STATE OF MICHIGAN

COURT OF APPEALS

VIRGINIA HARRIS,

Plaintiff-Appellee,

v

BOTSFORD CONTINUING CARE CORPORATION, d/b/a BOTSFORD CONTINUING HEALTH CENTER,

Defendant/Third-Party-Plaintiff-Appellant,

and

STARMED HEALTH PERSONNEL, INC., d/b/a STARMED STAFFING GROUP, and KATHLEEN HOLMES, LPN,

Third-Party Defendants.

UNPUBLISHED
June 26, 2007

No. 267997
Oakland Circuit Court
LC No. 2003-051743-NH

VIRGINIA HARRIS,

Plaintiff-Appellee,

v

BOTSFORD CONTINUING CARE CORPORATION, d/b/a BOTSFORD CONTINUING HEALTH CENTER,

Defendant/Third-Party-Plaintiff-Appellant,

and

STARMED HEALTH PERSONNEL, INC., d/b/a STARMED STAFFING GROUP, and KATHLEEN HOLMES, LPN,

Third-Party Defendants.

No. 269452
Oakland Circuit Court
LC No. 2003-051743-NH

Before: Cooper, P.J., and Murphy and Neff, JJ.

PER CURIAM.

In these consolidated cases, defendant Botsford Continuing Care Corporation[1] appeals as of right the entry of judgment in favor of plaintiff following a jury trial (Docket No. 267997), and an order awarding plaintiff taxable costs and case evaluation sanctions (Docket No. 269452). We affirm the judgment in Docket No. 267997, reverse in part the award of case evaluation sanctions in Docket No. 269452, and remand.

I

On February 16, 2001, plaintiff, then 74 years old, was admitted to defendant Botsford Continuing Health Center from Henry Ford Hospital following surgery to place a colostomy. On March 11, 2001, plaintiff was placed on a bowel preparation regimen in anticipation of a scheduled surgical reversal of the colostomy the next day at Henry Ford Hospital. The regimen necessitated more frequent emptying of her colostomy bag in the bathroom. Plaintiff fell while attempting to enter the bathroom to empty the bag with the assistance of her elderly companion, Robert Hayes, allegedly after they were instructed to do so by the nursing staff.

Although plaintiff complained of hip pain immediately after her fall at Botsford, an initial bedside x-ray was negative for a fracture. Plaintiff was transported to Henry Ford Hospital the next day, and the surgery was undertaken as planned. Plaintiff continued to complain of severe hip pain after the surgery, which interfered with her physical therapy. A second bedside x-ray on March 15, 2001, was negative for a fracture, but the radiologist recommended a follow-up x-ray in the radiology department, which would provide higher quality imaging. The subsequent x-ray the next day was suspicious for osseous abnormality, and an MRI was recommended to exclude the possibility of a femoral neck fracture (fractured hip). An MRI performed on March 18, 2001, showed that plaintiff had a fractured hip. Plaintiff filed this action, alleging that because of the hip fracture suffered in the fall, she was required to have hip replacement surgery. Further, the hip fracture exacerbated her preexisting peripheral neuropathy.

Following a 4-day trial, the jury returned a verdict in favor of plaintiff for $205,000, including $155,000 for noneconomic damages suffered to date, and an additional amount of $50,000 for future noneconomic damages, based on an award of $5,000 for each year from 2006 to 2015.[2] The trial court subsequently awarded plaintiff case evaluation sanctions. The court denied defendant's motion for judgment notwithstanding the verdict or for a new trial.

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[1] Defendants Starmed Health Personnel, Inc., and Kathleen Holmes are not involved in this appeal and, therefore, this opinion will refer to Botsford Continuing Care Corporation simply as "defendant."

[2] The verdict form listed the noneconomic damages claimed by plaintiff, "such as pain and suffering, disability resulting from her fractured hip, mental anguish, aggravation of her pre-existing peripheral neuropathy, denial of social pleasure and enjoyment, embarrassment, (continued…)

II

Defendant argues that it was entitled to summary disposition on the basis of plaintiff's defective affidavit of merit, which failed to comply with requirements for out-of-state certification pursuant to MCL 600.2102(4) and *Apsey v Memorial Hosp (On Reconsideration) (Apsey II)*, 266 Mich App 666; 702 NW2d 870 (2005).[3] This argument fails.

