STATE OF MICHIGAN

COURT OF APPEALS

JAMES H. CLEMENT,

Plaintiff-Appellee/Cross-Appellant,

v

HAROLD C. ALLEN, SR., WYMADENE ALLEN, and HAROLD C. ALLEN, JR.,

Defendants-Appellants/Cross-Appellees,

and

TOWNSHIP OF RICHFIELD,

Defendant-Appellee,

and

SHARON MCCARTNEY and JAMES HERBERT,

Defendants/Not Participating.

UNPUBLISHED
October 14, 1997

No. 193128
Roscommon Circuit Court
LC No. 93-006385-CH

Before: Cavanagh, P.J., and Holbrook, Jr. and Jansen, JJ.

PER CURIAM.

Defendants Harold C. Allen, Sr., Wymadene Allen, and Harold C. Allen, Jr., appeal as of right the judgment entered for plaintiff following a jury trial. Plaintiff cross-appeals, challenging the denial of mediation sanctions. We affirm in part, reverse in part, and remand for proceedings consistent with this opinion.

I

Defendants first claim that the trial court clearly erred in refusing to enforce the April 1994 settlement agreement. The trial court's ruling regarding whether the parties entered into an enforceable agreement is reviewed for an abuse of discretion. *Rinvelt v Rinvelt*, 190 Mich App 372, 382; 475 NW2d 478 (1991).

The trial court appears to have believed that a written agreement to settle is not binding on a party who later changes his mind. This belief is erroneous. Once a contract to settle legal claims has been entered into, a unilateral change of mind is not a ground for excusing performance. *Reed v Citizens Ins Co*, 198 Mich App 443, 447; 499 NW2d 22 (1993). However, we nevertheless find that the trial court correctly refused to enforce the settlement agreement. This Court will not reverse where the trial court reaches the right result for the wrong reason. *Zimmerman v Owens*, 221 Mich App 259, 264; 561 NW2d 475 (1997).

In contract law, a condition precedent is a fact or event that the parties intend must take place before there is a right to performance. *Reed*, *supra* at 447. The agreement in this case contained two conditions precedent: it had to be approved by both the relevant governmental authorities and the other property owner whose land adjoined the road. Although the township approved the purchase and division of the property, it insisted upon recovering its attorney fees, in contradiction to the express provision of the settlement that no costs or attorney fees would be assessed. Because the township did not approve the settlement agreement as written, the necessary condition precedent to its enforceability was not met. Accordingly, the trial court did not abuse its discretion in refusing to enforce the agreement.

II

Next, defendants contend that the trial court should have granted their motion for a new trial on the ground that plaintiff failed to amend his complaint to include a specific claim for damages arising out of an alleged assault and battery that took place in July 1994. A trial court's decision on a motion for a new trial is reviewed for an abuse of discretion. *Mahrle v Danke*, 216 Mich App 343, 351; 549 NW2d 56 (1996).

Plaintiff's complaint, filed on September 28, 1993, stated that he claimed injuries from multiple assaults and batteries. At a hearing on June 20, 1995, defendants objected to plaintiff's failure to amend his complaint to set forth a separate count for the July 1994 incident. At that hearing, the trial court specifically stated that defendants were on notice that the July 1994 assault was included in plaintiff's claims for assault and battery. In fact, defendants afterward took a second deposition of plaintiff in connection with the incident and at trial presented the testimony of five witnesses regarding the altercation.

We find no error requiring reversal. Even substantial omissions from a complaint should be overlooked if the complaint is nonetheless sufficient to provide the defendant with notice of the claims against which he must defend. *Kewin v Massachusetts Mutual Life Ins Co*, 79 Mich App 639, 654; 263 NW2d 258 (1977), rev'd in part on other grounds 409 Mich 401; 295 NW2d 50 (1980).

Plaintiff's failure to plead a separate claim for the July 1994 assault does not provide grounds for a new trial in the absence of any showing of surprise or prejudice. See MCR 2.613(A). Accordingly, the trial court did not abuse its discretion in denying defendants' motion for a new trial.

III

Defendants next argue that the trial court abused its discretion in allowing plaintiff to testify with regard to his hospital and ambulance expenses without any corroborating evidence to prove that the injuries were a direct result of the assault. In their appellate brief, defendants complain that they were required to "guess as to what [plaintiff's] injuries and claim[s] for damages and special damages [were]."

