STATE OF MICHIGAN

COURT OF APPEALS

IGOR BERGER, a/k/a GERALD BERGER,

Plaintiff/Counter-Defendant-Appellee,

v

ALLA KATZ and PAUL KATZ,

Defendants/Counter-Plaintiffs-Appellants.

UNPUBLISHED
July 28, 2011

No. 291663
Wayne Circuit Court
LC No. 07-707413-CZ

IGOR BERGER, a/k/a GERALD BERGER,

Plaintiff-Appellant,

v

ALLA KATZ and PAUL KATZ,

Defendants-Appellees.

No. 293880
Wayne Circuit Court
LC No. 07-707413-CZ

Before: WILDER, P.J., and SAAD and DONOFRIO, JJ.

PER CURIAM.

Plaintiff and defendants are the owners of IPAX Cleanogel, Inc., a corporation that sells industrial cleaners.[1] Plaintiff owns a one-third interest and defendants together own the remaining two-thirds interest in the corporation. Plaintiff filed this action in 2007, alleging willfully unfair and oppressive conduct by defendants, as the majority shareholders, contrary to

[1] Throughout the bulk of our opinion we refer to plaintiff/counter-defendant merely as "plaintiff," and defendants/counter-plaintiffs merely as "defendants" for the sake of efficiency. However, with regard to our discussion of Case Evaluation Sanctions, for the sake of clarity, where necessary, we use their designations as counter parties.

MCL 450.1489, and alleging additional common-law claims for breach of fiduciary duty, breach of contract, and promissory estoppel. Defendants filed a counterclaim against plaintiff for breach of fiduciary duty. The common-law claims were tried before a jury, which awarded plaintiff $22,000 against each defendant for breach of fiduciary duty. The jury also determined that plaintiff breached a fiduciary duty to defendants, but did not award any damages for the breach. The trial court thereafter conducted a bench trial on plaintiff's statutory claim and found that defendants violated MCL 450.1489 by engaging in willfully unfair and oppressive conduct as majority shareholders. As a remedy for the violation, the court prescribed a buyout procedure whereby one side could purchase the fair value of the other side's shares in the corporation. If that was not possible, the court would appoint a receiver to liquidate the corporation. The trial court also ordered defendants to "reimburse the corporation the amount of legal fees and costs that the corporation paid out for Defendants [sic] willful misconduct in this case." In addition, the court ordered that, during the interim, plaintiff was to be paid $2,000 a month and receive other benefits until the corporation changed hands or was sold. After the trial court entered its final judgment, plaintiff filed a motion for case evaluation sanctions. The trial court determined that plaintiff was not entitled to sanctions and denied the motion. Defendants now appeal as of right in Docket No. 291663, and plaintiff appeals as of right in Docket No. 293880, challenging the denial of case evaluation sanctions. Because the only error established on this record is the trial court's refusal to award plaintiff case evaluation sanctions, we affirm the judgments for plaintiff, but reverse the trial court's order denying case evaluation sanctions and remand for a determination of sanctions.

This action arises from a strained business relationship between plaintiff and defendants. The parties together established IPAX Cleanogel, Inc. ("IPAX"), to create and market environmentally friendly cleaning products to various industries. The parties also formed API, L.L.C. ("API"), as a holding company for the warehouse and manufacturing facility that it leased to IPAX for its operations. The parties cooperatively operated IPAX for many years, during which time they equally divided the profits and equally participated in decisions affecting the company.

In 2006, plaintiff moved to California and was no longer involved in the day-to-day operations of the business, although he claimed that he continued to be involved in developing business opportunities for the company. Not long thereafter, defendants stopped making distributions to plaintiff and stopped consulting with him on matters involving the company. Plaintiff complained and, following substantial negotiations, the parties agreed to an interim arrangement whereby, pending a final agreement, plaintiff was paid $2,000 a month as advance distributions on profits from IPAX and $2,000 a month as his share of rental income from API, subject to reconciliation at the end of the year. The parties were never able to formally resolve their dispute and they disagreed on the financial condition of the company. Defendants eventually stopped making payments to plaintiff, claiming that the company was losing business and was no longer profitable. Plaintiff claimed that defendants resorted to tactics designed to benefit themselves personally and to artificially lower the corporation's profits to avoid paying him his fair share of his one-third interest in the corporation.