In *Apsey II*, this Court determined that an out-of-state affidavit filed with the complaint in a medical malpractice action must comply with the special certification requirements of MCL 600.2102(4), which provides that the signature of the notary public signing the out-of-state affidavit be certified by a court clerk in the county where the affidavit was taken, under the seal of the court. *Apsey, II* at 671, 674, 676. This Court determined that the specific requirements of MCL 600.2102(4) prevailed over the more general provision of the Uniform Recognition of Acknowledgements Act (URAA), which "provides that notarial acts performed in a sister state may function in this state as if performed by a Michigan notary public if performed by '[a] notary public authorized to perform notarial acts in the place in which the act is performed.'" *Apsey II*, *supra* at 672, 676, citing MCL 565.262(a)(i). However, in light of confusion over the applicable statute and extensive reliance by members of the bar on the verification requirements under the URAA, the Court provided that its decision would apply only prospectively. *Apsey II*, *supra* at 681-682. Further, the Court stated that in all pending medical malpractice cases in which the plaintiffs were not in compliance with MCL 600.2102(4), the "plaintiffs can come into compliance by filing the proper certification." *Apsey II*, *supra* at 682.

While we find no error in the trial court's denial of summary disposition in light of plaintiff's corrective action of filing a duplicate affidavit with the proper certification in this case, *Apsey II*, *id*. at 682, defendant's argument nevertheless fails because the Supreme Court has since rejected the requirements for out-of-state certification set forth in *Apsey II*. *Apsey v Memorial Hosp (Apsey III)*, 477 Mich 120; 730 NW2d 695 (2007). Contrary to defendant's argument, it is no longer necessary that an out-of-state affidavit meet the requirements for special certification mandated by MCL 600.2102(4) and *Apsey II*. *Tousey v Brennen*, ___ Mich App ___; ___ NW2d ___ (2007) (Docket No. 274086, issued May 15, 2007). The special certification provisions of MCL 600.2102(4) are merely an alternative means of authenticating out-of-state affidavits. *Tousey*, *supra* at 4. Accordingly, plaintiff's filing of an out-of-state affidavit that complied with MCL 565.262 was sufficient. *Apsey III*, *supra* at 128, 134.

III

Defendant argues that the trial court erred in denying defendant's motions for a directed verdict or a judgment notwithstanding the verdict (JNOV) because plaintiff failed to provide any evidence to establish the essential elements of proximate cause and damages. Defendant notes that plaintiff's fracture was only diagnosed several days after her fall and well after she left

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(…continued)

humiliation and depression."

[3] After the briefs on appeal were submitted in this case, the Supreme Court reversed the decision in *Apsey*. *Apsey v Memorial Hosp*, 477 Mich 120; 730 NW2d 695 (2007).

defendant's care. Defendant contends that the lack of any expert testimony to link the fracture to the fall is fatal to plaintiff's claim. We disagree.

This Court reviews de novo a trial court's denial of a motion for a directed verdict or for JNOV. *Reed v Yackell*, 473 Mich 520, 528; 703 NW2d 1 (2005). In doing so, we consider the evidence and all legitimate inferences in the light most favorable to the nonmoving party. *Id*. A motion for a directed verdict or JNOV should be granted only if the evidence fails to establish a claim as a matter of law. *Id*.

Defendant asserts that plaintiff failed to carry her burden of establishing the element of proximate cause because (1) her theory of causation was mere conjecture, and her circumstantial proof of causation was insufficient for the jury to conclude that the fall caused the fracture, and (2) plaintiff failed to sufficiently eliminate other possible causes of the fracture. Accordingly, plaintiff's claim legally failed and should have been dismissed in response to defendant's motion for a directed verdict or JNOV.

