STATE OF MICHIGAN

COURT OF APPEALS

RICHARD POLOMSKI, as Personal Representative for the Estate of WALTER POLOMSKI,

Plaintiff-Appellee/Cross-Appellant,

v

NIGHTINGALE EAST NURSING CENTER, INC., and SSC WARREN WOODS OPERATING COMPANY, LLC,

Defendants,

and

SAVASENIORCARE, L.L.C.,

Defendant-Appellant/Cross-Appellee.

UNPUBLISHED
October 7, 2014

No. 311041
Macomb Circuit Court
LC No. 2009-005089-CZ

RICHARD POLOMSKI, as Personal Representative for the Estate of WALTER POLOMSKI,

Plaintiff-Appellee,

v

NIGHTINGALE EAST NURSING CENTER, INC., and SSC WARREN WOODS OPERATING COMPANY, LLC,

Defendants,

and

SAVASENIORCARE, LLC,

No. 313727
Macomb Circuit Court
LC No. 2009-005089-CZ

Defendant-Appellant.

Before: RIORDAN, P.J., and CAVANAGH and TALBOT, JJ.

PER CURIAM.

In docket no. 311041, defendant SavaSeniorCare, LLC (Sava), appeals as of right the jury verdict in favor of plaintiff, Richard Polomski, as personal representative of the estate of Walter Polomski. Plaintiff cross-appeals from the trial court order granting a directed verdict for plaintiff's ordinary negligence claims. In docket no. 313727, Sava appeals as of right the trial court order awarding case evaluation and discovery sanctions. These appeals have been consolidated for our review. We affirm in part and reverse in part.

I. MOTION FOR MISTRIAL

A. STANDARD OF REVIEW

Sava first contends that the trial court erred in denying its motion for a mistrial. "Whether to grant or deny a mistrial is within the discretion of the trial court and will not be reversed on appeal absent an abuse of discretion resulting in a miscarriage of justice." *Veltman v Detroit Edison Co*, 261 Mich App 685, 688; 683 NW2d 707 (2004) (quotation marks and citation omitted). "An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes." *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008). The interpretation of statutes is a question of law that we review *de novo*. *Velez v Tuma*, 492 Mich 1, 11; 821 NW2d 432 (2012).[1]

B. ANALYSIS

At issue in this case is the admission of evidence regarding Sava's maintenance of insurance on the facility. The trial court ruled that insurance evidence was admissible for the purpose of proving Sava's ownership or control of the nursing home facility. At trial, plaintiff elicited testimony concerning a witness's response to an interrogatory in which he stated that Sava was the current owner of the nursing home and was self-insured for $1,000,000. While Sava moved for a mistrial, the trial court denied the motion. Sava now argues that the disclosure of this evidence was so prejudicial that it necessitated a mistrial.

MRE 411 provides that insurance evidence is inadmissible to prove that the defendant acted negligently or wrongfully. MCL 500.3030 likewise precludes any reference during trial to an insurer or the question of insurance. However, MRE 411 "does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, if controverted, or bias or prejudice of a witness."

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[1] Although plaintiff argues that this issue is unpreserved, defendant preserved it when moving for a mistrial. *Veltman*, 261 Mich App at 687.

The disputed evidence was relevant to prove Sava's ownership and control. Relevant evidence is evidence with "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. Here, Sava's self-insurance—with a limit of $1,000,000—tends to show that Sava was the actual owner of the facility, as it evinces Sava's interest and stake in the nursing home. Because this purpose is expressly permitted in MRE 411, we find no error in the failure to grant a mistrial.

