

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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JAMES MCDONNELL, D.O. and NORTHWEST  
MICHIGAN SURGICAL GROUP, P.C., d/b/a  
NORTHERN MICHIGAN VASCULAR LAB,  
d/b/a NORTHERN MICHIGAN VEIN CENTER,

UNPUBLISHED  
October 21, 2010

Plaintiffs/Counter-Defendants-  
Appellants,

v

No. 292601  
Grand Traverse Circuit Court  
LC No. 07-026179-CK

MICHAEL COLBURN, M.D.,

Defendant/Counter-Plaintiff/Third-  
Party Plaintiff/Appellee,

and

CARA COLBURN,

Defendant,

and

NWMSG PROPERTIES L.L.C. and JAMES R.  
MCDONNELL,

Third-Party Defendants.

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Before: MURPHY, C.J., and BECKERING and M. J. KELLY, JJ.

PER CURIAM.

In this case involving the break-up of a surgical practice, plaintiffs Dr. James McDonnell and Northwest Michigan Surgical Group, P.C. (NW Surgical) appeal as of right the trial court's order refusing to order defendant Dr. Michael Colburn to pay McDonnell and NW Surgical their actual costs as case evaluation sanctions under MCR 2.403(O). Because we conclude that the trial court had the discretion to decline to award the costs under the facts of this case and did not abuse its discretion in refusing to do so, we affirm.

## I. BASIC FACTS AND PROCEDURAL HISTORY

In 2002, McDonnell formed NW Surgical for his surgical practice. He also formed NWMSG Properties LLC (NW Properties) to own the real property for the practice. As the trial court noted, the history of NW Surgical has been one of unrelenting legal disputes. McDonnell originally practiced with Dr. Robert Dotterer and they hired Colburn. After Dotterer left the practice, NW Surgical became involved in litigation with him. At some point, McDonnell granted an interest in the practice to Colburn, but Colburn did not make any payments for this interest. The parties did, however, enter into a cross-purchase agreement that prevented the dissolution of the practice and set its value at \$50,000 without allocating any value to the business' goodwill.

In December 2005 or January 2006, NW Surgical hired Colburn's wife, Cara Colburn, in an administrative position. Cara Colburn's duties included marketing, bookkeeping, and payroll responsibilities. She also served as NW Surgical's treasurer and was the chief liaison with its accountant.

In addition to litigation involving Dotterer, NW Surgical became involved in litigation arising from its employment of another doctor and in still more litigation involving staff privileges at Munson Medical Center. NW Surgical ultimately incurred substantial debts to pay the legal fees associated with all the litigation.

At some point, Colburn formed another professional corporation to compete with NW Surgical while he was still a member of NW Surgical. Colburn and his wife instructed NW Surgical's attorney to reserve assumed names and obtain an employer identification number for the new business and instructed NW Surgical's accountant to reclassify the attorney fees on NW Surgical's books as loans to McDonnell rather than as expenses. Colburn also set up a separate bank account for his previous work and his wife cancelled NW Surgical's advertising. The parties finally severed their business relationship in November 2007.

McDonnell then sued Colburn for tortious interference with NW Surgical's contracts, breach of common law and statutory fiduciary duties, and shareholder oppression. For relief, McDonnell requested both monetary damages and injunctive relief, including an order that Colburn transfer his ownership interest in the businesses to McDonnell. Colburn counter-sued McDonnell, asserting claims for breach of fiduciary duty, tortious interference, and malicious prosecution. Colburn also asked for an accounting and dissolution. Colburn's wife was later added as a defendant and NW Surgical was changed to a plaintiff. Colburn also brought a third-party claim asking the trial court to order McDonnell to buy out Colburn's interest in NW Properties.

The case was submitted to case evaluation and the panel unanimously awarded NW Surgical and McDonnell \$300,000 "inclusive of all claims, counterclaims, and third-party claims." McDonnell and NW Surgical accepted the case evaluation, but Colburn and his wife rejected it.

After a six-day trial, the trial court found that Colburn and his wife breached their duty to NW Surgical:

It is the nature of the acts discussed above that causes the Court to find that [Colburn and his wife's] behavior was oppressive and willfully unfair as those terms are used in MCL 450.1489. The cancellation of advertising, appropriation of a corporate opportunity, withholding of billings and removal of marketing materials were intended to diminish [McDonnell's] income and reduce the value of [NW Surgical]. Accordingly, the Court will require . . . Colburn [to] transfer his shares . . . to [McDonnell]. . . .