Defendant argued below, and argues on appeal, that expert testimony was required to establish the cause of a fracture, citing *Woodard v Custer*, 473 Mich 1; 702 NW2d 522 (2005) and *Leavesly v Detroit*, 96 Mich App 92, 94; 292 NW2d 491 (1980), mod on other grounds 409 Mich 926 (1980). We find the cases cited inapposite in the circumstances of this case.

In *Woodard*, the Court addressed the applicability of res ipsa loquitur in a medical malpractice case concerning an infant who was treated for a respiratory problem and was subsequently discovered to have two fractured legs. *Id*. at 3, 6-8. The plaintiffs alleged that the fractures were the result of negligent medical procedures, specifically, "the improper placement of an arterial line in the femoral vein of the infant's right leg and the improper placement of a venous catheter in the infant's left leg," and that expert testimony was unnecessary to establish their claim because of the doctrine of res ipsa loquitur. *Id*. at 3, 6. The Court disagreed, holding that the "plaintiffs needed to produce expert testimony to support their theory that the infant's injuries were not the unfortunate complication of a reasonably performed medical procedure." *Id*. at 7. "[W]hether a leg may be fractured in the absence of negligence when placing an arterial line or a venous catheter in a newborn's leg is not within the common understanding of the jury," and, thus, expert testimony is required, regardless whether the doctrine of res ipsa loquitur applied. *Id*. at 8-9. Unlike in *Woodard*, the alleged injury here did not result from a medical procedure that was beyond the common understanding of the jury. Instead, the fracture was alleged to have resulted from plaintiff's fall, which under the facts of this case, was certainly within the common understanding of the jury.

Similarly, in *Leavesly*, this Court found error in the admission of testimony from the plaintiff, who fell from a bus, that he had suffered a fractured rib and a fractured vertebra in his fall because his testimony exceeded his experience and qualifications and no other testimony or evidence substantiated his claimed injuries. *Id*. at 93-95. The Court observed that whether or not one has suffered a fractured vertebra is a question that involves medical knowledge beyond that of ordinary unprofessional persons, unlike cases in which a fracture was readily obvious to the untrained eye. *Id*. at 94-95. The analysis and holding in *Leavesly* is inapplicable in this case. *Leavesly* involved a question of *whether a fracture occurred*; here, it was undisputed that plaintiff suffered a fractured hip.

In this case, the alleged negligence related to the care provided by the nursing staff in preventing plaintiff's fall. Contrary to defendant's argument, plaintiff's claim is not legally flawed simply because neither of plaintiff's two expert witnesses testified that plaintiff's fall on March 11, 2004, more probably than not caused her hip fracture. Plaintiff presented ample evidence from which the jury could properly conclude that the fall on March 11, 2004, caused plaintiff's hip fracture, which was within the common understanding of the jury. "To be adequate, a plaintiff's circumstantial proof must facilitate reasonable inferences of causation, not mere speculation." *Skinner v Square D Co*, 445 Mich 153, 164; 516 NW2d 475 (1994). This standard requires that:

> at a minimum, a causation theory must have some basis in established fact. However, a basis in only slight evidence is not enough. Nor is it sufficient to submit a causation theory that, while factually supported, is, at best, just as possible as another theory. Rather, the plaintiff must present substantial evidence from which a jury may conclude that more likely than not, but for the defendant's conduct, the plaintiff's injuries would not have occurred. [*Id*. at 164-165 (footnote omitted).]

Plaintiff presented ample evidence to establish a causal connection between her fall on March 11, 2001, and her hip fracture. Testimony at trial established that plaintiff had no pain in her left hip until her fall on March 11, and that the pain began immediately after her fall. Hayes testified that plaintiff never complained of severe hip pain before her fall, and that her complaints of pain in her left hip began when she fell on March 11. Plaintiff's son also testified that plaintiff complained of hip pain immediately after the fall, and continued to complain over the next week. Plaintiff testified that she fell on the left side of her butt, and that after she went down, she had a lot of pain in her left hip. Despite the negative bedside x-ray on March 11, plaintiff suffered hip pain so severe that she repeatedly asked for medication to ease the pain on March 11 and March 12, before she was transferred to Henry Ford Hospital. Plaintiff testified that she had never had the pain in her left hip until the fall. The medical records admitted into evidence likewise established that plaintiff complained of pain in her left hip immediately after her fall, and that defendant's staff administered Tylenol #3, a narcotic, to her for her pain, as instructed by plaintiff's physician. According to defendant's nursing notes, 3 hours after her fall, an ice pack was applied to plaintiff's left hip because she continued to experience pain. Plaintiff was again given Tylenol #3 on the morning of March 12 to alleviate her hip pain, to enable her to move into a wheelchair and be transferred to Henry Ford Hospital for surgery.

