

STATE OF MICHIGAN
COURT OF APPEALS

CHRISTINA MARTINELLI and JOHN
SANDLIN III, Individually and as Co-Personal
Representatives of the Estate of ELIZABETH
KITCHEN,

UNPUBLISHED
October 15, 2009

Plaintiffs-Appellees,

v

No. 283923
Wayne Circuit Court
LC No. 05-524387-NH

OAKWOOD HOSPITAL & MEDICAL CENTER,

Defendant,

and

MICHAEL DARGAY, D.O.,

Defendant-Appellant.

Before: Saad, C.J., and O'Connell and Zahra, JJ.

PER CURIAM.

In this wrongful death action, defendant Michael Dargay, D.O. (Dargay), appeals as of right from the trial court's order granting his motion for \$42,048.50 in case evaluation sanctions against plaintiffs, but denying his request to have the sanctions paid from the proceeds of a \$17,500 settlement between plaintiffs, as co-personal representatives of the estate of Elizabeth Kitchen, and codefendant Oakwood Hospital and Medical Center (Oakwood Hospital). We affirm.

Plaintiffs filed a wrongful death action against defendants on August 18, 2005, in both an individual and representative capacity, alleging medical malpractice against Dargay and vicarious liability on the part of Oakwood Hospital.¹

¹ The issue on appeal only concerns plaintiffs' actions in a representative capacity as co-personal representatives of Kitchen's estate.

In October 2007, plaintiffs settled the estate's claims against Oakwood Hospital for \$17,500. Plaintiffs' claims against Dargay went to trial, where a jury found in favor of Dargay. On November 26, 2007, the trial court entered a judgment of no negligence in favor of Dargay, in accordance with the jury's verdict. The settlement proceeds were to be paid directly to plaintiffs' attorney because the retainer agreement required that costs be paid first from any settlement. Because costs exceeded the settlement amount, the entire amount was to be paid to plaintiffs' attorney.

The next day, Dargay moved for case evaluation sanctions under MCR 2.403 because the jury verdict was more favorable than a \$125,000 case evaluation award that both plaintiffs and Dargay had rejected. The trial court awarded \$42,048.50 in case evaluation sanctions to Dargay.

Dargay also claimed a priority right to the settlement proceeds under the wrongful death act. However, the retainer agreement between plaintiffs and their attorney required that costs be paid first from any settlement. Because costs exceeded the \$17,500 settlement amount, plaintiffs claimed that no money from the settlement would be available to pay the sanctions. The trial court determined that the \$17,500 settlement not be considered part of the judgment against Dargay and ordered that plaintiffs' attorney's law firm receive the \$17,500 settlement to cover costs of litigation.

On appeal, Dargay argues that case evaluation sanctions have priority under the wrongful death act, MCL 600.2922, and that the trial court should not have denied his request for payment of the case evaluation sanctions from the proceeds of plaintiffs' settlement with Oakwood Hospital. We disagree.

The interpretation and application of a statute presents a question of law that we review de novo. *Associated Builders & Contractors v Dep't of Consumer & Industry Services Director*, 472 Mich 117, 123-124; 693 NW2d 374 (2005). The same legal principles that govern the construction and application of a statute also apply to the construction of a court rule. *Marketos v American Employers Ins Co*, 465 Mich 407, 413; 633 NW2d 371 (2001). When construing a statute, "we give effect to the Legislature's purpose and intent according to the common and ordinary meaning of the language used." *Bailey v Oakwood Hosp & Medical Ctr*, 472 Mich 685, 693; 698 NW2d 374 (2005). "Statutes that relate to the same subject or that share a common purpose are *in pari materia* and must be read together as one law, even if they contain no reference to one another and were enacted on different dates." *Walters v Leech*, 279 Mich App 707, 709-710; 761 NW2d 143 (2008). "The object of the *in pari materia* rule is to effectuate the legislative purpose as found in harmonious statutes." *In re Project Cost & Special Assessment Roll for Chappel Dam*, 282 Mich App 142, 148; 762 NW2d 192 (2009).

