STATE OF MICHIGAN

COURT OF APPEALS

CRAIG GOODMAN,

Plaintiff-Appellant,

v

JOHN DOE,

Defendant,

and

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant-Appellee.

UNPUBLISHED
July 24, 2018

No. 338612
Macomb Circuit Court
LC No. 2012-004471-CK

Before: BORRELLO, P.J., and M. J. KELLY and BOONSTRA, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's second amended judgment of verdict, and by extension, an opinion and order denying plaintiff's motion to assess additional costs and fees against defendant State Farm Mutual Automobile Insurance Company (State Farm). For the reasons set forth in this opinion, we affirm.

I. BACKGROUND

In a prior appeal, this Court summarized the factual background leading up to this case:

> This case arises from an incident in which plaintiff's motorcycle collided with the rear bumper of a vehicle, which fled the scene of the accident. Plaintiff hit the rear bumper of the vehicle after the vehicle suddenly braked. The accident occurred during rush hour on I–696. Plaintiff and Monty Kamposh, a witness to the incident, testified at trial that plaintiff could not have done anything different to avoid the accident and that the driver of the vehicle, known as the uninsured motorist, was entirely at fault. Plaintiff and Kamposh also testified at trial that plaintiff was changing lanes right before the accident.

> Plaintiff had a no-fault insurance policy with State Farm covering his motorcycle. The policy included a provision for uninsured motorist (UM) benefits. The policy provided that the insured is entitled to recover UM benefits if the insured is legally entitled to recover compensatory damages from the owner or driver of the uninsured vehicle. If the parties do not agree that the insured is legally entitled to recover damages, then the insured must file a lawsuit.
>
> State Farm denied plaintiff's claim for UM benefits, at first stating that there was no evidence that another vehicle was involved in the accident, and later stating that plaintiff was negligent and at fault for the accident. Plaintiff filed [a complaint in the Macomb Circuit Court], which proceeded to trial. [On July 24, 2014, t]he jury found in favor of plaintiff and awarded a judgment of $490,000. The trial court later granted State Farm's motion for remittitur and reduced the award to $100,000. [*Goodman v Doe*, unpublished per curiam opinion of the Court of Appeals, issued June 21, 2016 (Docket Nos. 323615 and 326547), pp 1-2.]

On August 18, 2014, plaintiff filed a motion to amend the judgment of verdict to add taxable costs, case evaluation sanctions in the form of attorney fees, and interest. Approximately a month later, on September 18, 2014, plaintiff supplemented his motion to amend the judgment with additional fees and costs. The trial court held an evidentiary hearing on the motion on January 9, 2015, at which it took the issues under advisement before later issuing a February 6, 2015 opinion and order granting plaintiff fees and costs that had accrued up to the trial date—July 24, 2014. An amended judgment of verdict reflecting the opinion and order was entered on March 3, 2015.

State Farm appealed the amended judgment of verdict, arguing that that the trial court (1) "awarded attorney fees at an excessive and unsubstantiated hourly rate," and (2) "the trial court incorrectly awarded certain costs to plaintiff for items that were not recoverable in a civil case." *Goodman*, unpub op at 10, 16. In an unpublished opinion issued on June 21, 2016, this Court determined that (1) the trial court did not err with regard to its determination of the attorney fee awards, and (2) although some of the costs requested by plaintiff may have been recoverable, the trial court nevertheless erred in assessing them without making factual and legal findings on the record with regard to each individual item. *Id*. at 15-19. This Court affirmed the jury verdict and fees, but vacated the award of $8,489.96 in taxable costs and remanded to the trial court so that it could "recalculate taxable costs consistent with this [Court's] opinion." *Id*. at 19-20.

On November 14, 2016, plaintiff filed a supplemental motion to amend the judgment of verdict that led to the current appeal. In the motion, plaintiff requested new attorney fees and taxable costs through October 31, 2016. State Farm objected to the relief requested, and a hearing was held on plaintiff's motion on November 21, 2016, at which the trial court again took the issues under advisement. In a subsequent opinion and order issued January 6, 2017, the trial court held that (1) plaintiff waived the issue of taxable costs at the November 21, 2016 hearing, (2) plaintiff's request for additional fees was outside the scope of the remand, and (3) plaintiff's

motion was untimely. The second amended judgment of verdict reflecting the January 6, 2017 opinion and order was entered on May 8, 2017.[1] Plaintiff now appeals the second amended judgment of verdict and the underlying opinion and order.