Evidence further established that plaintiff's pain in her left hip continued from the time of the fall on March 11 until the time the hip fracture was finally diagnosed on March 18, 2004. Although the bedside x-ray at defendant's facility on March 11 was negative, the admission notes at Henry Ford Hospital indicated that plaintiff's status after the fall at the nursing home included a possible hip injury. The physician recommended that plaintiff's hip be re-radiographed "for injury." Medical records from Henry Ford Hospital substantiated plaintiff's continuing complaints of severe and ultimately excruciating hip pain, which limited physical therapy following her surgery. Consequently, a follow-up portable x-ray was performed on plaintiff's hip on March 15. Although the x-ray showed no obvious fracture, further x-ray in the radiology department was recommended for "better diagnostic quality films." The subsequent x-ray on March 16 indicated an abnormality, and recommended an MRI to exclude the possibility

of a femoral neck fracture. The medical history record noted "74 year old woman with left hip pain one week status post fall—no other trauma." An MRI on March 18, 2001, showed that plaintiff had a fractured hip. Viewing the evidence and all legitimate inferences in the light most favorable to plaintiff, *Reed, supra* at 528, we find no error in the denial of defendant's motion for a directed verdict or for JNOV.

Although defendant argues that there was evidence that other causes of plaintiff's hip fracture were a *possibility*, these possibilities do not negate plaintiff's evidence of causation. While the plaintiff bears the burden of proof of causation, it is not necessary that the plaintiff produce evidence to positively eliminate every other potential cause. *Skinner, supra* at 159.

> "'[I]f there is evidence which points to any 1 theory of causation, indicating a logical sequence of cause and effect, then there is a juridical basis for such a determination, notwithstanding the existence of other plausible theories with or without support in the evidence.'" [*Id*. at 164 (citation omitted).]

Plaintiff presented substantial evidence that established a "'logical sequence of cause and effect.'" *Id*. Moreover, although defendant elicited testimony that plaintiff's hip fracture could have been spontaneous because of her osteoporosis, there was also testimony that defendant's suggested scenarios were improbable.

IV

Defendant argues in the alternative that it was entitled to a new trial because of the improper admission of evidence on the issue of plaintiff's neuropathy and the jury instructions regarding this theory. We disagree.

This Court reviews a trial court's decision to admit or exclude evidence for an abuse of discretion. *Craig v Oakwood Hosp*, 471 Mich 67, 76; 684 NW2d 296 (2004). Any error in the admission or exclusion of evidence will not be grounds for reversal unless the denial of relief would be inconsistent with substantial justice or affects a substantial right of the opposing party. *Id*. We review for an abuse of discretion a trial court's denial of a motion for new trial. *Allard v State Farm Ins Co*, 271 Mich App 394, 406; 722 NW2d 268 (2006).

This Court generally reviews claims of instructional error de novo, *Burnett v Bruner*, 247 Mich App 365, 375; 636 NW2d 773 (2001), although a trial court's determination whether a standard instruction was applicable and accurate is reviewed for an abuse of discretion, *Stevens v Veenstra*, 226 Mich App 441, 443; 573 NW2d 341 (1997). A court's determination whether an instruction is supported by the evidence is entitled to deference. *Keywell & Rosenfeld v Bithell*, 254 Mich App 300, 339; 657 NW2d 759 (2002). This Court examines the jury instructions as a whole to determine whether the trial court committed error requiring reversal. *Burnett, supra.* Reversal is warranted only where failure to reverse would be inconsistent with substantial justice. *Id.*, citing MCR 2.613(A).

