mich App 576, 590; 657 NW2d 804 (2002). Whether an instruction is accurate and applicable based on the characteristics of a case is in the sound discretion of the trial court. *Stevens v Veenstra*, 226 Mich App 441, 443; 573 NW2d 341 (1997). It is error to instruct a jury on a matter not sustained by the evidence or the pleadings. *Murdock v Higgins*, 454 Mich 46, 60; 559 NW2d 639 (1997).

The trial court instructed the jury that plaintiff could not recover for the loss of an opportunity to achieve a better result unless she proved "that the chance of achieving a better result fell more than 50 percentage points as a result of the professional negligence." The record is devoid of any testimony to support this instruction. Plaintiff's entire theory of the case was that defendant, by his professional negligence, caused a direct injury: a severed saphenous nerve. She did not allege, argue, or present testimony that any opportunity to achieve a better result was lost through either treatment or diagnosis. Similarly, defendant's theory was that the nerve was not severed or damaged during surgery. He did not defend, argue or present any evidence to support the instruction. The trial court erred in instructing the jury on lost opportunity for a better result, but as the jury never considered the extent of plaintiff's injury, any error was harmless.

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[3] "'Proximate cause' is a legal term of art that incorporates both cause in fact and legal (or 'proximate') cause." *Craig v Oakwood Hosp*, 471 Mich 67, 86; 684 NW2d 296 (2004). "As a matter of logic, a court must find that the defendant's negligence was a cause in fact of the plaintiff's injuries before it can hold that the defendant's negligence was the proximate or legal cause of those injuries." *Id.* at 87.

III. Directed Verdict

Plaintiff next argues that the trial erred in denying her motion for a directed verdict based upon an alleged admission made by defense counsel in his opening statement. We disagree. Whether a statement made by counsel constitutes a judicial admission is an evidentiary issue that is reviewed for an abuse of discretion. *Hilgendorf v Saint John Hosp*, 245 Mich App 670, 688; 630 NW2d 356 (2001). A trial court's decision on a motion for a directed verdict is reviewed de novo. *Sniecinski v BCBSM*, 469 Mich 124, 131; 666 NW2d 186 (2003). When evaluating a motion for a directed verdict, a court must consider the evidence in the light most favorable to the nonmoving party, making all reasonable inferences in favor of the nonmoving party. *Meagher v Wayne State Univ*, 222 Mich App 700, 708; 565 NW2d 401 (1997). A directed verdict is appropriate only when no factual question exists upon which reasonable minds could differ. *Cacevic v Simplimatic Engineering Co (On Remand)*, 248 Mich App 670, 679-680; 645 NW2d 287 (2001).

During trial, all expert witnesses agreed that the standard of care requires an orthopedic surgeon to identify, isolate, and protect major structures while performing surgery. The question litigated at trial was whether the saphenous nerve was within the immediate "area" where defendant performed the surgery, thereby triggering the standard of care. At various times, the expert witnesses referred to the area as the "surgical site," "surgical area," "operative site," and "operative field." Despite the use of different terms, all agreed that the immediate area where surgery is performed is different from the area prepped for surgery or the surrounding vicinity. The defense experts further agreed that the "operative field" is a larger area than the immediate surgical area and, while the saphenous nerve was in the "operative field," it was not within the "surgical field." A contested issue at trial was the location of the nerve to the area where defendant operated and during opening statements, defense counsel stated:

> Dr. deBari's defense in this case is very simple to state. He isn't liable because he didn't do any thing wrong. The saphenous nerve was not in his operative field, so there is no reason for him to identify it, to isolate it out, to dissect it out, and protect it. The saphenous nerve was not in his operative field.

Plaintiff, although not clear in her argument, appears to contend that this statement is a "judicial admission" binding on defendant. According to plaintiff, this statement, coupled with the testimony of defendant's experts that the nerve was in the operative field, entitled her to a directed verdict on liability. Plaintiff's argument is without merit.

Generally, statements by attorneys are not evidence. However, certain statements by a party or counsel can be considered admissions. A "judicial" admission is a formal concession or stipulation that has the effect of withdrawing a fact from issue and dispensing the need for proof of the fact. MCR 2.312; *Radtke v Miller, Canfield, Paddock & Stone*, 453 Mich 413, 420-421; 551 NW2d 698 (1996). A statement made by a party opponent under MRE 801(d)(2) is an "evidentiary" admission. *Id.* The import of the judicial admission is that it is conclusive in the case and is not subject to contradiction or explanation. *Id.* at 421. However, parties may attempt to explain or disprove an evidentiary admission. *Id.* at 425.

