STATE OF MICHIGAN

COURT OF APPEALS

GLENN WILLIAMS,

Plaintiff-Appellee/Cross-Appellant,

v

CHELSEA COMMUNITY HOSPITAL and WILLIAM R. LEE, M.D.,

Defendants-Appellants/Cross-Appellees,

and

EMERGENCY PHYSICIANS MEDICAL GROUP and PATRICK MUNSON, M.D.,

Defendants.

UNPUBLISHED
December 28, 2006

No. 261946
Washtenaw Circuit Court
LC No. 01-001416-NH

Before: White, P.J., and Zahra and Kelly, JJ.

PER CURIAM.

In this medical malpractice case, defendants Chelsea Community Hospital and William R. Lee, M.D. appeal as of right a judgment in favor of plaintiff Glenn Williams. Plaintiff cross-appeals asserting that the trial court erred in failing to add prejudgment interest to the case evaluation sanctions. We affirm, but remand for calculation of prejudgment interest on the case evaluation sanctions and for amendment of the judgment to add that amount.

I. Facts

In August 1999, plaintiff, a 39-year-old journeyman electrician, fell and twisted his ankle. He presented to defendant hospital where Patrick Munson, M.D. ordered ankle x-rays and diagnosed an ankle fracture. Joanne Barbour-Walker, M.D., a radiologist, also read the x-rays. Dr. Munson referred plaintiff to Dr. Lee who reviewed the x-rays and also diagnosed an ankle fracture. Dr. Lee applied a fiberglass cast to plaintiff's lower leg. A few days later, plaintiff presented to the emergency department of defendant hospital with complaints of pain and swelling in his foot. Dr. Lee removed the cast. Plaintiff continued, over the next two weeks, to complain of unusual sensations in his toes and foot. Dr. Lee assured plaintiff that this was normal. In August 1999, Dr. Lee and radiologist Michael Sarosia, M.D. interpreted additional x-

rays to show no change. It was not until September 15, 1999, that x-rays of plaintiff's foot were taken and showed a fracture in plaintiff's calcaneous (heel bone). As instructed by Dr. Lee, plaintiff underwent rigorous physical therapy. It was not until October 1999, that Dr. Lee referred plaintiff for a CT scan, which showed that plaintiff had sustained a severely comminuted calcaneal fracture. In May 2000, plaintiff underwent a right subtalar fusion with right lateral wall decompression and right distal fibula resection.

Plaintiff filed a complaint alleging that defendant hospital was liable for the negligence of Dr. Lee, Dr. Barbour-Walker, and Dr. Sarosia in failing to timely diagnose his calcaneal fracture. He also alleged that the hospital was liable for Dr. Lee's negligence in failing to timely and properly treat the fracture. There was no claim against the hospital other than for its vicarious liability for the negligence of these doctors. Plaintiff named Dr. Lee separately and alleged that he was liable for his own negligence.

The case proceeded to trial. After both sides rested, the jury returned a verdict in plaintiff's favor. Defendants appeal the judgment entered against them. Plaintiff cross-appeals the trial court's decision not to add prejudgment interest on the case evaluation sanctions.

II. Analysis

A. JNOV

Defendants first argue that the trial court erred in denying their motion for judgment notwithstanding the verdict (JNOV). We disagree.

A trial court's decision on a motion for JNOV is reviewed de novo. *Sniecinski v BCBSM*, 469 Mich 124, 131; 666 NW2d 186 (2003). In reviewing the decision, this Court must view the evidence and all legitimate inferences from it in the light most favorable to the nonmoving party, *id.* to determine whether a question of fact existed, *Zantel Marketing Agency v Whitesell Corp*, 265 Mich App 559, 568; 696 NW2d 735 (2005). Only if the evidence failed to establish a claim as a matter of law is JNOV appropriate. *Sniecinski, supra* at 131.

