STATE OF MICHIGAN

COURT OF APPEALS

TAMISHA HOYE, Individually and as Next Friend of Corey Bates, Minor, Plaintiff-Appellant, v DMC/WSU and SINAI GRACE HOSPITAL, Defendants, and VICTOR ADLAI, M.D., Defendant-Appellee.	UNPUBLISHED January 28, 2010 No. 285780 Wayne Circuit Court LC No. 04-407341-NH

Before: Gleicher, P.J., and Fitzgerald and Wilder, JJ.

PER CURIAM.

Plaintiff appeals as of right the May 12, 2008, "Amended Order Approving Settlement and Authorizing Distribution" in this medical malpractice action. We affirm.

Plaintiff first argues that the trial court erred by denying plaintiff's motion for a new trial with regard to defendant Dr. Adlai. However, plaintiff raised precisely the same issue and arguments with regard to the trial court's denial of her motion for new trial with regard to Dr. Adlai in her interlocutory appeal. This Court denied plaintiff's application for leave to appeal "for lack of merit in the grounds presented."[1] Therefore, because this Court expressed an opinion on the merits of plaintiff's arguments in denying the application for leave to appeal in Docket No. 282647, the law of the case doctrine precludes this Court from readdressing the arguments.

Plaintiff also argues that the trial court erred by awarding case evaluation sanctions in favor of Dr. Adlai and against plaintiff. A trial court's decision to grant or deny case evaluation

[1] *Hoye v DMC/WSU*, Unpublished order of the Court of Appeals, entered July 3, 2008 (Docket No. 282647).

sanctions is subject to review de novo on appeal. *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008). Similarly, the interpretation and application of a court rule involves a question of law that this Court reviews de novo. *Associated Builders & Contractors v Dep't of Consumer & Industry Services Director*, 472 Mich 117, 123-124; 693 NW2d 374 (2005).

On April 5, 2007, the jury returned a verdict of no professional negligence against Dr. Adlai. A finding of professional negligence against the hospital defendants was made as a result of a default ordered by the court as a discovery sanction. The trial court entered an order granting judgment in favor of Dr. Adlai on May 18, 2007, and subsequently entered an Order of Judgment dated June 5, 2007, which included both the judgment of no cause of action in favor of Dr. Adlai, and the judgment in favor of plaintiff and against the hospital defendants in the amount of $851,062.12.

The hospital defendants subsequently filed motions to set aside the default and the default judgment, and for judgment notwithstanding the verdict and for new trial. Following a hearing, the trial court entered an order on October 10, 2007, granting the hospital defendants' motion to set aside the default and default judgment under MCR 2.603(B)(1), and for new trial pursuant to MCR 2.611(A)(1)(a), by which plaintiff's verdict against the hospital defendants was vacated and extinguished.[2] This order was consistent with an earlier order providing that the May 18, 2007, judgment in favor of Dr. Adlai "remains in full force and effect."

On October 11, 2007, Dr. Adlai renewed his motion for case evaluation sanctions under MCR 2.403. The case evaluators had issued an award of $75,000 for plaintiff against Dr. Adlai, and an award of $5,000 in favor of plaintiff against the hospital defendants. All of the parties rejected the evaluation. The trial court entered an order on December 4, 2007, awarding case evaluation sanctions in favor of Dr. Adlai and against plaintiff in the amount of $97,717.50. Together with the "prevailing party" costs, the total amount of the award for costs and case evaluation fees was $112,817.50. The trial court ordered that Dr. Adlai could take no steps to collect on the award of costs or sanctions until further order of the court. The case ultimately settled for $875,000 in favor of plaintiff and against the hospital defendants. An order entered on May 12, 2008, ordered that the settlement proceeds be distributed, including the placement of $112,817.50 in an escrow account.

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[2] The trial court explained its rationale for setting aside the default and default judgment, and for granting a new trial:

> Since then, however, I have had substantial opportunity to review this case and review my notes and reflect. I cannot say after this review that the failure to abide by any court order or any discovery mandates was intentional. . . . The sanction I imposed was the civil justice equivalent of the death penalty."

The trial court further explained that a mistrial, rather than a default, should have been granted with regard to the hospital defendants.

Plaintiff maintains that case evaluation sanctions in favor of Dr. Adlai were not appropriate because the order reflecting the settlement between plaintiff and the hospital defendants was a "verdict" for the purpose of case evaluation sanctions, and the aggregate verdict was more favorable to plaintiff than the aggregate evaluation under MCR 2.403(O)(4). To the contrary, Dr. Adlai argues that pursuant to the plain and unambiguous language of MCR 2.403(O)(2), the $875,000 settlement of plaintiff's claims against the hospital defendants was not a "verdict" for the purposes of MCR 2.403(O).