The defense counsel's statement was not an admission but rather merely an explanation of what he believed the evidence would establish.[4] There was no clear consensus on the proper use of the terms "operative field," "surgical area," "surgical site," or "operative area." The terms were used interchangeably and were subject to clarification by each expert. Despite the less than precise terminology, the issue presented to the jury was clearly whether the saphenous nerve was in close proximity to where the lipoma was removed whereby the duty to protect the nerve arose, or if the nerve was sufficiently below the lipoma whereby the duty did not arise. The trial court properly denied the motion for directed verdict.

IV. Expert Qualifications

Plaintiff argues that the trial court improperly permitted defendant's expert neurologist to testify to the standard of care of an orthopedic surgeon in violation of MCL 600.2169 and *Woodard v Custer*, 476 Mich 545; 719 NW2d 842 (2006). We disagree. A trial court's decision whether a witness is qualified as an expert is reviewed for an abuse of discretion. *Mulholland v DEC Int'l Corp*, 432 Mich. 395, 402; 443 N.W.2d 340 (1989).

In support of her argument, plaintiff quotes her counsel's objection to the testimony, but not the actual testimony itself. An examination of the challenged testimony shows that Dr. William Leuchter, a board certified neurologist, did not testify regarding the standard of care. Defendant presented Dr. Leucher to testify on the issue of proximate cause and human anatomy. As part of his testimony, he explained the anatomical relationship between the saphenous vein and nerve and their location with respect to the surgery performed by defendant. After pointing out the location of the surgical incision, the location of the saphenous nerve and saphenous vein, he testified, anatomically, that given the manner in which the surgery was performed, the saphenous nerve could not be severed and that it would not have been near the surgical site. The trial court did not abuse its discretion in allowing the testimony.

V. Assessment of Costs Prior to Appellate Resolution

Plaintiff argues the trial court erred in considering defendant's motion for post-judgment costs and attorneys fees before the appellate resolution of this case. We again disagree. The interpretation and application of a court rule is reviewed de novo. *Haliw v Sterling Heights*, 471 Mich 700, 704; 691 NW2d 753 (2005).

The pendency of an appeal does not prevent the imposition of costs. *Butt v Giammariner*, 173 Mich App 319, 324; 433 NW2d 360 (1988). A trial court is empowered to award "costs or attorneys fees under MCR 2.403, 2.405, 2.625 or other law or court rule, unless

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[4] Defendant also correctly points out that the "admission" is a subject that is only properly presented through expert testimony. MCL 600.2169; *Bryant v Oakpointe Villa Nursing Ctr*, 471 Mich 411; 684 NW2d 864 (2004). The location of the saphenous nerve and whether it had to be indentified and protected is "beyond the realm of common knowledge and experience." *Id.* at 422.

the Court of Appeals orders otherwise." MCR 7.208(I). This Court did not direct the trial court to abstain from entertaining defendant's motion for costs and offer of judgment sanctions.

In support of her argument that the trial court did not have jurisdiction to award costs and attorneys fees once the first claim of appeal had been filed, plaintiff cites *Keiser v Allstate In Co,* 195 Mich App 369; 491 NW2d 581 (1992), and *Severn v Sperry Corp,* 212 Mich App 406; 538 NW2d 50 (1995). Plaintiff's reliance is misplaced. In *Keiser*, the plaintiff brought an action for no-fault benefits. The trial court denied defendant's motion for a directed verdict, which was ultimately reversed on appeal. Defendant then moved for case evaluations sanctions and plaintiff objected because, at the original trial, the plaintiff was the prevailing party. This Court held that it is the ultimate verdict after appeal that must be measured against the case evaluation sanctions. *Id.* at 374. In *Severn*, *supra* at 417, this Court held that attorneys fees incurred at trial and retrial after appeal were properly assessed. Here, there is no prior appeal or trial.

Because defendant timely filed his motion for assessment of costs and offer of judgment sanctions, MCR 2.405(D)(5), the trial court properly considered it.