II. ANALYSIS

On appeal, plaintiff argues that the trial court erred in determining that the relief requested in his supplemental motion to amend the judgment was outside the scope of this Court's remand. "Whether a trial court followed an appellate court's ruling on remand is a question of law that this Court reviews de novo." *Schumacher v Dep't of Natural Resources (After Remand)*, 275 Mich App 121, 127; 737 NW2d 782 (2007). " 'It is the duty of the lower court or tribunal, on remand, to comply strictly with the mandate of the appellate court.' " *K & K Const, Inc, v Dep't of Environmental Quality*, 267 Mich App 523, 544; 705 NW2d 365 (2005), quoting *Rodriguez v Gen Motors Corp (On Remand)*, 204 Mich App 509, 514; 516 NW2d 105 (1994). "The power of the lower court on remand is to take such action as law and justice may require so long as it is not inconsistent with the judgment of the appellate court." *K & K Const, Inc*, 267 Mich App at 544 (citations and quotation marks omitted). "When an appellate court remands a case without instructions, a lower court has the 'same power as if it made the ruling itself.' " *K & K Const, Inc*, 267 Mich App at 544, quoting *People v Fisher*, 449 Mich 441, 447; 537 NW2d 577 (1995). "However, when an appellate court gives clear instructions in its remand order, it is improper for a lower court to exceed the scope of the order." *K & K Const., Inc*, 267 Mich App at 544-545, citing *Waatti & Sons Elec Co v Dehko*, 249 Mich App 641, 646; 644 NW2d 383 (2002).

Here, this Court remanded to the trial court with explicit instructions:

> Because the trial court erred in assessing certain costs as discussed above, we vacate the portion of the amended judgment assessing $8,489.96 in costs, and remand the case to the trial court in order to recalculate taxable costs consistent with this opinion. The court shall make findings on the record with regard to whether each remaining category of expenses constitutes a taxable cost. [*Goodman*, unpub op at 19.]

Hence, clearly the purpose of the remand was for the trial court to determine whether certain individual costs were taxable as a matter of law, and to make findings of fact regarding those costs. *Goodman*, unpub op at 19. Accordingly, plaintiff's requested relief in his supplemental motion to amend the judgment was plainly outside the scope of this Court's instructions on remand.

Plaintiff next argues there is nothing from the trial court's February 6, 2015 opinion and order, the March 3, 2015 first amended judgment of verdict, or the prior appeal that suggests he should be limited to sanctions through the July 24, 2014 trial date. Such an argument is contrary

[1] Notably, the trial court allowed plaintiff to keep funds that State Farm tendered at the November 21, 2016 hearing that ultimately exceeded the judgment award by $30,538.23.

to the wording contained in the amended judgment of verdict, wherein the judgment was limited to the trial date. The fact that the amendment provides for potential future fees and costs is irrelevant because it only provides for additional fees and costs *as authorized by statute or court rule*. Having reviewed the entirety of plaintiff's claims for additional fees and costs, we find that none of the additional fees and costs requested by plaintiff were authorized either by court rule or statute. Additionally, as previously noted, this Court was clear in its prior opinion of the specific, limited instructions on remand. *Goodman*, unpub op at 19.

Plaintiff also requested and was denied fees and costs accrued through December 31, 2014. Plaintiff's postappeal request duplicitously ignores that those fees and costs had been denied by the trial court prior to the first appeal, the trial court's decision regarding fees was affirmed in the appeal, and its decision regarding costs was vacated for the very limited purpose of determining whether certain costs were statutorily authorized and factually supported. *Goodman*, unpub op 15, 19-20. [2] Plaintiff simply provides no support for the contention that he should now be able to request, for a second time, the fees and costs that were already denied him as if the proceedings on his first motion to amend the judgment of verdict never occurred. The remedy for plaintiff, in the event that he wanted to recover those fees and costs through December 31, 2014, was to appeal the decision of the trial court. Plaintiff did not do so, and thus, not only was the issue outside the scope of the remand, but it was abandoned during the first appeal.

Even if this Court were to presume that plaintiff's request for additional fees and costs was not outside the scope of the remand, plaintiff's motion was untimely. Plaintiff contends that the trial court erred in determining that his motion was untimely pursuant to MCR 2.611(B) because it was "undeniable that Plaintiff timely filed his motion for sanctions" pursuant to MCR 2.403(O)(8). Plaintiff also notes that the first amended judgment of verdict explicitly preserved plaintiff's ability to file future motions to amend the judgment, and that to prohibit the additional case evaluation sanctions would frustrate the purpose of the court rule.