To prevail in a medical malpractice action, a plaintiff must prove (a) the applicable standard of care, (b) that the defendant breached the standard, (c) an injury, and (d) that the breach proximately caused the injury. *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 492; 668 NW2d 402 (2003). "To establish proximate cause, the plaintiff must prove the existence of both cause in fact and legal cause." *Weymers v Khera*, 454 Mich 639, 647; 563 NW2d 647 (1997). Expert testimony is essential to establish a causal link between the alleged negligence and the alleged injury. *Dykes v William Beaumont Hosp*, 246 Mich App 471, 476-482; 633 NW2d 440 (2001); *Thomas v McPherson Community Health Ctr*, 155 Mich App 700, 705; 400 NW2d 629 (1996). "To recover for the loss of an opportunity to survive or an opportunity to achieve a better result, a plaintiff must show that had the defendant not been negligent, there was a greater than fifty percent chance of survival or of a better result." *Dykes, supra* at 477. MCL 600.2912a provides:

> (2) In an action alleging medical malpractice, the plaintiff has the burden of proving that he or she suffered an injury that more probably than not was proximately caused by the negligence of the defendant or defendants. In an action

> alleging medical malpractice, the plaintiff cannot recover for loss of an opportunity to survive or an opportunity to achieve a better result unless the opportunity was greater than 50%.

In *Fulton v William Beaumont Hosp*, 253 Mich App 70, 83; 655 NW2d 569 (2002), this Court held that "MCL 600.2912a(2) requires a plaintiff to show that the loss of the opportunity to survive or achieve a better result exceeds fifty percent."

1. Causation

Defendants first argue that the trial court should have granted JNOV because plaintiff's expert testimony did not satisfy the requirements of MCL 600.2912a(2) with respect to plaintiff's loss of an opportunity to avoid fusion, arthritis, and a work-ending injury. We disagree.

The evidence demonstrates that plaintiff underwent a fusion, suffers from arthritis, and is unable to work in his former capacity as an electrician. George Holmes, M.D. testified that if plaintiff's injury had been timely and properly treated with a reduction, he more likely than not would have avoided fusion and suffered only mild arthritis. Dr. Holmes testified,

> My opinion is that, if this had been reduced in a timely manner, he would have had a much better – more likely than not, a much better prognosis in terms of healing and not needing a brace or any other devices for ambulation.

He further testified:

> *Q.* . . . More likely than not, would Mr. Williams have not needed a fusion or not had the subtalar arthritis had this fracture been timely diagnosed and treated?
>
> *A.* Yes.

With regard to arthritis, Dr. Holmes testified that if the fracture had been fixed, plaintiff would have had a seventy to eighty percent chance of "doing well," meaning functioning with mild arthritis.

Roy Sanders, M.D. testified to a reasonably degree of medical certainty with regard to the possibility of plaintiff sustaining a work-ending injury. He testified:

> *Q.* Now, with regard to his calcaneal fracture, I think we – you've – you've testified on direct examination about the – the type of result he could have had if he was timely diagnosed and treated with – with an open reduction.
>
> Do you have an opinion more probably than not if this had been timely diagnosed and treated, that it would not have been a work-related – work-ending injury for him?
>
> [Defense objection.]
>
> *A.* I believe that to be true.

The testimony of these experts was sufficient to create a question of fact with regard to whether plaintiff lost a greater than 50 percent opportunity to avoid fusion, arthritis, and a work-ending injury. The testimony cited by defendants that falls short of the requirements of MCL 600.2912a does not directly contradict any of the experts' statements that do meet the requirements of MCL 600.2912a. Although Dr. Sanders conceded that plaintiff continued to work, his use of the term "working-ending injury" was accurate when the evidence demonstrated that plaintiff would have to be retrained to perform a new and sedentary job and would not be able to work as an electrician in the same capacity that he did before the alleged negligence. To the extent that this testimony calls into question the weight or credibility of the experts' opinions, these matters are for the jury, not this Court. *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 194; 600 NW2d 129 (1999). The trial court did not err in denying defendants' motion for JNOV on this ground.

2. Scientific Basis for Plaintiff's Experts' Opinions

Defendants next argue that the trial court should have granted JNOV because Dr. Holmes and Dr. Sanders had no reliable scientific basis for their opinions on the standard of care and causation. Plaintiff asserts that this Court should not review this issue because defendants failed to challenge the scientific reliability of this evidence until after trial. Defendants suggest that they were not required to do otherwise because "the court can still satisfy its gatekeeper role when asked to rule on a post-trial motion." But defendants cite no authority to support this proposition. Defendants cite *Goebel v Denver and Rio Grande West Railroad Co*, 215 F3d 1083 (CA 10), which is not binding on this Court, and *Badalamenti v William Beaumont Hosp*, 237 Mich App 278, 286; 602 NW2d 854 (1999), which did not address whether expert opinion was scientifically reliable, but rather, whether it was "based on assumptions that are not in accord with the established facts."