In this case, the only source that Dargay is looking for to pay the case evaluation sanctions is the \$17,500 settlement between Oakwood Hospital and plaintiffs. A settlement between parties is not the result of a ruling on a motion and, therefore, is not a "verdict" subject to costs under MCR 2.403. *Webb v Holzheuer*, 259 Mich App 389, 392; 674 NW2d 395 (2003). The material question in this case is whether Dargay, a non-party to the \$17,500 settlement, may nonetheless look to that settlement to recover case evaluation sanctions that decedent's estate owed him as a result of a separate verdict of no negligence in his favor.

In general, the probate court has jurisdiction over matters relating to the settlement of a decedent's estate under the Estates and Protected Individuals Code (EPIC), MCL 700.1101 *et seq.* See MCL 700.1103(j) (defining "court" as "the probate court or, when applicable, the family division of circuit court") and MCL 700.1302(a) (a "court" has exclusive jurisdiction over "[a] matter that relates to the settlement of a deceased individual's estate"). The matters coming within the probate court's exclusive jurisdiction include, but are not limited to, estate administration, settlement and distribution, and a declaration of rights involving an estate, devisee, heir, or fiduciary. MCL 700.1302(a)(ii) and (iii).

EPIC contains a number of specific provisions governing the administration of an estate. Specifically, MCL 700.3805(a) establishes the priority of claims in the event that "the applicable estate property is insufficient to pay all claims and allowances in full." The first priority is given to "[c]osts and expenses of administration." MCL 700.3805(a). Further, MCL 700.3715(w) authorizes a personal representative, acting reasonably and for the benefit of reasonable persons, to "[e]mploy an attorney to perform necessary legal services or to advise or assist the personal representative in the performance of the personal representative's administrative duties."

MCL 700.3924 addresses the distribution of proceeds where a wrongful death claim is not pending in another court. The statute authorizes the probate court to approve a settlement, MCL 700.3924(1), and to authorize distribution of the proceeds of a court settlement as follows:

After a hearing on the personal representative's petition, the court shall order payment from the proceeds of the decedent's reasonable medical, hospital, funeral, and burial expenses for which the estate is liable. *The proceeds shall not be applied to the payment of any other charges against the decedent's estate.* The court shall then enter an order distributing the proceeds to those persons designated in section 2922 of the revised judicature act of 1961 who suffered damages and to the decedent's estate for compensation for conscious pain and suffering, if any, in the amount the court considers fair and equitable considering the relative damages sustained by each of the persons and the decedent's estate. [MCL 700.3924(2)(d) (emphasis added).]

Where a wrongful death action is pending in a different court, MCL 700.3924(2)(g) provides that procedures prescribed in MCL 600.2922 apply to "the distribution of proceeds of a settlement or judgment." MCL 600.2922, commonly referred to as the wrongful death act, concerns actions brought by the personal representative of a decedent's estate where the death was caused by the wrongful act, negligence, or fault of another. MCL 600.2922(1) and (2). As amended in 2000 and 2005, MCL 600.2922 identifies persons who might be entitled to damages, subject to MCL 700.2802 to MCL 700.2805 in EPIC. MCL 600.2922(3). The statute also provides, in pertinent part:²

² The pre-EPIC version of the statute, as amended by 1985 PA 93, contains the same distribution provision as the current subsection (6)(d). The 2000 amendment primarily changed references in the statute from the Revised Probate Code to the EPIC. The 2005 amendment does not contain
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(5) If, for the purpose of settling a claim for damages for wrongful death where an action for those damages is pending, a motion is filed in the court where the action is pending by the personal representative asking leave of the court to settle the claim, the court shall, with or without notice, conduct a hearing and approve or reject the proposed settlement.

(6) In every action under this section, the court or jury may award damages as the court or jury shall consider fair and equitable, under all the circumstances including reasonable medical, hospital, funeral, and burial expenses for which the estate is liable; reasonable compensation for the pain and suffering, while conscious, undergone by the deceased during the period intervening between the time of the injury and death; and damages for the loss of financial support and the loss of the society and companionship of the deceased. *The proceeds of a settlement or judgment in an action for damages for wrongful death shall be distributed as follows:*

(a) The personal representative shall file with the court a motion for authority to distribute the proceeds. Upon the filing of the motion, the court shall order a hearing.