As a preliminary matter, it is not entirely clear whether plaintiff considers his November 14, 2016 "supplemental motion" a new motion, or a second supplement to the original, August 18, 2014 motion. It would appear that plaintiff would prefer the latter interpretation, but plaintiff provides no precedent to justify a theory that proceedings other than those prescribed by this Court on remand may continue on a motion two years after it was filed, decided by the trial court, disposed of in a final order, and appealed. Accordingly, consistent with the manner in which the trial court treated plaintiff's November 14, 2016 motion, the only plausible interpretation of plaintiff's motion is that it was a new motion to amend the amended judgment, and not a supplement to the already decided motion. With that in mind, plaintiff's motion was

[2] Prior to the first appeal, plaintiff requested fees *through December 19, 2014*, and costs *through December 26, 2014*, and both were denied by the trial court. Hence, plaintiff, represented by the same counsel, had already requested and been denied fees and costs through December 31, 2014, but yet requested the same fees and costs again on remand.

untimely regardless of whether it is treated as a motion to amend a judgment—as it is titled—or a motion for case evaluation sanctions—as plaintiff would like to treat it.

This Court reviews de novo the interpretation and application of statutes and court rules. *Lech v Huntmore Estates Condominium Ass'n (On Remand)*, 315 Mich App 288, 290; 890 NW2d 378 (2016), citing *McCormick v Carrier*, 487 Mich 180, 188; 795 NW2d 517 (2010), and *In re McCarrick/Lamoreaux*, 307 Mich App 436, 445; 861 NW2d 303 (2014). Specifically, "[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), citing *Casco Twp v Secretary of State*, 472 Mich 566, 571; 701 NW2d 102 (2005), and *Allard v State Farm Ins Co*, 271 Mich App 394, 397; 722 NW2d 268 (2006). However, a trial court's decision with regard to attorney fees and costs is reviewed for an abuse of discretion. *Smith*, 481 Mich at 526, citing *Wood v Detroit Auto Inter-Ins Exch*, 413 Mich 573, 588; 321 NW2d 653 (1982). "An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes." *Smith*, 481 Mich at 526, citing *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). "We use the same rules of interpretation to interpret statues and court rules." *Lech*, 315 Mich App at 290, citing *McCarrick*, 307 Mich App at 446. Words of court rules are construed according to their "plain and ordinary meanings," and "legal terms according to their legal meanings." *Lech*, 315 Mich App at 290 (citations omitted). "We determine the intent of the court rule 'from an examination of the court rule itself and its place within the structure of the Michigan Court Rules as a whole.' " *Lech*, 315 Mich App at 290, citing *Haliw v City of Sterling Heights*, 471 Mich 700, 706; 691 NW2d 753 (2005).

MCR 2.611(B) provides that "[a] motion for a new trial made under this rule *or a motion to alter or amend a judgment* must be filed and served within 21 days after entry of the judgment." (Emphasis added.) The parties do not dispute that plaintiff's original motion to amend the judgment was timely, but inasmuch as the November 14, 2016 motion must be treated as a new motion, plaintiff fails to describe how it was timely. Plaintiff contends that the trial court erred in relying on MCR 2.611(B) because, despite its title, plaintiff's motion was a motion for case evaluation sanctions which should have been governed by MCR 2.403(O)(8). That rule provides:

> (8) A request for costs under this subrule must be filed and served within 28 days after the entry of the judgment or entry of an order denying a timely motion
>
> (i) for a new trial,
>
> (ii) to set aside the judgment, or
>
> (iii) for rehearing or reconsideration. [MCR 2.403(O)(8).]