Plaintiff's argument, on the other hand, finds support in *Craig v Oakwood Hosp*, 471 Mich 67, 82; 684 NW2d 296 (2004), in which our Supreme Court held that the trial court has "an independent obligation to review *all* expert opinion testimony" to determine whether it satisfied MRE 702, but also held that, "[w]hile a party may waive any claim of error by failing to call this gatekeeping obligation to the court's attention, the court *must* evaluate expert testimony under MRE 702 once that issue is raised." (Emphasis in original.) Accordingly, if a party does not challenge the expert testimony under MRE 702, the court has no duty to *sua sponte* conduct a hearing and determine whether the expert testimony is admissible. Rather, the issue is waived.

We agree with plaintiff that defendants waived this issue. Plaintiff was not required by any rule, statute, or case law to produce data and literature to support his experts' opinions unless and until the scientific reliability of his evidence was challenged by defendants. Defendants posed no such challenge. Because defendants never challenged the scientific reliability of plaintiff's experts' opinions, no record was created regarding this issue. Because no record was developed, there is nothing for this Court to review.

3. Inconsistent Verdict

Defendants also argue that the trial court should have granted partial JNOV as to future economic damages beyond 2008 because the jury awarded no noneconomic damages beyond that time and, therefore, the verdict is inconsistent. We disagree.

The determination of whether the evidence supports the jury award is based on objective considerations relating to the actual conduct of the trial or to the evidence adduced. *Palenkas v Beaumont Hosp,* 432 Mich 527, 532; 443 NW2d 354 (1989). Our Supreme Court has repeatedly held that "A jury's verdict must 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.' " *Bean v Directions Unlimited, Inc,* 462 Mich 24, 31; 609 NW2d 567 (2000), quoting *Granger v Fruehauf Corp,* 429 Mich 1, 7; 412 NW2d 199 (1987). " '[E]very attempt must be made to harmonize a jury's verdicts. Only where verdicts are so logically and legally inconsistent that they cannot be reconciled will they be set aside[.]' " *Lagalo v The Allied Corp,* 457 Mich 278, 282; 577 NW2d 462 (1998), quoting *Granger, supra* at 9.

In this case, the jury awarded noneconomic damages only to 2008 and awarded economic damages through 2021. This award was not inconsistent and it was supported by the evidence. First, there is no necessary relationship between economic and noneconomic damages: a person can sustain economic loss without suffering physical pain. Second, the evidence supports the conclusion that plaintiff would do just that for some portion of his life. Dr. Sanders testified that subsequent surgeries would address plaintiff's pain, but would leave him unable to work as an electrician in his former capacity. After describing the surgeries that plaintiff would require, Sanders testified:

> The – the biggest problem for him is he has to climb ladders and work on uneven ground, and it's difficult with this amount of work. What I'm trying to – what I would do with this surgery is trying to get him to be painfree and comfortable on even ground. But he has a subtalar fusion and has had these injuries to his foot, so up and down ladders, carrying heavy cable and walking through uneven ground in job sites is a bit difficult, and I don't think he could do that.

Additionally, Dr. Robert Ancel testified that with plaintiff's physical limitations, he could train for another position and would earn a reduced salary. And Dr. Young-Iob Chung opined that plaintiff will earn less money than he would have before the alleged injury. Defendants' distinction that plaintiff complained that he could not work because of pain did not adequately consider Dr. Sanders's testimony, namely his suggestion that plaintiff should (after trial) undergo several surgeries, which could improve his pain, but would nonetheless leave plaintiff disabled and unable to perform his previous job. To the extent that defendants' argument touches on issues of the weight or credibility of the evidence, those matters are left to the jury to resolve, not this Court. *Ellsworth, supra* at 194. Therefore, the jury's award of noneconomic damages until 2008 with economic damages continuing until 2021 was supported by the record. The trial court did not err in denying defendants' JNOV motion in this regard.

B. New Trial

Defendants next contend that a new trial should have been granted pursuant to MCR 2.611(a) and (g) because the trial court should have excluded Dr. Sanders's testimony about calcaneal fractures generally and plaintiff's counsel should not have been permitted to question Dr. Lee about x-rays that were taken after his treatment decision was made. We again disagree.