VI. Taxable Costs and Offer of Judgment Sanctions

Finally, plaintiff asserts the trial court abused its discretion in taxing costs and awarding offer of judgment sanctions. Specifically, she argues the expert fees are not taxable, unreasonable and not supported by affidavits; the attorney fees are excessive and "obviously padded;" and costs and attorneys fees should not be awarded under the interest of justice exception to the offer of judgment rule, MCR 2.405(D)(3). We disagree. Under MCR 2.405(A)(6), "actual costs" are "the costs and fees taxable in a civil action and a reasonable attorney fee for services necessitated by the failure to stipulate to the entry of judgment." The costs and fees taxable in a civil action are enumerated in MCL 600.2405. The interpretation and application of the offer of judgment rule is reviewed de novo. *Castillo v Exclusive Builders, Inc*, 273 Mich App 489, 492; 733 NW2d 62 (2007). The imposition of costs and attorney fees is reviewed for an abuse of discretion, as is the decision regarding whether the "interest of justice" exception in MCR 2.405(D)(3) applies to the facts of a specific case. *Knue v Smith,* 269 Mich App 217, 220; 711 NW2d 84 (2005).

A. Expert Witness Fees

MRC 2.625 provides that "costs will be allowed to the prevailing party in an action, unless prohibited . . . ." Defendant submitted his request for taxable costs and attorneys fees, together with defense counsel's sworn affidavit and billing statements in support of the request. Plaintiff argues that in order to comply with MCR 2.625(G)(3), defendant was required to submit sworn affidavits or jurats by the experts themselves rather than simply rely on defense counsel's affidavit. MCR 2.625 (G), provides in relevant part:

> (1) Each item claimed in the bill of costs, except fees of officers for services rendered, must be specified particularly.
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> (2) the bill of costs must be verified and must contain a statement that
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> (a) each item of cost or disbursement claimed is correct and has been

necessarily incurred in the actions, and

(b) the services for which fees have been charged were actually performed.

(3) If witness fees are claimed, an affidavit in support of the bill of costs must state the distance traveled and the days actually incurred and the days actually attended. [Emphasis added.]

This Court interprets courts rules using the same principles that govern statutory interpretation. Court rules should be construed using the ordinary meaning of the rule's language and "in light of the purpose to be accomplished by its operation." *Smith v Henry Ford Hosp*, 219 Mich App 555, 558; 557 NW2d 154 (1996). If the plain and ordinary meaning of the rule's language is clear, judicial construction is normally neither necessary nor permitted. *In re Moukalled Est*, 269 Mich App 708, 715; 714 NW2d 400 (2006).

While MCR 2.625(G)(3) does specify that affidavits are necessary, it does not require any particular person provide the affidavit. Here, defense counsel provided the affidavit attesting what costs were charged and paid for, on what days, and for what purpose. Attached to the bill of costs were itemized bills and supporting documentation. While no itemization for "distance traveled" was included, no mileage was ever requested. Plaintiff cites no authority to support her argument that MCR 2.625(G)(3) limits the affidavit requirement to witnesses whose fees are being sought. Relying on the plain language of the court rule, defense counsel's affidavit submitted in support of the bill of costs satisfies the requirements of MCR 2.625. Moreover, plaintiff makes no argument that the fees were not actually paid.

The trial court also properly awarded the expert witness fees. MCL 600.2164(1) provides:

> No expert witness shall be paid, or receive as compensation in any given case for his services as such, a sum in excess of the ordinary witness fees provided by law, unless the court before whom such witness is to appear, or has appeared, awards a larger sum, which sum may be taxed as a part of the taxable costs in the case. Any such witness who shall directly or indirectly receive a larger amount than such award, and any person who shall pay such witness a larger sum than such award, shall be guilty of contempt of court, and on conviction thereof be punished accordingly.

The parties stipulated to, and the trial court certified, all three expert witnesses at trial. Other than a conclusory statement that the charges were unreasonable, plaintiff fails to articulate any substantive objection to the amounts charged. A party cannot "announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his positions." *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1950). Because plaintiff has failed to brief the merits of this argument, we deem it abandoned. *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999).

With respect to the $1,000 fee for plaintiff's expert deposition fee, plaintiff does not contest that it was a charge actually incurred. In the lower court and on appeal, she contends that it should not be charged because the doctor was called in support of her case in chief. This

argument is without merit. In order to take plaintiff's expert discovery only deposition, defendant was charged, and paid, the fee. The charge is authorized pursuant to MCR 2.625 and MCL 600.2164(1).

