STATE OF MICHIGAN

COURT OF APPEALS

DANIEL A. YOUNG, as Personal Representative of the Estate of PATRICIA J. YOUNG, deceased,

Plaintiff-Appellee/Cross-Appellant,

V

PARTHA SHANKER NANDI, M.D., SANTE BOLOGNA, M.D., and TROY GASTROENTEROLOGY, P.C., d/b/a CENTER FOR DIGESTIVE HEALTH,

Defendants-Appellants/Cross-Appellees.

UNPUBLISHED
May 3, 2011

No. 292409
Oakland Circuit Court
LC No. 2003-049093-NH

Before: OWENS, P.J., and K. F. KELLY and FORT HOOD, JJ.

PER CURIAM.

In this medical malpractice action, the jury returned a verdict in favor of plaintiff Daniel Young, as personal representative of the estate of Patricia J. Young, against defendants Partha Shanker Nandi, M.D., Sante Bologna, M.D., and the Center for Digestive Health, an assumed name for Troy Gastroenterology, P.C. (defendants). With regard to noneconomic damages, the trial court ruled that plaintiff was entitled to the higher loss amount for permanent impaired cognitive capacity. This Court reversed that conclusion, holding that plaintiff failed to establish that the decedent suffered permanent damage to her mental abilities. *Young v Nandi*, 276 Mich App 67, 80; 740 NW2d 508 (2007) vacated in part 482 Mich 1007 (2008).[1] On remand, the parties disputed whether the 2005 cap on noneconomic damages, corresponding to the date of the original judgment, should apply or whether the current year, the 2009 cap, should apply. The trial court ruled that the 2009 cap on noneconomic damages was applicable. Additionally, the trial court held an evidentiary hearing regarding the reasonable attorney fee to be awarded as part of case evaluation sanctions.

[1] Our Supreme Court denied the applications for leave to appeal, but vacated the ruling regarding the attorney fee issue, concluding that defendants were entitled to an evidentiary hearing. *Young v Nandi*, 482 Mich 1007 (2008).

Defendants filed a claim of appeal challenging the application of the 2009 cap on noneconomic damages, the propriety of an award of case evaluation sanctions, and the reasonable hourly attorney fee rate. Plaintiff filed a cross-appeal challenging the case evaluation sanctions award following remand proceedings in the circuit court and the cap on noneconomic damages. We affirm in part, reverse in part, and remand for proceedings consistent with this opinion.

The application of the proper cap for purposes of computing damages presents a question of law. Issues of statutory construction present questions of law subject to de novo review. *Hunter v Hunter*, 484 Mich 247, 257; 771 NW2d 694 (2009). Application of the law to the facts presents a question of law subject to review de novo. *Miller-Davis v Ahrens Constr, Inc*, 285 Mich App 289, 299; 777 NW2d 437 (2009). MCL 600.1483(1) sets forth limitations on noneconomic damages and provides in relevant part:

> In an action for damages alleging medical malpractice by or against a person or party, the total amount of damages for noneconomic loss recoverable by all plaintiffs, resulting from the negligence of all defendants, shall not exceed $280,000.00 unless, as the result of the negligence of 1 or more of the defendants, 1 or more of the following exceptions apply as determined by the court pursuant to section 6304, in which case damages for noneconomic loss shall not exceed $500,000.00 ….

The amount of noneconomic damages is adjusted on an annual basis, MCL 600.1483(4):

> The state treasurer shall adjust the limitation on damages for noneconomic loss set forth in subsection (1) by an amount determined by the state treasurer at the end of each calendar year to reflect the cumulative annual percentage change in the consumer price index. As used in this subsection, "consumer price index" means the most comprehensive index of consumer prices available for this state from the bureau of labor statistics of the United States department of labor.

The statute at issue, MCL 600.1483(1), does not provide the date that governs the calculation of the noneconomic damages. Both parties contend that the decision in *Wessels v Garden Way, Inc*, 263 Mich App 642; 689 NW2d 526 (2004) supports their respective positions. In *Wessels*, the dispute regarding the application of a damages cap to MCL 600.2946a(1), a products liability action, involved whether the cap should be applied at the time of the verdict or the time of the entry of the judgment. *Id*. at 651. Although the jury rendered a verdict on July 19, 2001, the defendant filed for bankruptcy. Over time, the bankruptcy court allowed the circuit court action to continue, and a judgment was entered on January 15, 2003. In between the time of the jury verdict and the entry of the judgment, two annual adjustments to the cap amount had occurred. *Id*. at 651-652. The trial court held that the cap amount at the time of the verdict was controlling. This Court reversed, concluding:

> First, it is evident that the Legislature determined the acceptable maximum amount of noneconomic damages to be $280,000. It is likewise clearly apparent that the Legislature protected that cap amount from the effects of inflation by requiring the state treasurer to annually adjust the cap "to reflect the cumulative