We review for abuse of discretion a trial court's ruling on a motion for new trial. *Gilbert v Daimler Chrysler Corp,* 470 Mich 749, 761; 685 NW2d 391 (2004). An abuse of discretion

occurs when an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made. *Id.* at 761-762.

Defendants first contend that Dr. Sanders should not have been permitted to testify about calcaneal fractures generally because this was irrelevant and misleading. Reading the complained of testimony in context, it is apparent that Dr. Sanders's actually testified this testimony related to "calcaneal displaced intra-articular fractures in general, not this patient's injury in specific." This testimony was not inadmissible for being irrelevant or misleading. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable than it would be without the evidence." MRE 401. Although this testimony could not be used directly to prove plaintiff's case because it did not relate to plaintiff's injury in particular, it was asked in a series of questions that covered both "calcaneal displaced intra-articular fractures in general" and plaintiff's injury. While some of Dr. Sanders's answers were more helpful to proving plaintiff's case than others, this particular testimony, which was less helpful, was nonetheless properly admitted. What defendants are essentially arguing is that any response a witness provides that does not directly prove a plaintiff's case should be struck as irrelevant. But relevant evidence is much broader than evidence that can directly prove an element of a plaintiff's claim.

Nor is the testimony misleading. Defendants argue that it is misleading

> given that the degree of lost chance between surgical and conservative treatment was a critical issue in this case, and that Dr. Sanders was otherwise unable to quantify the opportunity to avoid an ankle fusion with timely surgery, given the conceded absence of studies involving the long-term outcome of a significant number of patients with fracture-dislocations, the injury plaintiff is claimed to have had.

In this sentence, which comprises defendants' entire argument on this issue, defendants argue both that Dr. Sanders failed to provide evidence of causation and that his opinion was not supported by adequate data (both issues discussed separately above), but they do not state why the testimony identified in this issue is misleading. Moreover, this testimony could not be misleading when Dr. Sanders clearly informed the jury, "I would be speaking about calcaneal displaced intra-articular fractures in general, not this patient's injury in specific, because it's a little bit different pattern . . . ." The trial court did not err in admitting this testimony.

Defendants also argue that the trial court improperly allowed plaintiff's counsel to elicit testimony from Dr. Lee about x-rays taken after his treatment decision. Defendants contend that this testimony was inadmissible because Dr. Sanders testified that other x-rays taken subsequent to Dr. Lee's treatment decision were different in appearance from similar x-rays taken before Dr. Lee's treatment decision due to changes in the bone. Dr. Sanders testified:

> So if one looks at these two – this is from August 2nd. I flipped it just so I could fit it in. And you see how much mineral there is. It's very white and dense and sharp. And then if you look at this one from September 15th, because he's not using it, you can already see that some of the mineral content is lost and so it's a letter darker and looks a little more washed out.

Defendants contend that this testimony renders Dr. Lee's testimony irrelevant, misleading, and prejudicial.

It does not. In asking these questions of Dr. Lee, plaintiff's counsel was attempting to prove that if Dr. Lee had ordered foot films earlier, he would have ordered a CT scan and then properly diagnosed and treated plaintiff's injury. In pursuing this line of questioning, plaintiff's counsel showed Dr. Lee foot x-rays that were taken in September, which showed the fracture that Dr. Lee did not diagnose from looking at only ankle x-rays. The fact that x-rays showed degenerative changes in the bone over time has little if any effect on this line of questioning. If anything, this presents a factual issue for the jury to determine what effect this evidence had on plaintiff's case. It does not render Dr. Lee's testimony inadmissible. It was clearly relevant to the issues to be tried. Nor does it render Dr. Lee's testimony misleading, especially when the jury was also allowed to consider Dr. Sanders's testimony about the bone changes shown in the x-rays. Finally, although Dr. Lee's testimony was prejudicial to defendants, there is no basis for concluding that it was *unfairly* prejudicial. The trial court did not err in denying defendants' motion for new trial on the basis of evidentiary errors.

C. Case Evaluation Sanctions

Defendants next argue that plaintiff should not have been awarded case evaluation sanctions because the case evaluators improperly entered one award against Dr. Lee and defendant hospital jointly for $750,000. Although we agree that the joint award was a violation of the court rules, we nonetheless conclude that the trial court properly awarded case evaluation sanctions against defendants because (1) defendants waived the error and (2) despite the incorrect award, the trial court, by applying MCR 2.403(O)(4)(b), was able to properly determine that plaintiff was entitled to case evaluation sanctions.