Sava, however, claims that plaintiff revealed this information in direct contravention of the trial court order. That argument is meritless. The trial court expressly ruled that plaintiff could rely on the exhibit to prove ownership and control, which put Sava on notice that all parts of the answers might be offered at trial. Nor did the trial court expressly rule that plaintiff could not introduce evidence of the amount of insurance. Thus, plaintiff's disclosure of the amount of liability coverage did not violate the trial court's previous evidentiary ruling.[2]

Furthermore, the trial court promptly instructed the jury that it could consider insurance "for the sole limited purpose of addressing ownership, control or agency by a corporate entity and/or entities." The court instructed the jury that it was not permitted to consider the evidence to determine whether defendants were negligent, or for the purpose of determining damages. This instruction is consistent with MRE 411. "Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors." *Zaremba Equip, Inc v Harco Nat Ins Co*, 302 Mich App 7, 25; 837 NW2d 686 (2013) (quotation marks and citation omitted).

We find no error in the trial court's failure to grant a mistrial.[3]

II. CAP FOR NONECONOMIC DAMAGES

A. STANDARD OF REVIEW

Sava next contends that the trial court erred in applying the higher of the two caps on noneconomic damages set forth in MCL 600.1483(1). Statutory interpretation is a question of law that we review *de novo*. *Velez*, 492 Mich at 11.

B. ANALYSIS

"It is uncontested that MCL 600.1483, which imposes noneconomic damages caps, applies to wrongful death actions premised on medical malpractice claims." *Young v Nandi*, 276 Mich App 67, 70; 740 NW2d 508 (2007), vacated in part on other grounds 482 Mich 1007 (2008). However, there are two caps in MCL 600.1483: a general cap of $280,000, and a higher

[2] Nor do we find that the danger of unfair prejudice outweighed its probative value. MRE 403.

[3] And contrary to defendant's argument, this case is distinguishable from *Benmark v Steffen*, 374 Mich 155; 132 NW2d 48 (1965) and *Felice v Weinman*, 372 Mich 278; 126 NW2d 107 (1964), as those cases involved repeated instances of misconduct.

cap of $500,000.[4] The higher cap is applicable to certain circumstances delineated in the statute. MCL 600.1483. At issue here is MCL 600.1483(1)(b), which authorizes the higher cap when "[t]he plaintiff has permanently impaired cognitive capacity rendering him or her incapable of making independent, responsible life decisions and permanently incapable of independently performing the activities of normal, daily living."

"As long as, at some point after the defendant's alleged negligence occurred and before the decedent's death, it could be said that, as the result of the negligence of 1 or more of the defendants" the plaintiff suffered one of the qualifying injuries, "the higher damages cap tier applies." *Shinholster v Annapolis Hosp*, 471 Mich 540, 562-563; 685 NW2d 275 (2004) (plurality opinion by MARKMAN, J.). We adopted this reasoning in *Young*, 276 Mich App at 73-74.[5] We also explained that "the meaning of 'permanently impaired cognitive capacity' includes damage to or diminishment of one's mental ability to perceive, memorize, judge, or reason that is expected to last forever." *Id.* at 79-80. Thus, to establish a qualifying injury under MCL 600.1483(1)(b), "the plaintiff must suffer damage to or diminishment of his or her mental ability to perceive, memorize, judge, or reason that is permanent rendering him or her incapable of making independent, responsible life decisions and permanently incapable of independently performing the activities of normal, daily living" and "this permanently impaired cognitive capacity must be the result of the negligence of 1 or more of the defendants." *Id.* at 80 (quotation marks and citation omitted).

Sava first argues that the higher cap was not warranted because any impairment was not permanent. We disagree. The evidence at trial supports the trial court's conclusion that, as a result of defendant's negligence, decedent became brain dead and would have remained so for as long as his body was still alive. This evidence supports the conclusion that decedent's impaired cognitive capacity was permanent. Further, we note that the Legislature did not include a minimum survival period, and this Court has reiterated that "as long as, at some point after the defendant's alleged negligence occurred and before the decedent's death, it could be said that" decedent suffered one of the qualifying injuries, the higher cap is satisfied. *Young*, 276 Mich App at 73-74 (quotation marks, citation, and brackets omitted).