I. DIRECTED VERDICT AND JUDGMENT NOTWITHSTANDING THE VERDICT

Defendants first argue that the trial court erred in denying their trial motion for a directed verdict with respect to plaintiff's breach of fiduciary duty claim, and in denying their post-trial motion judgment notwithstanding the verdict ("JNOV"). This Court reviews de novo a trial court's ruling on a motion for a directed verdict or JNOV. *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 131; 666 NW2d 186 (2003). This Court must review the evidence and all legitimate inferences arising from the evidence in the light most favorable to the nonmoving party. The motion should be granted only if the evidence fails to establish a claim as a matter of law. *Id*. If reasonable minds could differ regarding the evidence, the issue is for the jury and a directed verdict or JNOV is improper. *McPeak v McPeak (On Remand)*, 233 Mich App 483, 490; 593 NW2d 180 (1999).

We disagree with defendants' argument that plaintiff could not prevail on his breach of fiduciary duty claim because plaintiff admitted on cross-examination that he was suing defendants for amounts that he claimed were due from IPAX and API. Although plaintiff agreed that IPAX and API were directly liable for any corporate distributions, plaintiff's theory of the case was that defendants used their control as majority shareholders to manipulate the corporation's financial condition and to divert corporate profits to themselves, to either minimize or foreclose the availability of distributions to plaintiff. Majority shareholders in a corporation owe "the utmost good faith in its control and management as to the minority and it is the essence of this trust that it must be so managed so as to produce to each shareholder, the best possible return upon his investment." *Salvador v Connor*, 87 Mich App 664, 675; 276 NW2d 458 (1978), quoting 6 Callaghan's Michigan Civil Jurisprudence (2d ed), § 166, p 365. Where the evidence shows that majority shareholders improperly diverted corporate funds, a breach of fiduciary duty of the majority shareholders can be found. *Salvador,* 87 Mich App at 675-677. The evidence that defendants ceased making payments to plaintiff, no longer sought plaintiff's input on matters involving the corporation, and substantially increased their own salaries, at a time when they claimed the corporation was no longer profitable, supports the trial court's decision to submit plaintiff's breach of fiduciary duty claim to the jury.

Defendants also contend that the jury's award of $44,000 in damages is not consistent with the evidence. The jury rejected plaintiff's breach of contract claim, thereby indicating that it did not find an enforceable agreement for defendants to pay plaintiff either $4,000 a month until IPAX was sold, or for defendants to pay equal compensation to plaintiff as long as they all worked for IPAX. Nonetheless, there is no reason why the jury could not have found, consistent with the evidence, that plaintiff was still entitled to his share of the profits from IPAX, as a shareholder of the corporation. There was evidence from which the jury could have found that defendants artificially deflated the corporation's profits by paying themselves excessive salaries and other expenses unrelated to the business, which thereby prevented plaintiff from receiving his fair share of the profits as a shareholder of the corporation. Even if the jury looked to the evidence of the parties' interim arrangement as a basis for determining damages, that is not a reason to set aside the jury's verdict. The evidence showed that the parties had agreed on a figure of $4,000 a month while attempting to reach a final agreement. The jury properly could have found that even though the parties never reached a final agreement, the interim amount reflected plaintiff's damages for defendants' breach of their fiduciary duties. Therefore, defendants have not shown that the jury's verdict was not supported by the evidence.

II. ADDITUR

Defendants next argue that the trial court erred by denying their motion for additur with respect to their counterclaim. This Court reviews a trial court's decision on a motion for additur for an abuse of discretion. *Hill v Sacka*, 256 Mich App 443, 460; 666 NW2d 282 (2003). "An abuse of discretion occurs when the decision results in an outcome falling outside the range of principled outcomes." *Barnett v Hidalgo*, 478 Mich 151, 158; 732 NW2d 472 (2007).

