STATE OF MICHIGAN

IN THE SUPREME COURT

William C. Dessart and
Shiela A. Dessart,

Plaintiffs/Appellants,

vs

Court Of Appeals #: 233844
Lower Court #: 98-14355-NI

Lynn Marie Burak and
Bryan R. Burak,

Defendants/Appellees.

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BRIEF IN OPPOSITION TO

APPLICATION FOR LEAVE TO APPEAL

FILED

SEP 23 2002

CORBIN R. DAVIS
CLERK
MICHIGAN SUPREME COURT

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STATEMENT IDENTIFYING THE JUDGMENT/ORDER APPEALED FROM AND RELIEF SOUGHT

1. Plaintiffs/Appellants, **William C. Dessart and Shiela A. Dessart**, pursuant to MCR 7.302, have filed an application for leave to appeal from the opinion and order of the Michigan Court of Appeals issued in this matter on 13 August, 2002. **(Exhibit 1)** This matter was appealed by the Plaintiffs/Appellants from an order entered by the Delta County Circuit Court on April 3, 2001, denying their request for mediation sanctions pursuant to MCR 2.403 (**Exhibit 2**). The Court of Appeals affirmed the trial court and found that in adjusting a verdict for purposes of MCR 2.403(O)(3) the term "assessable costs" set forth therein includes only those costs taxable in a civil action incurred from the filing of the complaint to the date of mediation; "assessable costs" do not encompass post mediation costs or attorney fees. This brief is being submitted in opposition to Plaintiffs/Appellants' application for leave to appeal to this court.

STATEMENT OF QUESTION INVOLVED:

1. Should this court grant Plaintiffs/Appellants' application for leave to appeal because the Court of Appeals erred in ruling that pursuant to MCR 2.403(O)(3), assessable costs run from the date of filing of the complaint to the date of mediation evaluation rather than from the date of filing of the complaint to the date of verdict?

   The Plaintiffs/Appellants say "**Yes**",

   The Court of Appeals says "**No**",

   The Defendants/Appellees say "**No**".

STATEMENT OF FACTUAL BACKGROUND

This matter arose out of an automobile third-party negligence action which resulted in a jury verdict in favor of the Plaintiffs/Appellants. The matter was tried to a circuit court jury in Delta County Circuit Court. Verdict was rendered on August 31, 2000, in a total amount of $100,000. (**Exhibit 3**).

In effect, the jury found that the Plaintiffs/Appellants were entitled to non-economic loss up to the date of trial, but were not entitled to any non-economic loss beyond that date, and also found that the Plaintiffs/Appellants were not entitled to any economic loss, past or future. This matter was submitted to Judgment (**Exhibit 4**) and the Defendants/ Appellees have paid the Judgment (**Exhibit 5**) together with statutory interest and taxable costs.

Subsequent to the filing of Judgment, Plaintiffs/ Appellants filed a Request for Mediation Sanctions pursuant to MCR 2.403. After oral argument and briefs in this matter, the trial court issued an order denying Plaintiffs/Appellants' request for mediation sanctions (**Exhibit 2**).

The only issue before the appellate court is on the question of entitlement to mediation sanctions. All issues relating to the actual trial of this matter have been resolved. The Judgment itself has been satisfied.

This case originally mediated for $120,000. The cutoff for assessment of mediation sanctions is $108,000 as an adjusted verdict. For purposes of evaluating the entitlement

to sanctions, both parties agree that interest is assessable only from the date of filing the Complaint to the date of mediation (MCR 2.403(O)(3). Plaintiffs/Appellants claim that the assessable costs, however, run from the date of filing the Complaint to the date of the verdict in determining the adjusted verdict. The Defendants/Appellees claim that the reading of the applicable court rule requires that the assessable costs also run <u>only</u> from the date of filing the Complaint to the date of mediation in determining the adjusted verdict, (MCR 2.403(O)(3).

Both parties agree that if Plaintiffs/Appellants are correct on the time period involved, they are entitled to sanctions. Both parties also agree that if the Defendants/ Appellees are correct in determining the correct time frame, then the Plaintiffs/Appellants are not entitled to sanctions.

ARGUMENT

MCR 2.403(O)(1) provides as follows:

> **(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 mediation 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 mediation evaluation.**

The court rule goes on to provide at Section 3 the manner in which the adjusted verdict is to be determined.

> **(3) For the purpose of subrule (O)(1), a verdict must be adjusted by adding to it <u>assessable costs and interest on the amount of the verdict from the filing of the complaint to the date of the mediation evaluation</u>, and, if applicable, by making the adjustment of future damages as provided by MCL 600.6306; MSA 27A.6306.**

Finally, in the event the Plaintiffs/Appellants are entitled to sanctions, the sanctions being actual costs are defined under Section 6 of that court rule as follows:

> **(6) For the purpose of this rule, actual costs are**
>
> **(a) those costs taxable in any civil action, and**
>
> **(b) a reasonable attorney fee based on a reasonable hourly or daily rate as determined by the trial judge for services necessitated by the rejection of the mediation evaluation.**

The court construes a court rule in accordance with the ordinary and approved usage of the language, considering the purpose of the court rule. The purpose of MCR 2.403 is to expedite and simplify the final settlement of cases to avoid

a trial. *Neal vs. Neal, 219 Mich App 490 (1996).* The sanction conditions place the burden of litigation costs on the party who demands a trial by rejecting a proposed mediation award. *Bennett vs. Weitz, 220 Mich App 295 at 301 (1996).* However, the purpose of the mediation sanction provisions is not to act as a punitive measure but rather is intended to foster settlement. In order to do so, the court must review the mediation evaluation in light of the circumstances that existed at the time of the mediation itself, and do so in a logical manner.