We likewise reject Sava's argument that because decedent was impaired before any negligence occurred, he could not become impaired within the meaning of the statute as a result of defendant's negligence. Decedent had diabetes, and suffered from a diabetic incident wherein he was found lying on the floor and was rushed to the hospital. He had serious medical conditions, including dementia, brain damage as a result of complications of diabetes, hypertension, and coronary artery disease. Because of his diabetic episode, he was placed in the nursing home.

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[4] Both amounts are subject to adjustments based on inflation. MCL 600.1483(4).

[5] The Michigan Supreme Court denied leave with respect to this issue. *Young v Nandi*, 482 Mich 1007; 759 NW2d 351 (2008).

However, decedent made some limited progress in the nursing home. Initially, he was able to eat only from a feeding tube, but then progressed to a puree diet, and then to a mechanical soft diet. Decedent was able to wheel himself into the dining room when hungry, would listen to commands, and made it known when he was hungry. He fed himself, albeit with supervision. Decedent's brother detailed that he would visit during meal times, and they would talk. Decedent's condition varied, as some days he appeared "foggier" but other days appeared better and "more cheerful." A doctor who reviewed decedent's chart testified that decedent was becoming more social before he died, as he enjoyed visits with his brother and playing bingo.

Then, due to defendant's negligence, decedent suffered anoxic encephalopathy, which is the severe depravation of oxygen to the brain resulting in brain death. Decedent's cognitive abilities were completely impaired in the last hours of his life, and would have remained so for however long his body remained alive. He was unable to perform even the most basic of functions of normal living. As this Court has previously found, "permanently impaired cognitive capacity" includes cases where there is a "diminishment of one's mental ability to perceive, memorize, judge, or reason that is expected to last forever." *Young*, 276 Mich App at 79-80. That standard has been met in this case.

As the trial court found, while decedent had diminished capacity before the choking incident, he suffered an even greater loss because of the negligence. Decedent suffered a severe diminishment of his mental ability that permanently rendered him incapable of making independent, responsible life decisions and made him permanently incapable of independently performing the activities of normal daily living that he had performed before the choking incident. *Young*, 276 Mich App at 80; see, e.g., *Gibson v Moskowitz*, 523 F3d 657, 666 (CA 6 2008) ("That [the decedent] had an existing cognitive limitation" of schizophrenia "does not mean [the doctor's] care could not have impaired [the decedent's] cognitive capacity in other ways[.]").

We find no error in the trial court's imposition of the higher damages cap in MCL 600.1483.

III. ORDINARY NEGLIGENCE

A. STANDARD OF REVIEW

On cross-appeal, plaintiff argues that the trial court erred in granting a directed verdict with respect to plaintiff's claims of ordinary negligence. "We review de novo the trial court's grant or denial of a directed verdict." *Aroma Wines & Equip, Inc v Columbia Distribution Servs, Inc*, 303 Mich App 441, 446; 844 NW2d 727 (2013). "When evaluating a motion for directed verdict, the court must consider the evidence in the light most favorable to the nonmoving party, making all reasonable inferences in the nonmoving party's favor." *Id.* A trial court properly grants a directed verdict when no factual questions exist on which reasonable jurors could differ. *Id.*

B. ANALYSIS

Plaintiff contends that his allegations against the certified nurses aides (CNAs) and the kitchen staff do not sound in medical malpractice. He argues that these individuals were not

licensed health care professionals, they did not make medical decisions, and they merely complied with the care plan and nursing home rules and policies. For the reasons discussed *infra*, we disagree.

Claims of ordinary neglgience relate to matters within the common knoweldge and experience of the fact-finder. *Bryant v Oakpointe Villa Nursing Ctr*, 471 Mich 411, 422; 684 NW2d 864 (2004). A medical malpractice claim, in contrast, occurs only within the course of a professional relationship, and necessarily raises questions involving medical judgment. *Id.* "A professional relationship sufficient to support a claim of medical malpractice exists in those cases in which a licensed health care professional, licensed health care facility, or the agents or employees of a licensed health care facility, were subject to a contractual duty that required that professional, that facility, or the agents or employees of that facility, to render professional health care services to the plaintiff." *Id.* If "the reasonableness of the action can be evaluated by a jury only after having been presented the standards of care pertaining to the medical issue before the jury explained by experts, a medical malpractice claim is involved." *Id.* at 423.