With respect to damages, plaintiff alleged that her hip fracture aggravated a preexisting peripheral neuropathy, a malfunctioning of the nerves in her extremities that caused numbness in her feet. Defendant asserts that it learned of plaintiff's neuropathy damage claim only after the deposition of plaintiff's medical expert, Dr. Dabrowski. Defendant contends that it was

improperly surprised by this claim, and that evidence of the neuropathy should have been excluded or defendant should have been permitted to secure an expert to defend against this claim. Further, because the error was not harmless and it is impossible to determine which part of the jury verdict is attributable to the improper neuropathy evidence, a new trial on all issues is required.

We find no error requiring reversal with regard to the admission of evidence or the jury instructions. The trial court did not abuse its discretion in denying defendant's motion for a new trial.

Shortly before trial, defendant moved to essentially strike plaintiff's claim for any damage related to the neuropathy. In the alternative, defendant sought additional time to secure an expert witness to respond to the neuropathy claim. In a hearing on defendant's motion on September 7, 2005, defendant argued that it did not learn of this claim until plaintiff took the trial deposition of Dr. Dabrowski, and that although defense counsel had just come into this case 6 or 7 weeks earlier, there was no indication in the record that there would be a damage claim related to the neuropathy.

In response, plaintiff pointed out that the damage claim related to the neuropathy was not "new" because the neuropathy was referenced in plaintiff's medical records, was stated in plaintiff's case evaluation study provided to the defense nearly a year earlier, and that the neuropathy was addressed in Dr. Dabrowski's written report filed in this case. Further, defendant had the opportunity to take Dr. Dabrowski's deposition, but did not do so. Plaintiff noted that Dr. Dabrowski merely testified that plaintiff's peripheral neuropathy was aggravated by the hip fracture because plaintiff was bedridden for a longer period of time because of the hip fracture. Plaintiff also asserted that, contrary to defendant's argument, the relationship between the hip fracture and the aggravation of the neuropathy need not be expressly pleaded. And with regard to expert testimony, defendant was free to call any of the several neurologists that had been involved in plaintiff's treatment.

The trial court denied defendant's motion, adopting plaintiff's arguments. We find no basis for reversal. As plaintiff noted, her medical records expressly referenced the peripheral neuropathy, and defendant cannot claim to have been surprised by this aspect of plaintiff's damages claim. A July 12, 2003, medical record stated in part:

> This 77-year old woman is now approximately two-year status post critical illness neuropathy which was primarily sensory. She has had numerous medications to help control the discomfort from the numbness in her feet, without success. More recently, she has tried acupuncture . . . and now believes that there has been some benefit. With regard to the numbness in her foot, she is now reporting good days and bad days which certainly represent an improvement. She continues to deprive herself and restrict her activities because of the numbness, in my opinion.

Preceding medical records on March 1 and 4, 2002, November 26, 2002, and December 2, 2002, similarly discussed plaintiff's problems with neuropathy:

> This 75-year-old woman is recovering from a primarily sensory neuropathy which occurred with a critical illness and most likely had a nutritional basis. She still complains bitterly that she is not well whereas objectively, her neuropathy is much improved. . . .
>
> * * *
>
> The patient presents this date for followup visit regarding her peripheral neuropathy. She feels that some of her symptoms have improved, still notes some tingling in her feet; however, she does feel that she has some difficulty with walking at times. . . .
>
> * * *
>
> The patient presents this date regarding concerns that she has regarding her peripheral neuropathy. It seems like it has not improved. She has problems with painful pareaesthesias in both of her hands and feet. She has seen a couple neurologists and feels that nothing is being done to help her. . . .
>
> * * *
>
> This woman is now about a year and half status post a primarily sensory neuropathy, which occurred with a critical illness and may also have had a nutritional basis. She still complains bitterly of the sensory disturbance in her feet. . . .