Defendants' counterclaim alleged that plaintiff breached common-law fiduciary duties as a shareholder and director of IPAX when he voluntarily ceased his employment and moved to California. Defendants also claimed that they were personally damaged when plaintiff incurred corporate debt for his own personal benefit, and that his actions decreased the value of the corporation's stock. The jury found that plaintiff breached a fiduciary duty to defendants, but declined to award damages for the breach.

A trial court is permitted to grant a new trial whenever a party's substantial rights have been materially affected, such as where the jury's verdict was either clearly or grossly inadequate or influenced by passion or prejudice. MCR 2.611(A)(1)(c) and (d). If the court finds that the jury's verdict is inadequate, the nonmoving party has the right to accept or reject a new award in lieu of a new trial. See MCR 2.611(E)(1). "When reviewing a trial court's decision on additur, this Court must consider whether the jury award was supported by the evidence." *Hill*, 256 Mich App at 460. This Court will uphold a jury's verdict if an interpretation of the evidence provides a logical explanation for the jury's findings. *Id*. at 461.

Defendants requested additur in the amount of $27,000. They contended that the evidence showed that plaintiff received $10,000 as an advance on profits for which he was not entitled, another $2,000 for a rental payment in January 2008 that he was not entitled to receive, and $15,000 in unreimbursed personal expenses charged to his corporate credit card. But contrary to defendants' assertions, the evidence of damages was in dispute. With regard to plaintiff's credit card charges, there was evidence that defendants also charged personal expenses to IPAX for which they did not reimburse the corporation. Thus, the jury could have found that defendants were not entitled to damages because defendants incurred similar personal expenses. Further, with regard to the advances on IPAX's profits and the rental payments, the jury could have found that defendants were not entitled to damages because they increased their salaries and generated other corporate expenses to falsely portray IPAX as losing money. If the jury believed that defendants were misrepresenting IPAX's financial status to avoid paying plaintiff his share of the profits and rental payments, it could have found that defendants did not suffer any actual damages related to the value of their stock, that the stock was more valuable than defendants claimed, or that defendants had similarly benefited from the corporation. Accordingly, the trial court did not err in denying defendants' motion for additur.

III. MCL 450.1489

Next, defendants argue that the trial court erred in finding that they violated MCL 450.1489 by engaging in willfully unfair and oppressive conduct. We review the trial court's findings of fact under the clearly erroneous standard. MCR 2.613(C); *King v State*, 488 Mich 208, ___; ___ NW2d ___ (2010). A finding of fact is clearly erroneous when the reviewing court is left with a definite and firm conviction that a mistake has been made. *Reed v Reed*, 265

Mich App 131, 150; 693 NW2d 825 (2005). The trial court's conclusions of law are reviewed de novo. *In re Capuzzi Estate*, 470 Mich 399, 402; 684 NW2d 677 (2004).

MCL 450.1489 provides, in relevant part:

> (1) A shareholder may bring an action in the circuit court of the county in which the principal place of business or registered office of the corporation is located to establish that the acts of the directors or those in control of the corporation are illegal, fraudulent, or willfully unfair and oppressive to the corporation or to the shareholder. . . .
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> * * *
>
> (3) As used in this section, "willfully unfair and oppressive conduct" means a continuing course of conduct or a significant action or series of actions that substantially interferes with the interests of the shareholder as a shareholder. Willfully unfair and oppressive conduct may include the termination of employment or limitations on employment benefits to the extent that the actions interfere with distributions or other shareholder interests disproportionately as to the affected shareholder. The term does not include conduct or actions that are permitted by an agreement, the articles of incorporation, the bylaws, or a consistently applied written corporate policy or procedure.

The trial court found that defendants engaged in willfully unfair and oppressive conduct by (1) the way in which they eliminated plaintiff's salary and gave themselves raises, (2) terminating the rental payments to plaintiff that normally were made to all three directors, (3) issuing a capital call when the corporation was doing fairly well, which diluted plaintiff's stock and shares and forced plaintiff to put his own money into the corporation, and (4) engaging in other less oppressive actions with the intent to "squeeze Plaintiff out of the company rather than to give him his fair share of his investment."