* * *

(d) After a hearing by the court, the court shall order payment from the proceeds of the reasonable medical, hospital, funeral, and burial expenses of the decedent for which the estate is liable. *The proceeds shall not be applied to the payment of any other charges against the estate of the decedent.* The court shall then enter an order distributing the proceeds to those persons designated in subsection (3) who suffered damages and to the estate of the deceased for compensation for conscious pain and suffering, if any, in the amount as the court or jury considers fair and equitable considering the relative damages sustained by each of the persons and the estate of the deceased. If there is a special verdict by a jury in the wrongful death action, damages shall be distributed as provided in the special verdict.

(e) If none of the persons entitled to the proceeds is a minor, a disappeared person, or a legally incapacitated individual and all of the persons entitled to the proceeds execute a verified stipulation or agreement in writing in which the portion of the proceeds to be distributed to each of the persons is specified, the order of the court shall be entered in accordance with the stipulation or agreement. [MCL 600.2922(5), (6).]

Based on this statutory scheme, although a circuit court plainly has authority in a wrongful death action to distribute funds received pursuant to a settlement or judgment, it does

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any substantive changes to subsection (6).

not have authority to go beyond MCL 600.2922 and determine how a personal representative should pay expenses under EPIC. The trial court in this case unduly confused the issue by attempting to ascertain how expenses would be paid under EPIC.

Further, the trial court incorrectly cited *In re McDivitt Estate*, 169 Mich App 435; 425 NW2d 575 (1988), for the proposition that case evaluation sanctions are administrative expenses under the wrongful death act. The matter before the *McDivitt* Court was a probate court petition to recoup a prior distribution in order to pay mediation (now case evaluation) sanctions awarded to a defendant in a separate circuit court action. *Id.* at 437-438. The *McDivitt* Court held that mediation sanctions were administrative expenses of the estate under the priority provision in the Revised Probate Code, MCL 700.192 (repealed by 1998 PA 386, effective April 1, 2000), because a contrary holding would frustrate the intent in MCR 2.403(O) “by giving estates immunity from the consequences of prosecuting meritless claims.” *Id.* at 440. But recoupment of amounts already distributed was denied based on a determination that “the partial distribution was made in good faith, with full disclosure and pursuant to a court order which was not set aside and from which no appeal was taken.” *Id.* at 443. Because the instant action is a wrongful death action in circuit court, the material issue is whether MCL 600.2922(6) allows Dargay to recover case evaluation sanctions against a \$17,500 settlement to which he is not a party. This is not solely a question of priority, but rather whether there exists any right in the first instance to reach the settlement proceeds.

The trial court also considered *Bennett v Weitz*, 220 Mich App 295, 298; 559 NW2d 354 (1996), but that case does not involve a wrongful death action. In *Bennett*, the plaintiffs filed a medical malpractice action in district court. *Id.* at 296. The defendants were awarded mediation sanctions because a jury returned a verdict that was more than ten percent below the mediation evaluation. *Id.* at 296-297. The plaintiffs claimed that they were entitled to pay the contingent attorney fees and costs owed to their attorney before offsetting the mediation sanctions against the judgment. *Id.* at 297. The *Bennett* Court found merit to the plaintiffs’ argument that their attorney could collect attorney fees and costs from the judgment on the ground that “Michigan recognizes a common-law attorney’s lien on a judgment or fund resulting from the attorney’s services.” *Id.* But looking to MCR 2.403 and its purpose to place the burden of litigation costs on the party who demands a trial by rejecting a proposed mediation award, the *Bennett* Court held that the mediation sanctions must be deducted from the judgment before the plaintiffs paid the attorney fees and costs owed to their attorney. *Id.* at 301. In dicta, the *Bennett* Court observed:

[T]he action at bar is unlike cases with multiple defendants where one defendant has settled with the plaintiff, and then the verdict at trial is more favorable to another defendant, to whom the court later awards mediation sanctions. Under that circumstance, the plaintiff’s counsel is entitled to collect his contingency fee from the settlement, which was separate and apart from the verdict. Moreover, in that instance another defendant had paid the settlement, which is not the situation here. [*Bennett, supra* at 298.]