Here, defendant's negligence occurred during the course of a professional relationship. Decedent engaged the services of the nursing home for assistance with his medical conditions, and it was during mealtime at the nursing home that the choking incident occurred. See MCL 600.5838a(2); MCL 333.20106(h) ("Health facility or agency means . . . [a] nursing home."). Plaintiff, however, contends that Sava did not hold the license, and the aides and kitchen staff were not licensed health care professionals. The mere fact that the license may have been held by a different, related, entity is immaterial. As MCL 600.5838a(1) illuminates, the accrual period for "a claim based on the medical malpractice of a person or entity *who is or who holds himself or herself out to be a . . . licensed health care facility agency*. . . ." (Emphasis added).[6]

Plaintiff also asserts that his allegations against the CNAs and the kitchen staff do not sound in medical malpractice because their role was merely to comply with the decedent's care plan without making independent, medical judgments. However, MCL 600.5838a(1) plainly refers to "an employee or agent of a licensed health facility or agency who is engaging in or *otherwise assisting* in medical care and treatment . . . ." (Emphasis added). Thus, the acts or omissions of the CNAs, cooks, and kitchen staff could give rise to a medical malpractice claim if these persons were engaged in or otherwise assisted in medical care and treatment.

Upon examining plaintiff's complaint, we find that his claims against these individuals raised issues of medical care and judgment. "It is well established that the gravamen of an action is determined by reading the claim as a whole, and looking beyond the procedural labels to determine the exact nature of the claim." *Tipton v William Beaumont Hosp*, 266 Mich App 27, 33; 697 NW2d 552 (2005) (quotation marks, citations, and brackets omitted). Furthermore, a

[6] "[I]n MCL 600.5838a(1), the Legislature expanded the scope of those who could be liable for medical malpractice." *Kuznar v Raksha Corp*, 481 Mich 169, 177; 750 NW2d 121 (2008); see also *Bryant*, 471 Mich at 420-421 ("although § 5838a expands the category of who may be subject to a medical malpractice action, it does not define what constitutes a medical malpractice action.").

party cannot "avoid the application of the procedural requirements of a malpractice action by couching its cause of action in terms of ordinary negligence." *Dorris v Detroit Osteopathic Hosp Corp*, 460 Mich 26, 43; 594 NW2d 455 (1999).

Here, plaintiff's claims required more than a finding that the kitchen staff prepared unsuitable food, that the CNAs served an inappropriate tray, or that the CNAs failed to supervise the decedent during the meal without nurse supervision. Instead, the jury was required to hear medical expert testimony explaining the parameters of a restrictive diet, why it was required to meet decedent's medical needs, and what risks would result if he attempted to eat hard food. In other words, the reasonableness of CNAs and kitchen staff behavior could be evaluated only after the jury was presented with the standards of care pertaining to the treatment of decedent's medical conditions. *Bryant*, 471 Mich at 423. The assessment of whether decedent was being properly supervised "require[d] knowledge of that patient's medical history and behavior." *Id.* at 427. Knowing how to monitor decedent during meal times required "a specialized knowledge" pertaining to his medical needs and the particular risks to which he was prone. *Id.* at 426-427; see also *Dorris*, 460 Mich at 47 (A claim rests in medical malpractice if "[t]he ordinary layman does not know the type of supervision or monitoring" required in the case).

We find no error in the trial court granting defendant a directed verdict regarding the claims of ordinary negligence.[7]

IV. CASE EVALUATION SANCTIONS

A. STANDARD OF REVIEW

In docket no. 313727, Sava argues that the trial court erred in awarding 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." *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008).