At the time of the mediation, the assessable costs and the interest that had accrued were not significant in this matter. A considerable length of time passed between the time of mediation and the actual trial in this case, with the costs and interest, by their very nature, accruing significantly after the time of mediation. The Court of Appeals concluded that Plaintiffs/Appellants interpretation of "assessable costs" contradicts the underlying purpose of the court rule. It noted, "The rules governing the interpretation of statutes apply with equal force to the interpretation of court rules." *Yadashkim v. Holden, 247 Mich. App. 642, 649, 637 NW2d 257 (2001)* *(Opinion, page 4).*

The parties agree that if the mediation date is the cutoff point for determining entitlement to sanctions, then the Plaintiffs/Appellants are not entitled to sanctions.

The Plaintiffs/Appellants misguidedly rely on the case of *Beach vs. State Farm Mutual Automobile Insurance Co., 216 Mich App 612 (1996).* The Court of Appeals declined to adopt the rationale of *Beach* for several reasons. The dicta contained in that opinion flies clearly in the face of the plain language of the court rule and contradicts the underlying purpose of the court rule. The court rule talks about assessable costs and interest from the time of the date of filing of the Complaint to the date of mediation. [MCR 2.403(O)(3)] In discussing the concept of adjusted verdict for the purposes of assessing whether mediation sanctions are available, there is absolutely no mention in the court rule of the concept of using attorney fees. This would obviously boot strap the party seeking mediation sanctions by using one of the elements of the sanctions as the basis for the sanction.

In evaluating the propriety of the rejection of the mediation evaluation, and thus determining whether sanctions are appropriate, one has to look at the situation that existed at the time of the mediation. Attorney fees had not been incurred to that point, in fact Plaintiffs/Appellants had a contingent fee arrangement so the attorney fee would be determined by the amount of the recovery, if any. The Court of Appeals also noted that the *Beach* case is distinguishable from the case involving Mr. Dessart and Mrs. Burak by the simple fact that the *Beach* case was a first party case where the concept of attorney fees as an actual element of damage may very well have been a factor. Therefore in assessing the

mediation evaluation the court in the *Beach* case could look at whether or not an attorney fee was involved. Given the significant time delay from the date of the mediation to the actual date of trial, and the fact that considerable costs are necessarily incurred in going to trial as well as attorney time, it is grossly unfair to tack on things that have been incurred beyond the date of mediation as well as attorney time beyond the date of mediation to determine whether in fact the Plaintiffs/Appellants are entitled to mediation sanctions.

Only if the Plaintiffs/Appellants have prevailed on the concept of adjusted verdict or the Defendants/Appellees have failed to improve their position with the adjusted verdict, only in that event can the Plaintiffs/Appellants recover sanctions. The concept of actual costs and attorney fees does not come into play until a determination is made that sanctions are appropriate. Therefore, in this case, because the Plaintiffs/Appellants have not reached the threshold level of an adjusted verdict of $108,000, they are not entitled to sanctions.

The trial court in reviewing the cases including *Beach*, (above) as well as *Grow vs. W. A. Thomas Co., 236 Mich App 696*, the trial court found that it would be inappropriate to use different time lines in determining eligibility for sanctions. Judge Davis in his review of the existing case law states:

> **"Now, that was what I found, and I found it because I was looking in the Michigan Court Rules Practice**

> **Set and looking at the latest pocket part that just came in on that, it's mentioned and criticized. The criticism is, This interpretation creates an artificial distinction between the adjustment for interest and the adjustment for costs and runs contrary to the evident purpose of the adjustment, i.e., to permit an apples to apples comparison between the verdict and the mediation evaluation.** (Transcript, page 19)

This is basically the Defendants/Appellees position in a nutshell. It would be grossly unfair under the mediation format to cut off interest on one clearly defined date, that being the date of mediation, and then to allow assessable costs to run uncontrolled, including attorneys' time, through the time of verdict. The Court of Appeals agreed stating that "a trial court must review the mediation evaluation in light of the circumstances that existed at the time of the mediation itself." *(Opinion, page 5)*

The purpose of mediation is to foster settlement. The purpose of mediation sanctions is to act as a deterrent to an unreasonable rejection of an evaluation as a delaying tactic or some other unreasonable rationale for rejecting.

However, to evaluate the reasonableness of the rejection in the context of whether sanctions should be assessed, the time frame of the mediation is critical. The parties have a specific figure based on the mediation evaluation which they know they have to improve upon in a trial. They know the interest that would have accrued to that point. They also have a very good idea of the "assessable costs" that have been incurred by both parties to the time of that mediation. To use the same time frame as dictated in the court rule makes

sense for both interest and assessable costs. To use a different time frame, especially with the very imprecise and at some times uncontrollable concept of "assessable costs" would make the assessment of accepting or rejecting a mediation very difficult, if not impossible. The whole concept of the system is to make settlement easier, not harder to evaluate.

SUMMARY

The logic of Plaintiffs/Appellants is difficult to accept. Basically, they argue that since the court rule could be interpreted as they espouse, it should be. Logic would dictate that we compare apples to apples. The time frame during which we calculate "assessable costs" should be the same time frame as we calculate for interest. This makes sense. The interpretation of Plaintiffs/Appellants makes no sense. The Court of Appeals agreed.

Therefore, Defendants/Appellees respectfully request that this Honorable Court deny Plaintiffs/Appellants' application for leave to appeal and award Defendants/Appellees their costs.

Respectfully submitted,

DATED: September 19, 2002

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