The trial court determined that McDonnell and NW Surgical were entitled to compensation for these breaches. The damages included \$14,824.50 for advertising expenses, \$61,015 for Colburn's share of the debt plus \$7,469 in interest on that debt, and \$13,793.33 for Colburn's share of the business' attorney fees. Turning to the interest in NW Properties, the trial court required Colburn to transfer his interest to McDonnell, but stated that he would get an offset on the amounts he owed to McDonnell equal to his share of the equity in the property, which the parties stipulated to be \$86,436.94. Finally, the trial court found that Colburn and his wife were jointly and severally liable for \$158,235 in lost revenue related to the cancellation of advertising. The trial court also declined to compensate Colburn for any share of the goodwill in NW Surgical because Colburn "caused conscious harm to the entity" and "[h]aving paid nothing for goodwill to begin with and never having valued it during the time that [he and McDonnell] practiced together, it would seem anomalous to award it here."

The trial court eventually entered a judgment with damages of \$255,336.83, which were to be offset by \$86,436.94. The judgment also ordered Colburn to "transfer his full interest in [NW Surgical] and [NW Properties] to . . . McDonnell and fully and timely cooperate in providing the necessary legal documents to effectuate such transfer." The trial court later awarded NW Surgical and McDonnell costs of \$28,549.64.

NW Surgical and McDonnell moved for case evaluation sanctions. They argued that Colburn failed to obtain a more favorable verdict than the case evaluation of \$300,000, and, for that reason, Colburn had to pay sanctions under MCR 2.403(O). NW Surgical and McDonnell calculated the adjusted verdict by adding the gross damages (\$255,336.83), interest (\$11,248.54), taxable costs (\$28,549.64), and the value of Colburn's interest in NW Properties (\$86,436.94), and then subtracting the offset ordered by the trial court (\$86,436.94) for a total adjusted verdict of \$295,135.01. Colburn and his wife argued in response that the adjusted verdict should be decreased by the \$86,436.94 offset and should not include the value of the transferred interest.

The trial court agreed that the \$86,436.94 should be subtracted from the total damages: "if [NW Surgical and McDonnell] had actually received close to \$300,000 that would seem incongruous given two checks were written, one for \$180,000 and change and another for \$28,000 and change," for a total "far short of \$270,000." In any event, the trial court explained that sanctions were not justified under the facts of this case:

Quite frankly, in this case, there were two claims presented to the Court, both of which the Court ordered a fraction of what was requested with regard to Dr. McDonnell's claim for lost profits associated . . . . No offense intended, but it was extreme and largely rejected by the Court. With respect to Dr. Colburn's analysis of his interest in the business and his good will, it was bizarre and totally unfounded and rejected by the Court.

The bottom line here is this case was driven less by logic and objectivity and a hard look at facts and damages than it was by emotion and . . . bad feelings. If there is a case that cries out for the interest of justice not pouring further gasoline on the fire it's this.

The Court is not going to award mediation sanctions, period. Because, quite frankly, neither side deserves it, you were both a bit too greedy.

After NW Surgical and McDonnell filed their claim of appeal with this Court, they moved the trial court to limit the record on appeal to the transcript of the post-judgment hearing on case evaluation sanctions. The trial court denied the motion. It then commented on its decision to deny sanctions:

But perhaps most importantly, if there was ever a case that cries out for a denial of sanctions, it is this one. Neither party should be compensated for continuing this trial where both of them took unrealistic positions. This is not a case where justice is served by—by rewarding the behavior of either.

Had Dr. Colburn prevailed, the Court wouldn't be providing him with attorney fees either. I understand the importance of sanctions and invariably the Court awards them when they've been asked for, very rarely do I not do so. So it's not a general predilection against sanctions. It is, in this particular case, both monetarily based on the net award, and equitably based on the mutual behavior of both parties, where frankly, I didn't believe they could see the forest for the trees, that we ended up with a trial as expensive as this one turned out to be.

This appeal followed.

## II. CASE EVALUATION SANCTIONS

### A. STANDARDS OF REVIEW

This Court reviews de novo a trial court's determination whether a party is liable for case evaluation under MCR 2.403(O). *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008). But where an award of case evaluation sanctions is discretionary, this Court reviews the trial court's decision for an abuse of discretion. See *Harbour v Correctional Med Servs, Inc*, 266 Mich App 452, 465; 702 NW2d 671 (2005). A trial court abuses its discretion when it selects an outcome that is outside the range of reasonable and principled outcomes. *Smith*, 481 Mich at 526. This Court also reviews de novo the proper interpretation of a court rule. *Marketos v American Employers Ins Co*, 465 Mich 407, 412; 633 NW2d 371 (2001).