"A trial court's decision whether to grant case-evaluation sanctions under MCR 2.403(O) presents a question of law, which this Court reviews de novo." *Campbell v Sullins*, 257 Mich App 179, 197; 667 NW2d 887 (2003). The construction and interpretation of a court rule is reviewed de novo and under the general rules of construction that apply to statutory review. *ISB Sales Co v Dave's Cakes*, 258 Mich App 520, 526; 672 NW2d 181 (2003). The goal is to give effect to the intent of the rule as expressed in the plain language. *Id.* at 526-527.

Defendants contend that, pursuant to MCR 2.403(K), the case evaluators were required to render separate awards for each defendant. Indeed, MRE 2.403(K)(2) provides:

> The evaluation must include a separate award as to the plaintiff's claim against each defendant and as to each cross-claim, counterclaim, or third-party claim that has been filed in the action. For the purpose of this subrule, all such claims filed by any one party against any other party shall be treated as a single claim.

The plain language of this court rule clearly does not permit a joint award against multiple defendants and, accordingly, the joint award against defendants for $750,000 was a violation of this rule. The court rules do not provide any sanction in the event of such an error. However, after reviewing the record, we conclude that defendants waived the error.

Several uncontested facts demonstrate that defendants not only failed to object to the error, but also contributed to it. First, MCR 2.403(H) provides that "a single fee is required of each party, even where there are counterclaims, cross-claims, or third-party claims." However, defendants, represented by the same attorney, paid only one fee. Second, MCL 2403(I)(1) provides, "At least 14 days before the hearing, *each party* shall file with the ADR clerk 3 copies of documents pertaining to the issues to be mediated and 3 copies of a consider summary setting forth that party's factual and legal position on issues presented by the action." (Emphasis added). However, defendants filed only case evaluation summary. Finally, MCL 2.403(L)(1) provides:

> Each party shall file a written acceptance or rejection of the panel's evaluation with the ADR clerk within 28 days after service of the panel's evaluation. Even if there are separate awards on multiple claims, the party must either accept or reject the evaluation in its entirety as to a particular opposing party. The failure to file a written acceptance or rejection within 28 days constitutes a rejection.

Defendants' attorney filed no acceptance or rejection for either party. As a result of these actions, defendants obtained only one case evaluation award and a single rejection was entered for them. Curiously, although defendants deliberately acted as one party for the purpose of case evaluation, they requested that the jury list separately their verdict against "Dr. William Lee and Chelsea Community Hospital," "Chelsea Hospital for Dr. Sarosi," and "Chelsea Community Hospital for Dr. Barbour Walker."

"It is well-established that error requiring reversal cannot be error to which the aggrieved party contributed by plan or negligence." *Phinney v Perlmutter*, 222 Mich App 513, 537; 564 NW2d 532 (1997). Stated another way, this Court has also held that "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). Additionally, our Supreme Court has held, when a party made no objection to the trial court's action until after the verdict, "It seems pretty well settled that, after one has knowledge of an irregularity, he cannot remain silent, and take his chances of a favorable verdict and afterwards, if the verdict goes against him, base error on it." *Samper v Boschma*, 369 Mich 261, 265; 119 NW2d 607 (1963). Applying these rules to the circumstances presented in this case, we hold that a party cannot, taking his chances on a favorable verdict, wait until after the verdict to assert that the case evaluators' error necessarily precludes the trial court from applying the case evaluation rules; rather, if possible, the trial court may apply the rules in MCR 2.403(O) and, when appropriate, award sanctions.

In this case, despite the case evaluators' error, it was possible for the trial court to apply MCR 2.403(O) and determine that case evaluation sanctions should be awarded against defendants. Our determination of whether case evaluation sanctions could be determined necessarily begins with the determination that defendants were jointly and severally liable. As this Court has recently noted, in medical malpractice cases in which the plaintiff is not at fault, "the liability of each defendant is joint and several." MCL 600.6304(6)(a); *Bell v Ren-Pharm, Inc*, 269 Mich App 464, 467; 713 NW2d 285 (2006). This Court previously held, however, that despite the retention of joint and several liability in MCL 600.6304(6)(a), the finder of fact shall allocate fault. *Salter v Patton*, 261 Mich App 559, 563; 682 NW2d 537 (2004). Thus, while the jury correctly allocated fault in this case, it is nonetheless a medical malpractice case in which

the plaintiff is not at fault and, accordingly, as defendants admitted at oral argument, defendants' liability is joint and several.