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:
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> (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.

In *Marketos v American Employers Ins Co,* 465 Mich 407, 413; 633 NW2d 371 (2001), our Supreme Court set forth the proper method for interpreting court rules:

> When called on to construe a court rule, this Court applies the legal principles that govern the construction and application of statutes. Accordingly, we begin with the plain language of the court rule. *When that language is unambiguous, we must enforce the meaning expressed, without further judicial construction or interpretation.* Similarly, common words must be understood to have their everyday, plain meaning." (Emphasis added.)

The first issue that must be addressed is whether the order reflecting a settlement of $875,000 on plaintiff's claims against the hospital defendants falls under the definition of "verdict" for purposes of MCR 2.403(O)(2). We conclude that it does not.

MCR 2.403(O) provides, in relevant part:

> (1) 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 case evaluation. However, if the opposing party has also rejected the evaluation, a party is entitled to costs only if the verdict is more favorable to that party than the case evaluation.

(2) *For the purpose of this rule* "verdict" includes,

(a) a jury verdict,

(b) a judgment by the court after a nonjury trial,

(c) a judgment entered as a result of a ruling on a motion after rejection of the case evaluation. [Emphasis added.]

Michigan courts, recognizing that our Supreme Court intended what it plainly stated, have consistently ruled that MCR 2.403(O)(2) contains a specific and precise definition of "verdict." Our Supreme Court itself held that 2.403(O)(2) provides a specific and "precisely worded" definition of "verdict." *Freeman v Consumers Power Co*, 437 Mich 514, 519; 473 NW2d 63 (1991). In applying MCR 2.403(O)(2), this Court has consistently rejected attempts to expand or read additional meaning into the rule that is not expressly stated. *Johnson v State Farm Mutual Automobile Ins Co*, 183 Mich App 752, 767-769; 455 NW2d 420 (1990), overruled on other grounds in *Devillers v Auto Club Ins Ass'n*, 473 Mich 562; 703 NW2d 539 (2005).

When read in context with the rest of the rule, it is clear that MCR 2.403(O)(2) provides that only three things qualify as verdicts for the purpose of this rule: "(a) a jury verdict, (b) a judgment by the court after a nonjury trial, and (c) a judgment entered as a result of a ruling on a motion after rejection of the case evaluation." Under the plain language of MCR 2.403(O)(2)(c), a judgment entered as a result of a settlement between the parties is not a "verdict." See, e.g., *Jerico Construction, Inc v Quadrants, Inc*, 257 Mich App 22; 666 NW2d 310 (2003) (a settlement agreement that resulted in a stipulated order of dismissal did not constitute a verdict for purposes of MCR 2.403).

Here, the order of settlement was entered on the basis of plaintiff's and the hospital defendants' settlement agreement, and not by any of the three methods clearly and unambiguously set forth in MCR 2.403(O)(2). Because the order was not a "verdict" for the purpose of MCR 2.403(O), the amount of the settlement with the hospital defendants is not to be considered in deciding whether Dr. Adlai was entitled to case evaluation sanctions. The only "verdict" in this case is the jury verdict of no cause of action with regard to Dr. Adlai. To conclude otherwise would impermissibly expand, by judicial fiat, the specific and precisely worded definition of "verdict" to include any order ending any part of a case by whatever method, thereby rendering the limiting language of MCR 2.403(O)(2)(a)-(c) nugatory. In construing a statute, this Court presumes that every word has some meaning and should avoid a construction that renders any part of it surplusage or nugatory. *Saint George Greek Orthodox Church of Southgate, Michigan v Laupmanis Associates, P C*, 204 Mich App 278, 284; 514 NW2d 516 (1994).

The case evaluation in this case was $75,000 with regard to Dr. Adlai. Because both parties rejected the evaluation, Dr. Adlai was entitled to costs only if the verdict was more favorable to him than the case evaluation. MCR 2.403(O)(1). The verdict of no cause of action

was more favorable to Dr. Adlai than the $75,000 evaluation. Therefore, the trial court properly found that Dr. Adlai was entitled to case evaluation sanctions pursuant to MCR 2.403(O)(4).[3]

Affirmed.

/s/ E. Thomas Fitzgerald

[3] Had plaintiff proceeded to a new trial with regard to the hospital defendants, a different situation would have been presented because a verdict, whether in favor of plaintiff or in favor of the hospital defendants, would have existed for purposes of determining case evaluation sanctions with regard to all defendants.