> annual percentage change in the consumer price index [CPI]." Finally, the Legislature has directed that it is the court that is to conform the verdict to the applicable cap amount. As … noted, under this statute " ' "[o]nce the jury has reached its verdict, the trial judge merely enters a judgment on the verdict that is consistent with the law." ' "
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> Second, it is well settled that courts can only act through their written judgments or orders. Consistently with this time-honored rule, we have held that the purpose of the judgment is to reflect the verdict in writing, which among other things provides a mechanism to enforce the verdict rendered by the jury.
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> In light of the foregoing, we conclude that the Legislature intended courts to apply the caps to the verdict, and courts can only do so by entry of a written judgment. It is also clear that the cap is to be annually modified consistently with changes in the CPI to protect the cap amount from inflationary increases. Thus, although the jury in this case rendered its verdict in 2001, the court did not apply the cap through a judgment until 2003. Before that time, the verdict was unenforceable by plaintiffs, and their verdict was to be protected from a decrease in value until the judgment and cap were applied and enforced through entry of the judgment. [*Id*. at 653-654 (citations and footnotes omitted).]

It is important to note that the *Wessels* Court was aware of the potential for abuse of this holding, noting that some may deliberately seek to extend the time for entry of a judgment in order to obtain the benefit of a subsequent annual adjustment. However, the Court concluded that there were adequate safeguards in the system, such as application of the court rules governing sanctions, to prevent such abuse. *Id*. at 654 n 5.

Other cases have also addressed the timing of the application of the cap. In *Velez v Tuma*, 283 Mich App 396, 414; 770 NW2d 89 (2009), the defendant asserted that the cap on noneconomic damages in effect at the time of the filing of the complaint should be applied rather than the cap in effect at the time of the entry of the judgment. This Court rejected that assertion, holding that the statutory cap applied, if at all, at the time the judgment was entered. Until that time, a plaintiff had no right to enforce the jury verdict awarding the noneconomic damages. *Id*. at 417.

Similarly, in *Shivers v Schmiege*, 285 Mich App 636, 650; 776 NW2d 66 9 (2009), the Court held that a verdict does not exist until the end of trial which may occur years after the complaint is filed. Therefore, the court cannot review a verdict to determine any applicable cap until the verdict has been rendered. *Id*. at 650-651. "The plain reading of this provision is that the court uses the limitation in effect at the time the court is conducting the review; if the Legislature intended the court to apply a cap from another time, it would need to say so." *Id*. at 651. "The successful plaintiff has no award to enforce until the judgment is entered." *Id*.

In the present case, the trial court calculated the economic cap at the time the judgment was entered in 2005. However, by the time the appellate process had been exhausted that reversed the trial court's application of the higher cap for noneconomic damages, the case was

returned to the trial court in 2009. Therefore, although the trial court recalculated the verdict utilizing the lower amount, the trial court applied the 2009 cap instead of 2005.

We conclude that the trial court erred and remand for calculation of the verdict applying the 2005 cap. The *Shivers* Court held that the appropriate cap was the limitation in effect at the time the court is conducting the review. In the present case, the trial court conducted the review in 2005. This Court reversed the trial court's application of the cap for permanent impaired cognitive capacity, holding that there was no evidence to support the permanent cognitive injury. Consequently, on remand, the trial court was required to recalculate the amount based on the 2005 standard. The application of the 2009 standard penalizes defendants who succeeded in reversing the application of the cognitive injury cap.

Plaintiff contends that the appellate reversal of the decision regarding the cap vacates the judgment, and therefore, the entry of an amended judgment is to be calculated by the 2009 standard. The delayed entry of a judgment should not benefit a party by allowing for additional annual adjustments. See *Wessels*, 263 Mich App at 654 n 5. Rather, the entry of a judgment following the appellate process is effectively a nunc pro tunc order. In determining whether it is appropriate to enter a judgment nunc pro tunc, this Court must exercise its flexibility and desire to achieve a fair result. *Vioglavich v Vioglavich*, 113 Mich App 376, 384-385; 317 NW2d 633 (1982). The entry of a judgment nunc pro tunc is an entry made now of something that was previously done to have effect as of the former date. *Freeman v Wayne Probate Judge*, 230 Mich 455, 460; 203 NW 158 (1925). The entry of judgment nunc pro tunc is necessary for the attainment of justice and favored when properly exercised. *Id*. at 460-461. A nunc pro tunc order does not involve the equity jurisdiction of the court, but rather, describes the inherent power of the court to make its records speak the truth. *Sleboede v Sleboede*, 384 Mich 555, 559 n 6; 184 NW2d 923 (1971). "The office of a nunc pro tunc order is to speak what has been done, not to create." *Haray v Haray*, 274 Mich 568, 574; 265 NW 466 (1936). On remand, the trial court shall enter a nunc pro tunc order calculating the judgment in accordance with the 2005 cap.

Next, defendants allege that the trial court erred in failing to adjust the verdict to account for the 2005 statutory cap for purposes of determining case evaluation sanctions. We disagree. The interpretation of the court rules are subject to review de novo. *Peterson v Auto-Owners Ins Co*, 274 Mich App 407, 414; 733 NW2d 413 (2007). When the plain language of the court rule is unambiguous, the rule is enforced as expressed without further judicial construction or interpretation. *Id*. (citations omitted). "This Court gives effect to the rule maker's intent as expressed in the court rule's terms, giving the words of the rule their plain and ordinary meaning." *Kloian v Domino's Pizza*, LLC, 273 Mich App 449, 458; 733 NW2d 766 (2006). When the language of the court rule is plain, this Court does not look outside the rule or construe it. *Id*. The factual findings that underlie the trial court's application of a court rule are reviewed for clear error. *Johnson Family Ltd Partnership v White Pine Wireless*, LLC, 281 Mich App 364, 387; 761 NW2d 353 (2008).