We disagree with defendants' argument that the trial court erred in finding that they engaged in willfully unfair and oppressive conduct because their conduct was authorized by the corporation's bylaws. Although the bylaws gave defendants the general authority to make business decisions such as setting salaries, issuing capital calls, or approving rental payments, that does not mean that defendants were permitted to act in a manner that was willfully unfair and oppressive to plaintiff, as a minority shareholder. The exception in MCL 450.1489(3) cannot be read as permitting willfully unfair and oppressive conduct under the guise of defendants' general authority to run and manage IPAX.

Further, the trial court did not clearly err in finding that defendants' use of their power as majority shareholders to pay themselves higher salaries, while at the same time claiming that the corporation was not profitable to justify their refusal to make any distributions to plaintiff, supported its determination that defendants engaged in willfully unfair and oppressive conduct. The evidence indicated that defendants' salaries were $64,000 in 2005, and $70,000 in 2006. Defendants claimed that the corporation began losing money in 2006, but their salaries were increased to $86,000 or $90,000 in 2007. Similarly, at the time of trial in 2008, defendants were receiving a biweekly salary of $3,500, the equivalent of an annual salary of $91,000.

Defendants also argue that plaintiff was not entitled to recover his salary or any rental payments he was due because those alleged losses were not attributable to his rights as a shareholder. However, defendants inappropriately rely on *Franchino v Franchino*, 263 Mich App 172, 182-186; 687 NW2d 620 (2004), for the proposition that MCL 450.1489 does not allow shareholders to recover if they are harmed in a capacity as an employee or board member. At the time *Franchino* was decided, MCL 450.1489(3) did not contain a provision addressing employment-related benefits to shareholders. MCL 450.1489(3) was amended by 2006 PA 68, effective March 20, 2006, to add the provision that "[w]illfully unfair and oppressive conduct may include the termination of employment or limitations on employment benefits to the extent that the actions interfere with distributions or other shareholder interests disproportionately as to the affected shareholder." Thus, MCL 450.1489(3) now allows a minority shareholder to claim willfully unfair and oppressive conduct as a result of reductions in salary or other employment benefits.

Defendants do not dispute that plaintiff's salary was cut and that plaintiff's rental payments from IPAX to API were stopped. Plaintiff was receiving those payments as a result of his status as a shareholder in this closely-held corporation, as well as the work he performed on the corporation's behalf. Yet, despite defendants' claims that IPAX was financially distressed and losing money, defendants increased their own salaries. The trial court did not clearly err in finding that defendants' conduct was designed to prevent IPAX from showing a profit that could be distributed to plaintiff as either rent or salary. There was also evidence that defendants refused to allow plaintiff to participate in corporate decisions beginning in 2006. Their conduct therefore affected plaintiff's rights, not only with regard to his employment, but also as a shareholder to participate in decisions affecting the corporation. Thus, defendants' actions affected plaintiff's interests as a shareholder.

Further, the jury's verdict did not preclude the trial court from finding that defendants violated MCL 450.1489 by refusing to pay plaintiff his salary or rent. The jury was asked to decide the limited issue whether there was an agreement to pay plaintiff $4,000 a month. The jury's finding that there was no contract did not foreclose the trial court from finding that defendants willfully engaged in unfair and oppressive conduct designed to manipulate IPAX's financial records to foreclose plaintiff's right to distributions as a shareholder.

For these reasons, we find no err in the trial court's determination that defendants violated MCL 450.1489 by engaging in willfully unfair and oppressive conduct.

IV. REMEDIES

Defendants next challenge the various remedies fashioned by the trial court to remedy defendants' violation of MCL 450.1489. Defendants first challenge the following buyout option imposed by the court:

> FIRST, the court will require the Defendants, Alla and Paul Katz [sic] to value Plaintiff, Mr. Berger's stock, and then give Mr. Berger the option of either

> having his shares purchased by the Defendants at a set price by the Defendants, or be able to purchase the Defendants [sic] shares at twice the price they set. The Defendants are to determine the fair value of Mr. Berger's shares within 60 days of this order and then present him with the option.
>
> If for whatever reason neither side is able to buy the other side out within 90 days of this order the court orders that that [sic] a receiver be appointed to take control of the company, Cleanogel, Inc. to sell it and all of its assets. This also includes API, LLC ("API"), and IPAX China ("IPAXChina").