Plaintiff's complaint alleged that she had sustained the following injuries and damages, among others: a hip fracture requiring surgery and hip replacement; severe pain and suffering; inability to perform and enjoy the normal functions of daily life; mental and emotional distress, hospital and medical expenses; replacement services, and all damages recoverable under Michigan law. Plaintiff's case evaluation summary, dated November 8, 2004, under "Damages" stated, in part: "In 2002 Mrs. Harris was diagnosed with a peripheral neuropathy which her Henry Ford Hospital physicians attributed to prolonged debilitation following the hip fracture."

Given the numerous references to plaintiff's neuropathy and her claims, defendant cannot be said to have not been on notice of this aspect of her damages claim. We are unpersuaded by defendant's contention that any notice of neuropathy damages was effectively negated by Dr. Dabrowski's written report that disclaimed any connection between the hip fracture and the neuropathy. The report, dated September 21, 2004, did indicate that because the neuropathy was a "symmetric sensory neuropathy," it was not related to the hip:

> Mrs. Harris is status post bladder suspension with resultant sigmoid perforation and subsequent spinal epidural abscess of the spine requiring drainage and eventually the need for laminectomy. She also has evidence of a sensory neuropathy which appears to have progressed somewhat, both historically by the records as well as on physical examination. It would appear that the neuropathy gradually developed following the fall while she was recovering in the rehabilitation facility. The etiology of the sensory neuropathy is obscure. It is a

> symmetric sensory neuropathy, however, and as such is not related to the hip. There is also a mild motor component, as demonstrated by the electrodiagnostic testing.

Read in context, the statement about the hip relates to the etiology of the neuropathy; however, plaintiff's claim was not that the hip fracture caused the neuropathy, but instead that it aggravated it because of the length of time that she was bedridden. In any event, we disagree that this sentence negates any claim of damages related to the neuropathy, given the references to the neuropathy in the records and plaintiff's statements of her damage claims.

Because we find no error in the trial court's denial of defendant's motion to strike Dr. Dabrowski's testimony, we reject any claim of instructional error related to the neuropathy damages. Moreover, as the trial court pointed out in denying defendant's motion for a new trial on this ground, defendant's cross-examination elicited testimony that the neuropathy was not related to the hip. Defendant has failed to show that any error was inconsistent with substantial justice.

V

Defendant argues that the trial court erred in awarding appellate fees and costs as case evaluation sanctions.[4] We agree.

The trial court awarded plaintiff case evaluation sanctions in the amount of $81,457.04. This Court reviews de novo a trial court's decision whether to award sanctions; we review the amount of sanctions imposed for an abuse of discretion. *Ivezaj v Auto Club Ins Ass'n*, ___ Mich App ___; ___ NW2d ___ (Docket No. 265293, issued April 24, 2007) slip op, p 4; *Campbell v Sullins*, 257 Mich App 179, 197; 667 NW2d 887 (2003).

Plaintiff requested, and the trial court granted, attorney fees and costs related to the interlocutory appeal to this Court after the trial court denied defendant's motion for summary disposition on the ground of the defective affidavit of merit. "[A]ppellate attorney fees and costs are not recoverable as case evaluation sanctions." *Haliw v City of Sterling Heights*, 471 Mich 700, 706; 691 NW2d 753 (2005). In *Haliw*, *id*. at 702, the Supreme Court rejected this Court's conclusion that appellate fees may be awarded under MCR 2.403(O). The Court noted that "Michigan follows the 'American rule' with respect to the payment of attorney fees and costs. *Haliw*, *supra* at 706. Under that rule, attorney fees and costs are generally not recoverable in the absence of an exception set forth in a statute or court rule expressly authorizing such an award. *Id*. at 707. The Court concluded that because MCR 2.403 expressly authorizes recovery of "a reasonable attorney fee" and "costs," but does not expressly authorize appellate attorney fees and costs, the American rule mandates that appellate fees and costs not be read into the court rule.

[4] Defendant also argues that if this Court agrees that it is entitled to judgment notwithstanding the verdict or a new trial, the trial court's order regarding sanctions and costs must be reversed. In light of our rejection of defendant's JNOV and new trial arguments, this argument fails.

Haliw, supra at 707. Further, MCR 2.403(O) is "trial-oriented" and there is no mention of the appellate process in the rule. *Haliw, supra* at 707-708.