The primary function of a pleading is to give notice of the nature of the claim or defense sufficient to permit the opposite party to take a responsive position. *Stanke v State Farm Mutual Automobile Ins Co*, 200 Mich App 307, 317; 503 NW2d 758 (1993). Plaintiff's complaint was required only to set forth the specific allegations reasonably necessary to inform defendants of the nature of the claims they were called on to defend. See MCR 2.111. Plaintiff's complaint informed defendants that plaintiff claimed injuries from multiple assaults and batteries. Plaintiff was not required to plead the precise nature of his injuries or the damages sustained. More particularized information on these topics was obtainable by defendants through discovery.[1] Cf. *Major v Schmidt Trucking Co*, 15 Mich App 75, 81-82; 166 NW2d 517 (1968).

Prior to trial, defendants did not avail themselves of the available discovery procedures to ascertain plaintiff's injuries and damages. In addition, defendants did not take advantage of available opportunities at trial, including cross-examination of plaintiff, to establish whether the medical expenses testified to by plaintiff were related to the assault.[2]

Defendants correctly state that medical bills are admissible only if a proper foundation is laid with regard to their reasonableness and their relation to the defendant's actions. See *Haidy v Szandzik*, 46 Mich App 552, 556; 208 NW2d 559 (1973). Plaintiff concedes that he never testified that the medical expenses were incurred as a direct result of the defendants' actions. However, defendants failed to argue at trial that there was no evidence that the medical expenses were related to the assault, preferring instead to merely challenge plaintiff's credibility. Because defendants consented to a verdict form that did not specify whether the damages awarded were for economic or non-economic losses, it is impossible to determine whether plaintiff's testimony had any impact on the verdict. Under the circumstances, we decline to speculate whether the jury was influenced by plaintiff's testimony. The trial court found, and we agree, that the jury verdict was supported by the evidence presented at trial and was not excessive.

In sum, we find no error requiring reversal. Reversible error cannot be error to which the aggrieved party contributed by plan or negligence. *Harville v State Plumbing and Heating, Inc*, 218 Mich App 302, 323-324; 553 NW2d 377 (1996).

IV

Next, defendants claim that the trial court abused its discretion when it refused to allow defense counsel to introduce the testimony of an unendorsed witness who claimed that plaintiff asked him to testify falsely in the instant case. We review a trial court's decision concerning the

admission of evidence for an abuse of discretion. *Zeeland Farm Services, Inc v JBL Enterprises, Inc*, 219 Mich App 190, 200; 555 NW2d 733 (1996). An abuse of discretion exists when the result is so palpably and grossly violative of fact and logic that it evidences perversity of will or the exercise of passion or bias rather than the exercise of discretion. *Dacon v Transue*, 441 Mich 315, 329; 490 NW2d 369 (1992).

The trial court held that whether plaintiff committed a separate criminal act was irrelevant to the proceedings and a matter for the prosecutor. We conclude that the trial court did not abuse its discretion. Defendants made no showing that the witness had any knowledge about the facts giving rise to the cause of action. Even if the excluded testimony were relevant to plaintiff's credibility, it would have been unfairly prejudicial because the individual was not listed as a witness, and plaintiff was deprived of any opportunity to prepare to impeach the witness or offer contradicting testimony.

V

Defendants assert that the trial court abused its discretion when it refused to allow defense counsel to ask plaintiff's son, "Which time did you lie?" We find no abuse of discretion. See *Zeeland Farm Services, supra*. The trial court is required to exercise reasonable control over the interrogation of witnesses. MRE 611(a). The trial court merely ordered counsel to rephrase the question. Defense counsel continued his cross-examination, during which the witness admitted that his prior testimony was inconsistent with his testimony at trial. During closing arguments, defense counsel argued that the witness should not be believed because of the discrepancies in his testimony. Thus, defendants suffered no prejudice, and reversal is not required. See MRE 103(a).

VI

Defendants next argue that the trial court erred in refusing to compel plaintiff to testify, posttrial, regarding any compensation that he had received from collateral sources. The trial court denied defendants' motion, finding no indication that the jury verdict was based on plaintiff's medical expenses. We find no abuse of discretion. See *Szymanski v Brown*, 221 Mich App 423, 431; 562 NW2d 212 (1997). Defendants waived their right to a setoff under the collateral source rule by failing to ascertain during discovery whether plaintiff's medical bills had been covered by insurance and by failing to request that the verdict form distinguish between economic and noneconomic damages.

VII

Defendants claim that the trial court erred in refusing to assess costs against plaintiff for filing a frivolous claim. A trial court's decision whether to award sanctions for the filing of a frivolous claim is reviewed for clear error.