Plaintiff also contends that the deposition fee for plaintiff's expert is only authorized if the deposition was read into the record and/or filed with the clerk of the court. MCL 600.2549. Plaintiff's argument is misplaced. Defendant is not seeking reimbursement for the *cost* of the deposition, i.e. transcript fee, but rather the expert witness fee charged for the *appearance* at the deposition. The fee was properly awarded.

B. Attorneys Fees

Under the offer of judgment rule, MCR 2.405, actual costs are the costs and fees taxable in a civil action plus a reasonable attorney fee for services necessitated by the failure to stipulate to the entry of judgment. MCR 2.405(A)(6); *Luidens v 63rd District Court*, 219 Mich App 24, 30; 555 NW2d 709 (1996). For the attorney fees to be necessitated by the rejection of an offer of judgment, there must have been a causal nexus between the fees and the rejection. *Castillo*, *supra* at 493. If a party challenges the reasonableness of the fees requested, the court should conduct an evidentiary hearing and make factual findings regarding the issue. *Miller v Meijer, Inc*, 219 Mich App 476, 479-480; 556 NW2d 890 (1996).

While there is no precise formula for assessing the reasonableness of an attorney fee, some of the factors to be considered are: (1) the professional standing and experience of the attorney; (2) the skill, time and labor involved; (3) the amount in question and the results achieved; (4) the difficulty of the case; (5) the expenses incurred; and (6) the nature and length of the professional relationship with the client. *Crawley v Schick*, 48 Mich App 728, 737; 211 NW2d 217 (1973). Our Supreme Court has explained that a trial court is not limited to these factors and is not required to set forth detailed findings on each specific factor. *Michigan Tax Mgt Services Co v City of Warren*, 437 Mich 506, 509-510; 473 NW2d 263 (1991).

Here, defense counsel asked for attorney fees at an hourly rate of $150 and $110 based upon actual billing rates. Plaintiff did not make any specific objection to the hourly rate or the amount of hours expended with the exception of one five and a half hour trip by defense counsel to consult with Dr. Leuchter. Even on appeal, plaintiff merely contends that the "hours were obviously padded," but provides no specifics or support. Again, this Court will not search for authority either to support or reject a position. *Mitcham*, *supra* at 203. Moreover, if plaintiff had specific objections to the amount of hours expended or the rates charged, she could have requested an evidentiary hearing. *Miller*, *supra* at 480. She failed to do so.

Defendant clearly incurred expenses in successfully defending against the litigation. The trial court knew both attorneys, was familiar with the facts of the case, and presided over the trial. Although the trial court did not explicitly state its findings on all factors, it does not appear that the trial court considered none of them. *JC Building Corp II v Parkhurst Homes, Inc*, 217 Mich App 421, 430-431; 552 NW2d 466 (1996). The trial court's award was not "so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias," *Herald Co, Inc v Tax Tribunal*, 258 Mich App 78, 92; 669 NW2d 862 (2003), particularly in light of the fact that no specific objections were made either at the trial court level or on appeal to either the hours or rates charged.

C. Interest of Justice Exception

MCR 2.405 governs offers to stipulate to entry of judgment, and provides:

> (D) Imposition of Costs Following Rejection of Offer. If an offer is rejected, costs are payable as follows:
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> * * *
>
> (3) The court shall determine the actual costs incurred. The court may, in the interest of justice, refuse to award an attorney fee under this rule.

Generally, actual costs must be awarded to whichever party offered an amount less favorable to him than the adjusted verdict. The sanction should be routinely enforced and attorney fees granted absent unusual circumstances. *Miller*, *supra* at 480; *Luidens*, *supra* at 32. However, in the interest of justice, the court may refuse to award attorney fees under the offer of judgment rule. MCR 2.405(D)(3); *Castillo*, *supra* at 492-493. A party's ability to pay is not sufficient to justify denial of attorney fees. *Derderian v Genesys Health Care Systems*, 263 Mich App 364, 374; 689 NW2d 145 (2004).

Plaintiff contends that plaintiff was injured, continues to suffer and is unable to afford the fees. This is insufficient to invoke the interest of justice exception. This matter was not a case of first impression, particularly complex, and did not present any unusual circumstances. The trial court properly declined to apply the interest of justice exception.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Kirsten Frank Kelly