B. ANALYSIS

Sava first argues that the trial court erred when using the jury's verdict, rather than the adjusted verdict capped for noneconomic damages, to determine plaintiff's eligibility for case evaluation sanctions. When interpreting a court rule or statute, this Court "must give effect to a statute or court rule as written when its language is clear and unambiguous." *In re FG*, 264 Mich App 413, 418; 691 NW2d 465 (2004). "In construing ambiguous language, every word or

[7] In light of the foregoing, we decline to address plaintiff's arguments about the appropriate remedy. Although plaintiff also claims he would be unable to obtain an affidavit of merit if the trial court's ruling was upheld, MCL 600.5838a(1) clearly contemplates medical malpractice actions against "*an employee or agent of a licensed health facility* or agency who is engaging in or *otherwise assisting in medical care and treatment* . . . ." (Emphasis added). We also note that issues pertaining to the affidavit of merit are now moot in light of trial.

phrase, unless specifically defined, should be given its plain and ordinary meaning, considering the context in which the words are used." *Id.*

Case evaluation sanctions are authorized pursuant to MCR 2.403(O), which provides:

> (1) If a party has rejected an evaluation and the action proceeds to verdict, 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.
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> (2) For the purpose of this rule "verdict" includes,
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> > (a) a jury verdict,
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> > (b) a judgment by the court after a nonjury trial,
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> > (c) a judgment entered as a result of a ruling on a motion after rejection of the case evaluation.
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> (3) 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.

Recently, in *Acorn Investment Co v Mich Basic Prop Ins Ass'n*, 495 Mich 338; ___ NW2d ___ (2014), the Michigan Supreme Court clarified the meaning of MCR 2.403(O)(2)(c). *Acorn* involved an arbitration award, which the trial court subsequently adjusted. *Id*. at 343. The Court observed that in the context of MCR 2.403(O)(2)(c), "[a] 'judgment' is a court's final determination of the rights and obligations of the parties in a case" and the court, not the appraisal panel in that case, "made the final determination of the parties' rights and obligations." *Id.* at 351. The Court found relevant that "the [trial] court retained jurisdiction over the case and the award, and it entered a judgment as a result of its ruling on the motion for entry of judgment and interest." *Id.* at 352.

Similarly, in *Marketos v Am Employers Ins Co*, 465 Mich 407, 415; 633 NW2d 371 (2001), our Supreme Court recognized that a " 'verdict' must represent a finding of the amount that the prevailing party should be awarded. The dollar amount that the jury includes on the verdict form may or may not be the 'verdict' for that purpose." In *Marketos*, the Court found that while the jury made specific factual findings about the cash value of categories of property damage, "the trial court—*not* the jury—determined the amount that defendant would have to pay" based on the "legal effect of the setoff for defendant's payments to the bank on the mortgage" and "applicable policy limits or deductibles." *Id.* at 413, 414, 415 (emphasis in

original). Likewise in *Klinke v Mitsubishi Motors Corp*, 219 Mich App 500, 518; 556 NW2d 528 (1996), this Court held that the operative verdict for determining entitlement to case evaluation sanctions was the jury's verdict, as reduced pursuant to plaintiff's comparative negligence.

Thus, a jury's verdict is not necessarily the dispositive figure for case evaluation sanctions. The determining factor is the point at which the trial court enters a judgment. Here, the jury made findings of the noneconomic loss plaintiff suffered. Plaintiff then submitted a proposed judgment to adjust the jury's verdict to account for the higher damages cap, MCL 600.1483, to which Sava objected. Sava filed a motion to resolve the parties' objections to the proposed cap. The trial court subsequently entered a judgment adjusting the jury's figures to account for the statutory cap.

Because the court "made the final determination of the parties' rights and obligations," *Acorn*, 495 Mich at 351, the court's ruling is the relevant figure for case evaluation sanctions. This is consistent with the purpose of case evaluation sanctions, which is to encourage "settlement and deter protracted litigation by placing the burden of litigation costs upon the party that required that the case proceed toward trial by rejecting the mediator's evaluation." *Peterson v Fertel*, 283 Mich App 232, 236; 770 NW2d 47 (2009) (quotation marks and citation omitted). It is the capped number that parties, knowing any potential liability will be limited, rely on when making strategic decisions about whether to accept the case evaluation award.