Defendants contend that although the trial court had the authority to require them to purchase plaintiff's shares of stock, it lacked the authority to provide plaintiff with the option of purchasing defendants' shares. MCL 450.1489(1) provides, in pertinent part:

> (1) A shareholder may bring an action in the circuit court of the county in which the principal place of business or registered office of the corporation is located to establish that the acts of the directors or those in control of the corporation are illegal, fraudulent, or willfully unfair and oppressive to the corporation or to the shareholder. *If the shareholder establishes grounds for relief, the circuit court may make an order or grant relief as it considers appropriate, including, without limitation, an order providing for any of the following*:
>
> (a) The dissolution and liquidation of the assets and business of the corporation.
>
> (b) The cancellation or alteration of a provision contained in the articles of incorporation, an amendment of the articles of incorporation, or the bylaws of the corporation.
>
> (c) The cancellation, alteration, or injunction against a resolution or other act of the corporation.
>
> (d) The direction or prohibition of an act of the corporation or of shareholders, directors, officers, or other persons party to the action.
>
> (e) *The purchase at fair value of the shares of a shareholder, either by the corporation or by the officers, directors, or other shareholders responsible for the wrongful acts*.
>
> (f) An award of damages to the corporation or a shareholder. An action seeking an award of damages must be commenced within 3 years after the cause of action under this section has accrued, or within 2 years after the shareholder discovers or reasonably should have discovered the cause of action under this section, whichever occurs first. [MCL 450.1489(1) (emphasis added.)]

Contrary to defendants' argument, MCL 450.1489(1) does not limit a buyout option to the purchase of a prevailing shareholder's shares. Although that option is permitted by MCL

450.1489(1)(e), the statute authorizes a trial court to "make an order or grant relief as it considers appropriate, including, *without limitation*, an order providing for any of the following . . . ." MCL 450.1489(1). Thus, the statute gives a trial court broad discretion in deciding an appropriate remedy, and those remedies are not limited to those listed in MCL 450.1489(1)(a) – (f).

We also find no merit to defendants' argument that plaintiff's poor health made it inappropriate for the trial court to provide plaintiff with the option of purchasing defendants' shares. Contrary to defendants' assertions, that option did not require plaintiff to be involved in the day-to-day operations of the company. It merely addressed ownership of the corporation.

Defendants also argue that the trial court lacked the authority to appoint a receiver for IPAX, because IPAX was not a party to this lawsuit. This argument is directed at the following provision in the trial court's judgment:

> If for whatever reason neither side is able to buy the other side out within 90 days of this order the court orders that that [sic] a receiver be appointed to take control of the company, Cleanogel, Inc. to sell it and all of its assets. This also includes API, LLC ("API"), and IPAX China ("IPAXChina").

We agree that the trial court could not appoint a receiver for the corporation without the corporation being added as a party to this lawsuit. See *Shouneyia v Shouneyia*, ___ Mich App ___; ___ NW2d ___ (Docket No. 297007, issued January 18, 2011), slip op 3-5. However, the trial court imposed the receivership option as a contingent remedy, one that had not yet materialized. The trial court's judgment did not purport to actually appoint a receiver, but rather provided that appointment of a receiver to liquidate the corporation would be available as a contingent remedy if the buyout option was not feasible. Thus, it was not necessary to add IPAX as a party, because no receiver had yet been appointed. In the event it becomes necessary to appoint a receiver, the corporation can be added as a party at that time. See *Shouneyia*, slip op at 3-4.

Furthermore, we disagree with defendants' argument that the contingent remedy of receivership was not factually appropriate. The "dissolution and liquidation of the assets and business of the corporation" is one of the available remedies specified in MCL 450.1489(1)(a). Liquidation seems especially appropriate in this case given that IPAX is a closely-held corporation and that all of the shareholders of IPAX are parties to this action. Although defendants assert that liquidation is not necessary because IPAX would be able to continue to operate, the evidence showed that IPAX was being operated to benefit defendants, who attempted to shut plaintiff out. The parties thereafter attempted to resolve their differences through an interim arrangement, but they were unable to reach a final agreement. Without a buyout, it was not feasible for IPAX to continue to operate as a going concern.