In this case, the trial court found this dictum persuasive in concluding that the separate settlement should not be considered part of the judgment. Although the trial court did not indicate that it applied MCL 600.2922 and the analysis in *Bennett* did not involve the wrongful death act, the trial court considered Dargay’s argument based on another case, *Colbert v Primary*

Care Medical, PC, 226 Mich App 99; 574 NW2d 36 (1997), which involves MCL 600.2922 and provided the framework for the trial court's decision.

The decision in *Colbert* was preceded by and, in part, predicated on an earlier decision in *Mason v Cass Co Bd of Co Rd Comm'rs*, 221 Mich App 1; 561 NW2d 402 (1997). The *Mason* Court construed the "proceeds" subject to distribution in the wrongful death act, MCL 600.2922, as permitting a deduction for case evaluation sanctions in an appropriate case. *Id.* at 5. The *Mason* Court declined to preclude a defendant from filing a claim against a decedent's estate for administrative expenses, stating in part:

We do not conclude that the wrongful death act requires this result. In its first sentence, § 6 provides: "In every action under this section the court or jury may award damages as the court or jury shall consider fair and equitable, under all the circumstances" In its next sentence, § 6 provides for the distribution of "[t]he proceeds of a settlement or judgment." We conclude from the language and structure of this subsection that "[t]he proceeds" means an "award [of] damages as the court or jury shall consider fair and equitable, under all the circumstances." Further, "all the circumstances" surrounding an award of damages certainly includes the court rules and their provision for mediation as an important tool to promote settlements, using mediation sanctions to promote that end. Thus, when § 6(d) limits the purposes for which "the proceeds" are to be used, that limitation applies to the "award [of] damages" which, in an appropriate case, has already been reduced as a sanction for rejecting a mediation evaluation.

Moreover, we conclude that this is the most "fair and equitable" approach, as contemplated by the statute. If defendants are required to seek the recovery of mediation sanctions from decedent's estate, they may well be able to make only partial, if any, recovery. Under § 6(d), most of the judgment amount will likely be used to pay medical, hospital, funeral, and burial expenses, along with payments to decedent's survivors for their pain and suffering, loss of companionship and support, or other damages they may have suffered. The estate will receive payment only to the extent that damages were awarded because of decedent's "conscious pain and suffering" before death. To the extent that defendants are unable to obtain full recovery of mediation sanctions from the estate, the penalty for rejecting the mediation evaluations is avoided. We will not "frustrate the intent behind the mediation sanctions rule . . . by giving estates immunity from the consequences of prosecuting meritless claims." *In re McDivitt Estate*, 169 Mich App 435, 440; 425 NW2d 575 (1988). [*Mason, supra* at 5-6.]

Although *Mason* supports Dargay's argument that case evaluation sanctions are deductible before a distribution under the wrongful death act in an appropriate case, *Mason* is distinguishable because it does not involve a settling defendant. A jury trial was held with respect to claims against an individual and the Cass County Board of Road Commissioners arising from the plaintiff's decedent's death in a traffic accident. *Id.* at 3. Apparently, the jury found only the board negligent. *Id.* Each defendant was awarded mediation sanctions because the plaintiff had previously rejected mediation awards that were higher than the jury award. *Id.* The *Mason* Court upheld the trial court's determination that each defendant's award of sanctions

was payable from the judgment owed by the board before the distribution of “proceeds” under the wrongful death act. *Id.* at 5-6.

In *Colbert, supra* at 104, this Court relied on *Mason* to determine that case evaluation sanctions may be imposed against a wrongful death judgment. As in this case, the circumstances in *Colbert* involved multiple defendants in a wrongful death action filed in circuit court. *Id.* at 101-102. The plaintiff settled with the hospital. *Id.* at 102. A jury trial against a doctor and Primary Care Medical, P.C., resulted in a no-cause verdict. *Id.* The *Colbert* Court found the record and the parties’ briefs insufficient to resolve whether the settlement proceeds should be applied to a codefendant’s case evaluation sanctions. *Id.* at 104. Rather, the case was remanded to the trial court for additional briefing and argument with respect to this issue. *Id.* at 105. On remand, the trial court was instructed to determine “whether the award against the codefendant should be treated as a judgment against defendants or if defendants should be treated as just other creditors (and, if so, at what level of priority) with respect to the award against the codefendant.” *Id.*