Therefore, we agree with Sava that the trial court erred in awarding case evaluation sanctions.

V. DISCOVERY SANCTIONS

A. STANDARD OF REVIEW

Lastly, Sava contends that the trial court erred in awarding discovery sanctions. This Court reviews a trial court's order of discovery sanctions for an abuse of discretion. *Traxler v Ford Motor Co*, 227 Mich App 276, 286; 576 NW2d 398 (1998). "An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes." *Kalaj v Khan*, 295 Mich App 420, 425; 820 NW2d 223 (2012). We review any factual findings underlying the trial court's order for clear error. *Hardrick v Auto Club Ins Ass'n*, 294 Mich App 651, 660; 819 NW2d 28 (2011). "A finding is clearly erroneous when this Court is left with a definite and firm conviction that a mistake has been made." *Id.* (quotation marks and citation omitted). The "interpretation of a court rule, like a matter of statutory interpretation, is a question of law that this Court reviews de novo." *CAM Constr v Lake Edgewood Condo Ass'n*, 465 Mich 549, 553; 640 NW2d 256 (2002).

B. ANALYSIS

Sava contends that the trial court erred in awarding discovery sanctions because plaintiff's motion was untimely, it lacked substantive merit, and there was no causal connection between the discovery violation and the sanctions imposed. We agree, in part.

The trial court awarded sanctions under MCR 2.302(E), which provides:

> (1) *Duty to Supplement.* A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement the response to include information acquired later, except as follows:
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> ***
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> (b) A party is under a duty seasonably to amend a prior response if the party obtains information on the basis of which the party knows that
>
> (i) the response was incorrect when made; or
>
> (ii) the response, though correct when made, is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.
>
> ***
>
> (2) *Failure to Supplement.* If the court finds, by way of motion or otherwise, that a party has not seasonably supplemented responses as required by this subrule the court may enter an order as is just, including an order providing the sanctions stated in MCR 2.313(B), and, in particular, MCR 2.313(B)(2)(b).[8]

Plaintiff originally named Nightingale East Nursing Center, Inc., not Sava, as defendant. Plaintiff claimed that Sava did not come forward in a timely matter to identify itself as the owner of the facility. However, as Sava observes, plaintiff was alerted in the answers to his first set of interrogatories on February 12, 2010, that Sava was the current owner of the nursing home and self-insured the nursing home. "In order for a duty to seasonably amend a discovery response to arise, the circumstances of the failure to so amend must be in substance a knowing concealment." *Richardson v Ryder Truck Rental, Inc*, 213 Mich App 447, 452; 540 NW2d 696 (1995). Here, plaintiff had notice of Sava's ownership, but seemingly overlooked the disclosure of this fact. Under such circumstances, we cannot say that the trial court properly awarded discovery sanctions.

We reverse the trial court's order awarding discovery sanctions.[9]

VI. CONCLUSION

We find no error in the trial court's denial of a mistrial, its imposition of the higher cap for noneconomic damages, or its order granting the directed verdict on plaintiff's ordinary

[8] MCR 2.313(B)(2) provides sanctions for the failure to provide or permit discovery.

[9] We decline to address Sava's alternative arguments for why discovery sanctions were improper. Although plaintiff observes that he also moved for sanctions under MCR 2.114, the trial court did not grant relief under that rule, and plaintiff fails to offer any analysis based on MCR 2.114. *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998).

negligence claims. However, we agree with Sava that the trial court erred in awarding case evaluation and discovery sanctions.

We have reviewed all remaining claims in the parties' briefs and find them to be without merit. We affirm in part and reverse in part. We do not retain jurisdiction.

/s/ Michael J. Riordan
/s/ Mark J. Cavanagh
/s/ Michael J. Talbot