Having determined that defendants are jointly and severally liable, we next look to the court rule that is applied to determine a rejecting party's liability for costs. MCR 2.403(O)(4) governs a rejecting party's liability for costs when multiple parties are involved and provides:

> (4) In cases involving multiple parties, the following rules apply:
>
> (a) Except as provided in subrule (O)(4)(b), in determining whether the verdict is more favorable to a party than the case evaluation, the court shall consider only the amount of the evaluation and verdict as to the particular pair of parties, rather than the aggregate evaluation or verdict as to all parties. However, costs may not be imposed on a plaintiff who obtains an aggregate verdict more favorable to the plaintiff than the aggregate evaluation.
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> (b) If the verdict against more than one defendant is based on their joint and several liability, the plaintiff may not recover costs unless the verdict is more favorable to the plaintiff than the total case evaluation as to those defendants, and a defendant may not recover costs unless the verdict is more favorable to that defendant than the case evaluation as to that defendant.
>
> (c) Except as provided by subrule (O)(10),[1] in a personal injury action, for the purpose subrule (O)(1), the verdict against a particular defendant shall not be adjusted by applying that defendant's proportion of fault as determined under MCL 600.6304(1)-(2).

Of the three rules in MCL 2.403(O)(4), it is clear that MCL 2.403(O)(4)(b) applies to this case because the verdict is "against more than one defendant" and it "is based on their joint and several liability." According to this rule, "the plaintiff may not recover costs unless the verdict is more favorable to the plaintiff than the total case evaluation as to those defendants." Thus, in determining whether plaintiff should be awarded sanctions in this case, the trial court was required to compare the verdict against defendants to the total case evaluation as to those defendants. In doing so, the trial court correctly determined that the verdict against defendants was greater than the case evaluation award as to those defendants. This being the case, defendants' assertion that it could not fairly determine whether to accept or reject to award is disingenuous. Knowing that their liability is joint and several, they needed only to review MCR

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[1] MCL 2.403(O)(10) provides:

> In an action filed on or after March 28, 1996, for the purpose of subrule (O)(1), a verdict awarding damages for person injury, property damage, or wrongful death shall be adjusted for relative fault as provided by MCL 600.6304.

2.403(O)(b) and consider whether the joint case evaluation award would be more or less than the total verdict against them.

In sum, we conclude that the case evaluators' failure to provide separate awards, as plainly required to MCR 2.403, was an error that defendants waived, but, by correctly applying the case evaluation rules, the trial court was nonetheless able to determine that plaintiff was entitled to case evaluation sanctions.

D. Satisfaction of Damages Through Annuity Contract Pursuant to MCL 600.6307

Defendants finally argue that the trial court erred in deducting the entire amount of attorney fees and costs from the future damages in an order allowing satisfaction of future damages by the purchase of an annuity contract pursuant to MCL 600.6307. We disagree.

This Court reviews questions of statutory interpretation de novo. *Ayar v Foodland Distributors*, 472 Mich 713, 715; 698 NW2d 875 (2005). Clear and unambiguous statutory language is given its plain meaning and is enforced as written. *Id.* at 716.

MCR 600.6307 provides:

> In an action alleging personal injury, if the amount of future damages, as described in section 6306(1)(c) and (e), in the judgment exceeds $250,000.00 gross present cash value, as determined under section 6306(2), *the court shall enter an order that the defendant or the defendant's liability insurance carrier shall satisfy that amount of the judgment, less all costs and attorney fees the plaintiff is obligated to pay, by the purchase of an annuity contract*, if all of the following requirements are met:
>
> (a) The purchase price of the annuity contract shall be equal to 100% of the future damages subject to this section, less an amount determined by multiplying the amount of those damages by a percentage equal to the rate of prejudgment interest as calculated under section 6013(5) or section 6455(2) on the date the trial was commenced.
>
> (b) The annuity contract is purchased from a life insurer authorized to issue annuity contracts under the insurance code of 1956, Act No. 218 of the Public Acts of 1956, being sections 500.100 to 500.8302 of the Michigan Complied Laws. [Emphasis added.]