Because *Colbert* did not decide the material question in this case concerning the application of settlement proceeds, it is of limited relevance in deciding whether Dargay should be allowed to collect his case evaluation sanctions from a codefendant’s settlement. *Colbert* seems to assume that the circuit court would have jurisdiction to decide priority issues in the administration of a decedent’s estate if the wrongful death act does not apply, inasmuch as the trial court was instructed to consider this priority issue in the event that it decided not to treat the award against the codefendant as a judgment against “defendants.” *Id.* For the reasons discussed earlier, the probate court has exclusive jurisdiction to decide priority issues under EPIC. Nonetheless, it appears from the trial court’s decision that it attempted to follow the approach in *Colbert*. Aside from its consideration of EPIC provisions to reach a conclusion regarding how administrative expenses would be paid, it specifically framed the issue as being whether the award against a codefendant should be treated at a judgment against “defendants.”

The trial court did not consider another case, *Hill v L F Transportation, Inc*, 277 Mich App 500; 746 NW2d 118 (2008), on which Dargay relies on appeal to support his claim that he should be permitted to receive case evaluation sanctions from the \$17,500 settlement before any distribution.³

In *Hill*, the decedent died when his vehicle was struck by a tractor-trailer driven by an individual hauling materials for L.F. Transportation, Inc. (LFT). *Id.* at 502. The decedent’s vehicle was insured by Auto-Owners Insurance Company (Auto-Owners). *Id.* The personal representative of the decedent’s estate filed a wrongful death action against the driver of the tractor-trailer, LFT, LFT’s insurance carrier, and Auto-Owners, among others. *Id.* at 503. The personal representative also sought arbitration of an uninsured motorist claim under Auto-Owner’s insurance policy. *Id.* The wrongful death allegations were later dismissed, but the personal representative obtained an arbitration award against Auto-Owners. *Id.* at 504. On

³ *Hill* was decided on January 15, 2008, shortly before the trial court heard oral arguments on January 18, 2008.

appeal, this Court reversed the arbitration award on the ground that LFT's insurer was previously found obligated to provide liability coverage. *Id.* at 504-505. After the *Hill* Court granted taxable costs to Auto-Owners, the Eaton County Probate Court entered a judgment in favor of Auto-Owners, which was payable from any estate property that became available. *Id.* at 505.

The personal representative thereafter filed a wrongful death action against the driver of the tractor-trailer and LFT. *Id.* The claim against the driver was resolved pursuant to a case evaluation award of \$465,000. *Hill, supra* at 506. The circuit court denied Auto-Owners's motion to intervene for the purpose of recovering its prior judgment of costs from the proceeds of the case evaluation award. *Id.* The *Hill* Court reversed, finding a right to intervene. *Id.* at 507. Applying the rationale in *Mason* for deducting mediation sanctions from proceeds before making a distribution in a wrongful death action, the *Hill* Court held that litigation costs arising from the wrongful death should also be deducted because "there is no valid purpose to allowing estates the ability to escape an award of costs to the prevailing party." *Id.* at 510. The *Hill* Court did not address any concerns arising from the fact that the proceeds that Auto-Owners was attempting to reach were part of a case evaluation award for which it was not a party. Rather, the concern expressed by the *Hill* Court was that the action was technically separate from the one in which Auto-Owners prevailed and was awarded costs. *Id.* Relying on MCR 2.504(D), it concluded that the costs could not be avoided by the filing of a new action. *Id.* The *Hill* Court explained:

[T]he court rules recognize that a plaintiff may not avoid the payment of costs merely by dismissing an action and commencing a new action. The basis for any claim against Auto-Owners in the prior action is the same for the claim against the tortfeasor in the instant action. That is, any liability by Auto-Owners in the prior action was based not just on whether the defendants were insured, but also on whether the defendants were found liable for the wrongful death. In other words, if plaintiff were unable to prevail on the merits in the instant action, then she would have been unable to prevail against Auto-Owners in the prior action even if the defendants were uninsured. The distinction between the two actions is not whether plaintiff had a meritorious wrongful death claim or whether defendants are liable for that wrongful death, but which insurer was obligated to pay the claim.

