

RECENT DEVELOPMENTS IN MICHIGAN MCR 2.403 CASE EVALUATION LAW

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I. INTRODUCTION

This article reviews recent Michigan Supreme Court and Court of Appeal cases concerning MCR 2.403 case evaluation law.

II. CASE EVALUATION

A. SUPREME COURT DECISIONS

1. Right to a Hearing for Attorney Fee Amount

Young v Nandi, 482 Mich 1007 (2008), reiterated that the losing party is entitled to a hearing concerning the amount of attorney fees and costs to be assessed because of case evaluation sanctions.

2. Determination of Reasonable Attorney Fee - Four to Three Decision

Smith v Khouri, 481 Mich 519 (2008), reviewed a Circuit Court's award of "reasonable" attorney fees as part of case evaluation sanctions under MCR 2.403(O). The Court held that the Circuit Court should begin the process of calculating a reasonable attorney fee by determining the reasonable hourly or daily rate customarily charged in the locality for similar legal services, using reliable surveys or other credible evidence. This number would then be multiplied by the reasonable number of hours expended.

3. Discovery Sanction Dismissal Order Not A "Verdict"

Oram v Oram, 480 Mich 1163 (2008), held that case evaluation sanctions are not available when the dismissal order is the result of discovery sanctions rather than a "verdict."

4. Interest On Case Evaluation Sanctions

Ayar v Foodland Distribs, 472 Mich 713 (2005), held that interest begins to accrue on costs and attorneys fees assessed for case evaluation sanctions from the date of the filing of the complaint. MCL 600.6013(8).

5. Appellate Attorney Fees Not Available For Sanctions

Haliw v City of Sterling Heights, 471 Mich 700 (2005), held that attorney fees for case evaluation sanctions do not include appellate attorney fees and costs.

B. PUBLISHED COURT OF APPEALS DECISIONS

1. Summary Disposition Order Is Verdict

In *Peterson v Fertel*, ___ Mich App ___ (2009), the ultimately prevailing defendants filed their motions for summary disposition before the case evaluation session and evaluation. The Court granted the motions before the evaluation. Plaintiff did not accept the evaluation, hence rejecting it. After the evaluation, the plaintiff filed a timely motion for reconsideration which was denied after the evaluation was not accepted. The Circuit Court granted defendants's motion for case evaluation sanctions because, in the Circuit Court's viewpoint, the entry of the order after the evaluation rejection denying the reconsideration of the summary disposition order was a "verdict."

Plaintiffs appealed arguing that the denial of the reconsideration motion was not a "verdict" because the original order granting the summary disposition motions was entered

before the evaluation. The Court of Appeals affirmed the Circuit Court’s granting of attorney fee sanctions. According to the Court of Appeals, the ruling on plaintiff’s reconsideration motion was a “verdict” within the meaning of the case evaluations rule.

2. Stipulated Damage Amount

In *Tevis v Amex Assurance Co*, 283 Mich App 76 (2009), the parties stipulated the amount of damages. Only the issue of liability was decided by the jury. The losing party argued that, since the parties stipulated the amount of damages, there was no “verdict” concerning monetary amount and hence case evaluation sanctions could not be granted. The Court of Appeals disagreed and reversed the trial court’s denial of evaluation sanctions.

3. Statutory Attorney Fees As Affecting “Verdict” Amount

Ivezaj v Auto Club Ins Ass'n, 275 Mich App 349 (2007), held that the award of statutory attorney fees should not be included as part of the “verdict” when determining if a party is liable for case evaluation sanctions. The decision also indicated that, if the case evaluators incorporated statutory attorney fees when determining the valuation, the attorney fees should be considered part of the “verdict.”

C. UNPUBLISHED COURT OF APPEALS DECISIONS

1. Timeliness of Appeal From Case Evaluation Sanctions

King v American Axle & Manufacturing, Inc, unpublished opinion of the Court of Appeals, issued June 4, 2009 (Docket No 281928), involved a situation where the case evaluation sanction plaintiff timely appealed on November 9, 2007, the October 23, 2007, “final order” granting defendant summary disposition. Plaintiff did not file a new claim of appeal of the December 14, 2007, order granting case evaluation sanctions. The Court of Appeals held that it

did not possess jurisdiction over the case evaluation issue because plaintiff did not file a timely notice of appeal covering such sanctions. A “final order” includes “a postjudgment order awarding ... attorney fees and costs under MCR 2.403.” MCR 7.202(6)(a)(iv).

2. “Interest of Justice” Exception

Dormak v Zook, unpublished opinion of the Court of Appeals, issued May 21, 2009 (Docket No 284665), held that the Circuit Court erred when it denied the defendant’s motion for actual costs by utilizing the MCR 2.403(O)(11) “interest of justice” exception. The Court of Appeals indicated that the Circuit Court’s denial of sanctions pursuant to the interest of justice exception is reviewed for an abuse of discretion. For the interest of justice exception to be applicable, one of several “unusual circumstances” has to exist. Examples of these circumstances include legal issue of first impression or public interest, law is unsettled and substantial damages are at issue, a significant financial disparity between the parties, the effect on third persons may be significant, and where the prevailing party engages in misconduct.

3. Party Refuses To Settle As Affecting Sanctions

In *Moravcik v Trinity Health-Michigan*, unpublished opinion of the Court of Appeals, issued March 24, 2009 (Docket No 281838), both parties rejected the evaluation. The defendant made no attempt to settle. At trial, the jury returned a no cause of action verdict in favor of defendant. The Circuit Court denied defendant’s motion for case evaluation sanctions because defendant had made no attempt to settle. The Court of Appeals reversed. According to the Court of Appeals, the Circuit Court had impermissibly added a restriction that depended on the rejecting party’s willingness to settle.

III. CONCLUSION

In conclusion, the Michigan Supreme Court and Courts of Appeal have generally continued to strengthen the principles of case evaluation. This includes: (1) *Ayar, id*, interest on case evaluation sanction; (2) *Peterson, id*, summary disposition is case evaluation verdict; (3) *Tevis, id*, stipulated damage amount can be verdict; *Dormak, id*, interest of justice exception; and (4) *Moravcik, id*, sanction rights unaffected by refusal to settle.

On the other hand, a few decisions have arguably espoused policy principles other than, or in addition to, the alternative dispute resolution process in question. These decisions include: (1) *Haliw, id*, appellate attorney fees not available for case evaluation sanctions and (2) *King, id*, timeliness of appeal from case evaluation sanctions.

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