The trial court did not clearly err in denying defendants' motion for costs. MCR 2.625 and MCL 600.2591; MSA 27A.2591, which govern the award of costs for the filing of frivolous claims,

allow costs to be awarded only to the prevailing party. Because plaintiff's claim for a prescriptive easement was voluntarily dropped at the start of trial, no party prevailed on the claim.[3]

VIII

On cross-appeal, plaintiff argues that the trial court erred in denying his request for mediation sanctions. A trial court's award regarding an award of attorney fees is reversible only if it constitutes an abuse of discretion. *Beach v State Farm Mutual Automobile Ins Co*, 216 Mich App 612, 625-626; 550 NW2d 580 (1996).

The mediation panel recommended an award of $1,000 to plaintiff and division of the road according to the agreement of April 1994. Plaintiff accepted the evaluation and defendants rejected it. The jury found for plaintiff in the amount of $10,000.

A party who rejects a mediation evaluation is subject to sanctions if he fails to improve his position at trial. *Meagher v McNeely & Lincoln, Inc*, 212 Mich App 154, 157; 536 NW2d 851, (1995). MCR 2.403(O)(1) provides in pertinent part:

> If a party has rejected an evaluation and the action proceeds to trial, that party must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the mediation evaluation.

We find that the trial court abused its discretion in denying plaintiff's motion for mediation sanctions. The trial court erroneously thought that the mediation panel exceeded its authority when it made a recommendation with regard to the property division issue. However, pursuant to MCR 2.403(A)(1), "a court may submit to mediation any civil action in which the relief sought is primarily money damages or *division of property*" (emphasis added). Because the verdict was more favorable to plaintiff than the mediation evaluation,[4] sanctions pursuant to MCR 2.403(O) are mandatory. See *Butzer v Camelot Hall Convalescent Centre, Inc*, 201 Mich App 275, 284; 505 NW2d 862 (1993). We therefore remand this case to the trial court for a determination of actual costs to be awarded as mediation sanctions under MCR 2.403(O)(1).

Defendants argue that plaintiff is not entitled to mediation sanctions because he rejected their offer of judgment. Under MCR 2.405(D)(2), an offeree who has not made a counteroffer may not recover actual costs. The parties agree that plaintiff submitted an offer to settle on the same day that defendants made an offer of judgment for fifty dollars. This Court has held that MCR 2.405(D)(2) does not apply where, as here, each party is an offeror. See *Beveridge v Shorecrest Lanes & Lounge, Inc*, 204 Mich App 466, 470; 516 NW2d 117 (1994).

IX

Plaintiff contends that defendants' offer of judgment of fifty dollars does not constitute a valid offer of judgment in light of the mediation evaluation of $1,000 and the jury verdict of $10,000. However, because we have already found that plaintiff is entitled to recover mediation sanctions, we

decline to address this issue. See MCR 2.405(E); *Luidens v 63rd District Court*, 219 Mich App 24, 29; 555 NW2d 709 (1996).

Affirmed in part, reversed in part, and remanded for further proceedings. We do not retain jurisdiction. No taxable costs pursuant to MCR 7.219, neither party having prevailed in full.

/s/ Mark J. Cavanagh
/s/ Donald E. Holbrook, Jr.
/s/ Kathleen Jansen

[1] See also *Rockwell v Vandenbosch*, 27 Mich App 583, 589; 183 NW2d 900 (1970) ("The purpose of discovery proceedings is to narrow the issues and eliminate surprise.").

[2] The transcript contains the following passage from plaintiff's counsel's direct examination of plaintiff:

> Q: Did you have – was there an expense for the ambulance?
>
> A: The ambulance ride was $928.
>
> * * *
>
> Q: Was there a charge for that [hospital] stay?
>
> A: Six thousand, five hundred, one dollars and fifty cents.
>
> Mr. Miller (Defendants' attorney): Your Honor, I am going to object at this point unless I am able to see the billings. I am not – I have not been advised of these billings. I have not been advised that this is a part of this lawsuit. There is no proof this alleged hospitalization has anything to do with this incident.
>
> The Court: Well, the jury has heard this testimony, Mr. Miller, and you can argue to the jury that it hasn't been established that it is related. But I can't strike it now. They have heard something about what the witness did after this July incident. That's all we got is his testimony.
>
> [Plaintiff's attorney]: Do you want those admitted?

According to plaintiff's brief on appeal, his attorney was referring to plaintiff's medical bills, which plaintiff had with him at the time. The record shows no response to the question. Thus, defense counsel apparently had the opportunity to examine plaintiff's medical bills at trial and inexplicably failed to take advantage of it.

[3] Defendants are not entitled to costs pursuant to MCR 2.504(A)(1), the rule governing costs when an action is voluntarily dismissed, because plaintiff dismissed only one claim, not the entire lawsuit.

[4] Pursuant to MCR 2.403(3), a verdict is more favorable to a plaintiff if it is more than ten percent above the mediation evaluation, which is the situation in the present case.