Plaintiff argues that the fees rejected in *Haliw* are distinguishable from those in this case because in *Haliw*, the defendant sought recovery of attorney fees under MCR 2.403 for legal work that was done while the case was in the appellate courts, whereas, in this case, the fees related to legal work designed to keep this case out of this Court by allowing the scheduled trial to proceed. We are unpersuaded by this argument. We find no basis in the MCR 2.403 or the analysis in *Haliw* for such a distinction under the circumstances of this case. The interlocutory appeal in this case involved responding to defendant's application for leave to appeal the denial of defendant's motion for summary disposition, which is in effect, no different from the appeal in *Haliw*, in which this Court granted defendant's application for leave to appeal the denial of summary disposition, and affirmed the trial court, and the Supreme Court thereafter granted leave to appeal. *Id*. at 703.

The trial court erred in allowing appellate fees and costs. We vacate the award of attorney fees and costs and remand this case for entry of a judgment reducing the award by the amount of the disallowed appellate fees and costs.[5]

VI

Defendant argues that the court improperly awarded costs and fees that are not authorized by statute and therefore are not recoverable. Plaintiff does not address this argument on appeal.

Defendant contends that the improper costs include:

> Airfare, hotels and shuttle services for expert's trial testimony: $1,543.04; Postage, Reliable Delivery, and UPS; $218.75; Trial Exhibits: $3,010.80; Lodging – Trial: $298.00. Total: $3,704.94.

Defendant contends that the improper court fees include:

> Complaint: $235.00; Case evaluation: $225.00; Facilitation fee: $660.00. Total $1,120.00.

Defendant asserts that MCL 600.2441, which lists the "sundry costs" allowed in civil actions, does not provide for the above filing and case fees.

Defendant also argues that plaintiff was improperly awarded medical records/Henry Ford Hospital costs of $111.59 on the basis that these costs were allowable under MCL 600.2549. Defendant contends that these costs do not meet the three criteria for recovery under MCL

[5] Defendant asserts that the improper fees and costs consist of $4,500 in appellate attorney fees and $177.39 in costs. If this assertion is correct, the award of fees and costs shall be reduced by $4,677.39.

600.2549,[6] which include that the documents be obtained from a pubic office, certified, and used at trial.

Under MCR 2.403(O)(1), case-evaluation sanctions include actual costs. *Campbell*, *supra* at 203. Actual costs are the costs taxable in any civil action. *Id*., citing MCR 2.403(O)(6)(a); see also *Dessart v Burak*, 470 Mich 37, 39-40; 678 NW2d 615 (2004). Expert witness fees are included in actual costs. *Campbell*, *supra* at 203.

In the hearing on plaintiff's motion for fees and costs, plaintiff argued that the challenged fees and costs were allowable as case evaluation sanctions, pursuant to MCR 2.403, which provides for "actual costs," as opposed to "statutory costs," which are already provided for under the law. Plaintiff's request for costs detailed the costs as well as the statutory authority for each cost requested.

Although defendant raised the above challenges to costs before the trial court, the court failed to address defendant's arguments, and simply awarded the fees and costs requested by plaintiff (with the exception of any duplicate costs). We therefore remand this case for consideration of defendant's challenges to the costs and fees in the first instance.

Affirmed in part, reversed in part, and remanded for reconsideration of the award of fees and costs in accordance with this opinion, and for entry of a judgment reducing the award of attorney fees and costs to exclude appellate fees and costs and any additional fees and costs disallowed, if any, on remand, with respect to the above-challenged fees and costs. We do not retain jurisdiction.

/s/ Jessica R. Cooper
/s/ William B. Murphy
/s/ Janet T. Neff

[6] MCL 600.2549 provides: "Reasonable and actual fees paid for depositions of witnesses filed in any clerk's office and for the certified copies of documents or papers recorded or filed in any public office shall be allowed in the taxation of costs only if, at the trial or when damages were assessed, the depositions were read in evidence, except for impeachment purposes, or the documents or papers were necessarily used."