Defendants next argue that the trial court erred by ordering them "to reimburse the corporation the amount of legal fees and costs that the corporation paid out for Defendants [sic] willful misconduct in this case." Defendants contend that this remedy was improper because the corporation's bylaws specifically permitted the corporation to indemnify defendants for their legal expenses. The bylaws provide that the corporation shall indemnify officers and directors for any legal expenses incurred in their capacity as an officer or director, but further provide that "[t]he corporation shall not, however, indemnify such director or officer with respect to matters as to which he shall be liable for wilful misconduct in the performance of his duties as such director or officer." The bylaws are consistent with MCL 450.1561, which provides, in pertinent part:

> A corporation has the power to indemnify a person who was or is a party or is threatened to be made a party to a threatened, pending, or completed action, suit, or proceeding, whether civil, criminal, administrative, or investigative and whether formal or informal, other than an action by or in the right of the corporation, by reason of the fact that he or she is or was a director, officer, employee, or agent of the corporation, . . . including attorneys' fees, . . . if the person acted in good faith and in a manner he or she reasonably believed to be in or not opposed to the best interests of the corporation or its shareholders . . . .

In this case, the jury found that defendants breached their fiduciary duties to plaintiff as a minority shareholder, and the trial court found that defendants engaged in willfully unfair and oppressive conduct against plaintiff as a minority shareholder. These findings are inconsistent with defendants' contentions that they acted in good faith. On the contrary, they support the trial court's finding of willful misconduct that precludes indemnification under both the corporation's bylaws and MCL 450.1561.

We also reject defendants' argument that the reimbursement provision effectively requires them to pay the cost of their legal expenses twice, because they previously loaned funds to IPAX that IPAX in turn used to pay their legal costs in this action. Although there was evidence that defendants had loaned funds to IPAX, the evidence did not show that the loaned funds were used exclusively to pay the cost of defendants' legal expenses. Regardless, to the extent defendants loaned funds to IPAX, defendants would be permitted to seek repayment of those loans from IPAX. Thus, the trial court's judgment does not require defendants to effectively pay twice for the cost of their legal expenses.

Defendants also argue that it was improper for the trial court to enter an interim order requiring that plaintiff be paid $2,000 a month and other benefits until IPAX changes hands or is sold. Defendants contend that the trial court could not properly order IPAX to make monthly payments because IPAX was not a party to this case, and further, because IPAX is insolvent. However, the trial court's interim order does not impose any obligation on IPAX directly. Rather, it directs that "Plaintiff be paid $2,000 a month along with his health insurance and other benefits until the corporation finally changes hands completely to Plaintiff or Defendants or until the corporation is sold." Because this case concerned the shareholders' control over the corporation and all shareholders in the corporation were parties to this action, the trial court's order was not improper. Further, the record does not support defendants' argument that IPAX is insolvent. Although defendants testified at trial that IPAX was no longer profitable, there was also testimony that IPAX held other assets and real property, including lakefront property. There was no testimony that it was insolvent. Further, if IPAX believes that it is unable to comply with the trial court's order because of its financial condition, it can file an appropriate motion to intervene and seek relief from the trial court's order.

V. PLAINTIFF'S DEPOSITION TESTIMONY

Defendants finally argue that the trial court erred in allowing portions of plaintiff's deposition testimony to be introduced on redirect examination. Defendants contend that the evidence was inadmissible hearsay. Because defendants did not raise a hearsay objection in the trial court, this issue is not preserved. *City of Westland v Okopski*, 208 Mich App 66, 72; 527 NW2d 780 (1994). An unpreserved claim of evidentiary error is subject to review for plain error affecting a party's substantial rights. MRE 103(d); *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000).

The record discloses that the challenged testimony was offered to rebut defendants' suggestions that plaintiff's trial testimony was recently fabricated or the result of improper influence or motive. MRE 801(d)(1)(B) expressly provides that such statements are not hearsay. Accordingly, there was no plain error.