In short, because the instant action involves the same essential claim as the prior action, we do not believe that plaintiff may escape responsibility for paying costs in the prior action merely by choosing to commence a new action instead of continuing the old action. The costs awarded to Auto-Owners represent the cost of litigation of the wrongful death action that, under *Mason*, should have been deducted from the jury award before determining the amount of the net proceeds to be distributed to the beneficiaries. The trial court erred in failing to allow Auto-Owners to intervene and recover its award of costs from the wrongful death award before the proceeds of that award were distributed to the beneficiaries. [*Hill, supra* at 510-511.]

If one follows the logical implication in *Hill*, it appears immaterial whether the party seeking payment of case evaluation sanctions or taxable costs against a decedent's estate in a wrongful death action was a party to a judgment or settlement because the objective of allowing

a deduction before a distribution under MCL 600.2922 is to preclude the decedent's estate from escaping liability for litigation costs. If one applies the reasoning in *Mason*, on which the *Hill* Court relied, then the particular circumstances of the case should be considered to determine what is fair and equitable. If one applies the reasoning in *Colbert*, the appropriate focus is on whether a settlement by one codefendant should be treated as a judgment against "defendants," as was done by the trial court in this case.

A rule of law established by a prior published decision issued on or after November 1, 1990, is binding pursuant to MCR 7.215(J)(1). But "[s]tatements regarding a rule of law that are not essential to the outcome of the case do not create a binding rule of law." *Meyer v Mitnik*, 244 Mich App 697, 701; 625 NW2d 136 (2001). Further, a decision is not generally precedent with regard to a matter that was insufficiently argued and presented on appeal, *Foreman v Foreman*, 266 Mich App 132, 139; 701 NW2d 167 (2005), although if the point was essential, the fact that it was duly presented and considered may be assumed, *McNally v Bd of Canvassers of Wayne Co*, 316 Mich 551, 558; 25 NW2d 613 (1947).

We conclude that the essential rule of law that we are bound to follow is the fair and equitable approach in *Mason, supra*. Further, the trial court reached the right result in holding that the case evaluation sanctions were not deductible from the \$17,500 settlement under the circumstances of this case. There is never any guarantee that sanctions will be collectible against a party. *Colbert, supra* at 106. And while there is obviously a relationship between plaintiffs' claim against Dargay and the vicarious liability claim that they pursued against Oakwood Hospital, the effect that Oakwood Hospital's participation in the trial would have had on the outcome is unknown. This is not a case where the record on appeal reflects no triable issue. To the contrary, based on the verdict form, Dargay's negligence was submitted to the jury.

The settlement reached by plaintiffs and Oakwood Hospital is consistent with the intent of the case evaluation rule, which is to promote settlements. *Mason, supra* at 5. Because a settlement is not a "verdict" subject to sanctions under MCR 2.403, *Webb, supra* at 392, it would not frustrate the intent of MCR 2.403 to disallow a deduction against the settlement for sanctions owed to a party who did not participate in the settlement. To hold otherwise and require the deduction might prove counterproductive by discouraging settlements between the time of the case evaluation and the trial when there is more than one defendant.

Therefore, although it was unnecessary for the trial court to evaluate the priority of claims under EPIC, MCL 700.3805, the trial court correctly determined that the case evaluation sanctions should not be paid from the \$17,500 settlement. Although the trial court did not specifically discuss the fair and reasonable test in *Mason, supra*, we will not reverse a trial court's decision when the right result is reached. *Coates v Bastian Bros, Inc*, 276 Mich App 498, 508-509; 741 NW2d 539 (2007). For this reason, and considering that Dargay has not shown any basis for not allowing plaintiffs' attorney to be reimbursed for costs and attorney fees in an amount equal to the full amount of the settlement before any distribution of proceeds, we affirm the trial court's decision.

Affirmed.

/s/ Henry William Saad

/s/ Peter D. O'Connell

/s/ Brian K. Zahra