## B. DISCRETION TO AWARD SANCTIONS

Under MCR 2.403(O)(1), a party who rejects a case evaluation award is liable to pay sanctions: “that party must pay the opposing party’s actual costs unless the verdict is more favorable to the rejecting party than the case evaluation.” Actual costs include reasonable attorney fees. See MCR 2.403(O)(6)(b). For purposes of subrule (O)(1), the verdict “must be adjusted by adding to it assessable costs and interest on the amount of the verdict from the filing of the complaint to the date of the case evaluation . . . .” MCR 2.403(O)(3). “After this adjustment, the verdict is considered more favorable to a defendant if it is more than 10 percent below the evaluation, and is considered more favorable to the plaintiff if it is more than 10 percent above the evaluation.” *Id.*

MCR 2.403(O)(1) provides that the rejecting party “must” pay the opposing party’s actual costs. The word “must” indicates that the award of costs is mandatory, not discretionary. *Great Lakes Gas Transmission Ltd Partnership v Markel*, 226 Mich App 127, 130; 573 NW2d 61 (1997). However, MCR 2.403(O)(5) indicates that an award of sanctions is discretionary if the verdict includes equitable relief:

If the verdict awards equitable relief, costs may be awarded if the court determines that

(a) taking into account both monetary relief (adjusted as provided in subrule[O][3]) and equitable relief, the verdict is not more favorable to the rejecting party than the evaluation, and

(b) it is fair to award costs under all of the circumstances.

Equitable relief is a nonmonetary remedy, such as an injunction or specific performance, obtained when monetary damages cannot adequately redress the injury. See *Forest City Enterprises, Inc v Leemon Oil Co*, 228 Mich App 57, 79-80; 577 NW2d 150 (1998). And, this Court has held that setoff is an equitable remedy in the absence of a statute mandating or authorizing the setoff. *Walker v Farmers Ins Exch*, 226 Mich App 75, 79; 572 NW2d 17 (1997). In this case, the trial court’s decision to award additional relief in the form of an order awarding Colburn’s interest in NW Properties to McDonnell in exchange for a set off is clearly equitable in nature. The award serves as a nonmonetary remedy to sever all remaining connections between the parties. Accordingly, the trial court was not required to impose case evaluation sanctions, but it had the discretion to do so. MCR 2.403(O)(5).

MCR 2.403(O)(5) unambiguously states that “costs *may* be awarded” if the verdict awards equitable relief, and the court determines that the following two conditions are present:

(a) taking into account both monetary relief (adjusted as provided in subrule [O][3]) and equitable relief, the verdict is not more favorable to the rejecting party than the evaluation, and

(b) it is fair to award costs under all of the circumstances. [Emphasis added].

The rule does not provide that sanctions must be awarded if the monetary relief, apart from the equitable relief, alone does not result in a more favorable verdict for the rejecting party. Rather, it permits the trial court to award sanctions if: (1) the monetary and equitable relief together is not more favorable to the rejecting party *and* (2) it is “fair” to award the costs “under all the circumstances.” MCR 2.403(O)(5). That is, subrule (O)(5) plainly provides that sanctions may be denied even where the monetary and equitable relief is not more favorable to the rejecting party if the trial court determines that the award would be *unfair* under the totality of the circumstances. Consequently, in this case, the trial court had the discretion to refuse to award sanctions, even if the monetary award plus equitable award met or exceeded the \$270,000 threshold, if it also determined that it would be unfair to award the sanctions.

Here, the trial court repeatedly stated that sanctions were not appropriate because both parties had overreached and attempted to gain far more than they reasonably deserved. The court specifically opined that NW Surgical and McDonnell’s damages expert inflated the damages estimate far in excess of the evidence. The trial court also opined that the parties would have been able to resolve their differences without resorting to litigation if only they had not allowed their mutual antagonism to overrule reason. Given the facts of this case, we cannot conclude that the trial court’s decision to deny sanctions fell outside the range of principled outcomes. *Smith*, 481 Mich at 526.

Affirmed.

/s/ William B. Murphy  
/s/ Jane M. Beckering  
/s/ Michael J. Kelly