VI. CASE EVALUATION SANCTIONS

In his appeal in Docket No. 293880, plaintiff argues that the trial court erred in denying his motion for case evaluation sanctions. A trial court's decision to grant or deny case evaluation sanctions is subject to review de novo on appeal. *Elia v Hazen,* 242 Mich App 374, 376-377; 619 NW2d 1 (2000).

Plaintiff/counter-defendant's claims and defendants/counter-plaintiff's counterclaim were submitted to case evaluation and resulted in a net award of $50,000 in favor of plaintiff/counter-defendant. Plaintiff/counter-defendant received an award of $75,000 against defendants/counter-plaintiffs. Defendants/counter-plaintiffs received an award against plaintiff/counter-defendant in the amount of $25,000. Plaintiff/counter-defendant accepted the awards and defendants/counter-plaintiffs rejected them. Plaintiff argues, and we agree, that the trial court erred by viewing the net award of $50,000 as a separate award for each defendant, to be measured by the jury's verdict of $22,000 against each defendant. The case evaluation panel's award clearly indicates that a net $50,000 award encompassed plaintiff's claims against both defendants. Therefore, it is appropriate to view the jury's separate verdicts of $22,000 against each defendant as a total verdict of $44,000 for purposes of determining defendants' liability for case evaluation sanctions.[2] To avoid liability for case evaluation sanctions, defendants were required to improve their position by more than ten percent after adjustment of the jury's verdict. MCR 2.403(O)(3). Thus, because the net case evaluation award was for $50,000, defendants could avoid liability for case evaluation sanctions only if the adjusted verdict was less than $45,000. Appropriate

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[2] Although MCR 2.403(K)(2) indicates that the case evaluation panel should have issued separate awards for plaintiff's claims against each defendant, the award that was issued cannot be interpreted as separate awards. To the extent the rule was not followed, or defendants desired separate awards, it was incumbent on them to raise the issue in an appropriate motion in the trial court. Because they failed to do so, they may not now complain that MCR 2.403(K)(2) was not followed.

adjustments include assessable costs and statutory interest. MCR 2.403(O)(3). Plaintiff represented below, and defendants did not dispute, that statutory interest alone exceeded $3,000, which when added to the $44,000 jury verdicts, results in an adjusted verdict in excess of the $45,000 amount necessary to trigger liability for case evaluation sanctions. Therefore, the trial court erred in denying plaintiff's motion for case evaluation sanctions.[3]

We must also note that counter-plaintiffs did not better their position. To avoid liability for case evaluation sanctions, counter-plaintiffs were required to improve their position by more than ten percent after adjustment of the jury's verdict. MCR 2.403(O)(3). They did not, and they were liable for case evaluation sanctions to counter-defendant as well. First, case evaluation is mandatory. MCR 2.403(A)(2). The purpose of mandatory case evaluation is to encourage the parties to settle, settlement being the preferred manner of resolution dispute. While the dissent would forego case evaluation sanctions to plaintiff for failure to object to a unitary award in violation of MCR 2.403(K)(2), in our view such an application works an injustice and defeats the policy in support of mandatory case evaluation. Second, the dissent does not accord plaintiff as the counter-defendant sanctions on the successful completion of that portion of the litigation and for which there is no case evaluation award inconsistency. The conclusion offered by the dissent results in forfeiture. It is clear that neither of the parties sought to reform the award, set the award aside, or sought other intervention by the trial court. To deprive plaintiff of sanctions as either a plaintiff or counter-defendant works an injustice that is cured by treating the failures of the parties to rely on MCR 2.403(K)(2) as a waiver. Treating the parties' avoidance of MCR 2.403(K)(2) as a waiver additionally supports the policy of mandatory case evaluation. Accordingly, we reverse the order denying case evaluation sanctions and remand for a determination of sanctions under MCR 2.403(O).

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. Plaintiff, being the prevailing party, may tax costs pursuant to MCR 7.219. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ Pat M. Donofrio

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[3] Because the jury verdicts, as adjusted, alone establish defendants' liability for case evaluation sanctions, it is unnecessary to consider the effect of the remaining relief awarded by the trial court for defendants' violation of MCL 450.1489.