According to the plain language that is italicized, "that amount of the judgment" refers to "the amount of future damages, as described in section 6306(1)(c) and (e), in the judgment [that] exceeds $250,000.00 gross present cash value, as determined by section 6306(2)." Further, the statute provides that "the court shall enter an order that the defendant or the defendant's liability insurance carrier shall satisfy that amount of the judgment, less all costs and attorney fees the plaintiff is obligated to pay, by the purchase of an annuity contract." This language is not ambiguous.

Defendants argue that the costs and fees that should be deducted from the purchase price of the annuity should be in proportion to the purchase price. However, defendants do not cite any portion of the statute which so provides. Defendants suggest that portions of a statute must be construed with other sections of that statute. However, defendants do not identify what other portion of the statute is out of harmony with the plain language above. Therefore, defendants have failed to persuade us that the trial court erred when it correctly applied the plain language of the statute.

E. Prejudgment Interest on Case Evaluation Sanctions

Plaintiff contends on cross-appeal that this Court should remand this case for entry of an amended judgment adding prejudgment interest for the case evaluation sanctions.

Plaintiff timely moved for entry of judgment in the amount of the jury verdict plus case evaluation sanctions, including attorney fees, witness fees, actual costs and prejudgment interest on the entire amount. The trial court granted the motion in part, but refused to award prejudgment interest on the case evaluation sanctions in light of this Court's decision in *Ayar v Foodland Distributors*, 263 Mich App 105; 687 NW2d 365 (2004). On July 6, 2005, our Supreme Court reversed this Court's decision. *Ayar, supra* 472 Mich 713. In doing so, it held:

> [MCL 600.6013(8)] plainly states that interest on a money judgment is calculated from the date of filing the complaint. We find this language to be clear and unambiguous, as we did in [*Morales v Auto-Owners Ins Co (After Remand)*, 469 Mich 487; 672 NW2d 849 (2003)]. In *Morales*, we concluded that the statute makes no exception for periods of prejudgment appellate delay, and that interest on a judgment following such a delay is calculated, without interruption, from the date the complaint is filed. Similarly, the statute makes no exception for attorney fees and costs ordered as mediation sanctions under MCR 2.403(O).
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> * * *
>
> We conclude that, under MCL 600.6013(8), judgment interest is applied to attorney fees and costs ordered as mediation sanctions under MCR 2.403(O) from the filing of the complaint against the liable defendant. This results from a plain reading of the statute. [*Id.* at 716-717.]

Defendants present no argument that our Supreme Court's interpretation of MCL 600.6013 should not be applied to their case. Nevertheless, judicial decisions generally are given full retroactive effect. *Holmes v Michigan Capital Med Ctr*, 242 Mich App 702, 713; 620 NW2d 319 (2000). "Prospective application is a departure from this usual rule and is appropriate only in 'exigent circumstances.'" *Devillers v Auto Club Ins Ass'n*,472 Mich 562, 586; 702 NW2d 539 (2005) (citation omitted). The general rule is that prospective application is limited to decisions that overrule clear and uncontradicted case law, *id.* at 587, or decisions that address an issue of first impression whose resolution was not clearly foreshadowed, *Lindsey v Harper Hosp*, 455 Mich 56, 68; 564 NW2d 861 (1997). Our Supreme Court has listed three factors to be considered once it is determined that the decision clearly established a new principle of law: (1) the purpose to be served by the new rule, (2) the extent of reliance on the old rule, and (3) the

effect of retroactive application on the administration of justice. *Pohutski v City of Allen Park*, 465 Mich 675, 696; 641 NW2d 219 (2002).

In *Ayar*, our Supreme Court stated that its reading of MCL 600.6013(8) resulted from the plain reading of the statute. Because the statute has been determined by our Supreme Court to have been plainly written, we cannot conclude that *Ayar* clearly established a new principle of law. Therefore, we conclude that retroactive application of *Ayar* is appropriate.

We affirm, but remand for calculation of prejudgment interest on the case evaluation sanctions and for amendment of the judgment to add that amount. We do not retain jurisdiction.

/s/ Helene N. White
/s/ Brian K. Zahra
/s/ Kirsten Frank Kelly