A trial court's decision whether to grant case evaluation sanctions presents a question of law subject to review de novo. *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008). A trial court's award of costs and attorney fees is reviewed for an abuse of discretion. *Id*. An abuse of discretion occurs when the trial court's decision is outside the scope of reasonable and principled outcomes. *Id*. "The purpose of case evaluation sanctions is to shift the financial

burden of trial onto the party who demands a trial by rejecting a proposed case evaluation award." *Tevis v Amex Assurance Co*, 283 Mich App 76, 86; 770 NW2d 16 (2009).

In cases involving multiple parties, to determine whether the verdict is more favorable to a party than the case evaluation, the court shall consider only the amount of the evaluation and the verdict regarding the particular pair of parties rather than the aggregate evaluation or verdict as to all parties. MCR 2.403(O)(4)(a). MCR 2.403(O)(4)(a) does not contain any provision addressing adjustments. However, MCR 2.403(O)(3) addresses adjustments and provides:

> For the purpose of subrule (O)(1), a 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, and, if applicable, by making the adjustment of future damages as provided by MCL 600.6306. 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. If the evaluation was zero, a verdict finding that a defendant is not liable to the plaintiff shall be deemed more favorable to the defendant.

Defendants contend that the verdict must also be adjusted to account for the imposition of the noneconomic damages cap. MCR 2.403(O)(3) delineates the adjustments made to the verdict prior to considering the favorability of the verdict. The plain language of the court rule only provides for an adjustment of the verdict in accordance with MCL 600.6306. MCL 600.6306 provides for entry of the verdict into an order of judgment by the court, and it contains no provision governing a cap on noneconomic damages. The plain language of the court rule does not contain any provision for adjustments for noneconomic caps for purposes of determining case evaluation liability.[2] Accordingly, the trial court did not err in declining to include the cap in the calculation of case evaluation liability.

Defendants also assert that the trial court was precluded from revisiting the reasonable hourly attorney fee rate because it was not an issue raised in the Court of Appeals and the Supreme Court. We disagree. A review of the Supreme Court remand order reveals that it remanded the case to the trial court for "a hearing on the subject of a reasonable attorney fee consistent with *Smith*." The *Smith* Court defined a reasonable attorney fee as the product of a

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[2] See also *Hall v Bartlett*, unpublished opinion per curiam of the Court of Appeals, issued March 29, 2011 (Docket No. 288293) slip op p 23. Defendants contend that the jury verdict should be offset by the noneconomic cap citing *Marketos v American Employers Ins Co*, 465 Mich 407; 633 NW2d 371 (2001). However, the *Marketos* decision involved an action for breach of contract wherein an assignment of rights and payment of monies had transpired that the jury did not account for in rendering its verdict. *Id*. at 414-415. The failure to enter an offset would have resulted in a windfall to the plaintiffs wherein the defendant insurer paid monies to the mortgagee on behalf of the plaintiffs and there were policy limits and deductibles. *Id*. at 415. Additionally, the *Marketos* decision did not analyze the plain language of the court rule.

three step process: (1) establish the customary fee for those services in that locality, (2) establish the number of hours worked by the attorneys, and (3) make adjustments to the product of those figures, with reference to several factors, in search of a "reasonable attorney fee." *Smith*, 481 Mich at 530-532. The trial court previously did not hold an evidentiary hearing, but merely decided an hourly rate. Neither party addressed the propriety of the hourly rate with the Court of Appeals and Supreme Court, but defendant asserted that the trial court erred in failing to hold an evidentiary hearing on the issue. Defendants did not assert that any evidentiary hearing should be limited in scope to exclude the calculation of the hourly rate. The Supreme Court order of remand required the trial court to entertain the *Smith* factors, and the *Smith* factors include determining an hourly rate. Therefore, defendants' challenge is without merit.

On cross-appeal, plaintiff contends that the higher economic cap applies. However, this issue was previously ruled upon and is the law of the case. *Ypsilanti Fire Marshal v Kircher*, 273 Mich App 496, 499-500; 730 NW2d 481 (2007), rev'd in part on other grounds 480 Mich 910 (2007). Plaintiff also asserts that the trial court erred in failing to award attorney fees and costs for post-trial work that occurred in the lower court following the appellate process. We agree. Post-trial work is necessitated by the rejection of case evaluation. *Zdrojewski v Murphy*, 254 Mich App 50, 71-72; 657 NW2d 721 (2002). Accordingly, we remand for recalculation of the judgment consistent with this opinion.

Affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion. We do not retain jurisdiction. No costs, neither party having prevailed in full.

/s/ Donald S. Owens
/s/ Kirsten Frank Kelly
/s/ Karen M. Fort Hood