Even applying MCR 2.403(O)(8), and assuming that the window to file a motion for case evaluation sanctions reset upon entry of the first amended judgment, plaintiff's November 14, 2016 motion came well over a year after the entry of that judgment. Accordingly, the motion was untimely. Additionally, we note that it is also true that plaintiff's request for additional costs was untimely. Again, the supplemental motion to amend the judgment was untimely pursuant to

MCR 2.611(B), but to the extent that plaintiff might distinguish the motion to amend the judgment from the actual relief requested—taxable costs—plaintiff's request would still be untimely. Per MCR 2.625:

> (F) Procedure for Taxing Costs.
>
> > (1) Costs may be taxed by the court on signing the judgment, or may be taxed by the clerk as provided in this subrule.
> >
> > (2) When costs are to be taxed by the clerk, the party entitled to costs must present to the clerk, within 28 days after the judgment is signed, or within 28 days after entry of an order denying a motion for new trial, a motion to set aside the judgment, a motion for rehearing or reconsideration, or a motion for other postjudgment relief except a motion under MCR 2.612(C),
> >
> > > (a) a bill of costs conforming to subrule (G),
> > >
> > > (b) a copy of the bill of costs for each other part, and
> > >
> > > (c) a list of the names and addresses of the attorneys for each party or of parties not represented by attorneys. [MCR 2.625(F).]

Assuming that plaintiff's motion constituted a new request for taxable costs, plaintiff was required to submit his complete bill of costs within 28 days of the entry of the original judgment. MCR 2.625(F)(2). By the plain language of the court rule, just as his request for additional fees, plaintiff's request for additional costs was over a year late.

Lastly, plaintiff argues that the trial court erred in determining that plaintiff waived recovery of taxable costs at the November 21, 2016 motion hearing. Plaintiff argues that the trial court took the words of plaintiff's counsel out of context, and failed to acknowledge that the waiver was merely an element of a proposed resolution that was not, in the end, granted. Plaintiff also contends that, in finding that plaintiff waived taxable costs, the trial court failed to follow the instructions of this Court on remand and review each cost individually.

"Waiver is a mixed question of law and fact. The definition of a waiver is a question of law, but whether the facts of a particular case constitute a waiver is a question of fact." *Reed Estate v Reed*, 293 Mich App 168, 173; 810 NW2d 284 (2011) (citations and quotation marks omitted). "We review for clear error a trial court's findings of fact and review de novo its conclusions of law." *Reed*, 293 Mich App at 173, citing *Alan Custom Homes, Inc, v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003). " 'A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been committed.' " *Reed*, 293 Mich App at 173-174, quoting *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000).

"[W]aiver is the intentional relinquishment of a known right." *Sweebe v Sweebe*, 474 Mich 151, 156-157; 712 NW2d 708 (2006) (citations and quotation marks omitted). "The recognized definition of the term 'waiver' is '[t]he voluntary relinquishment or abandonment—express or implied—of a legal right or advantage . . . . The party alleged to have waived a right

must have had both knowledge of the existing right and the intention of forgoing it.' " *Reed*, 293 Mich App at 176 (alteration in original), citing *Black's Law Dictionary* (9th ed). "To effectuate a valid waiver, 'no magic language' need be used." *Reed*, 293 Mich App at 176, citing *Sweebe*, 474 Mich at 157. The court need only determine that a "reasonable person would have understood that he or she was waiving the interest in question," and that the waiver was "explicit, voluntary, and made in good faith," *Reed*, 293 Mich App at 176, citing *Sweebe*, 474 Mich at 157.

At the November 21, 2016 hearing on plaintiff's supplemental motion, plaintiff's attorney expressed his intent to waive the costs that had been vacated by this Court four separate times. He stated:

> The Court of Appeals affirmed everything appealed from with the exception of approximately $8500 in expenses, which [the Court] said had to be remanded to the trial court to consider each expense for costs, item by item.
>
> In an effort to compromise and finally get this over, we are willing to waive the $8500 without taking up the time or boring the court with arguing over item by item of costs.
>
> * * *
>
> I mean, the [c]ourt did not argue, or the [c]ourt did not strike anything we asked for and deemed it all appropriate.
>
> As I said, the Court of Appeals I guess was critical of that because [the trial court] didn't go through item by item, and I am waiving it for the purpose of today.
>
> * * *
>
> Just to get this over with, I'm willing to forgo the costs that were in dispute at the time[,]and they were all pre July 24th.

When questioned by the trial court, plaintiff's attorneys confirmed his intent to waive the previously vacated costs:

> *The Court*: So on your motion you have taxable costs $12887.
>
> *Plaintiff's Counsel I*: Correct.
>
> *Plaintiff's Counsel II*: That does not include anything pre-verdict. Okay. Just for the purpose of getting it over and to save the time of going item-by-item, I say forget about it. Okay.
>
> *The Court*: You are waiving the $12878 [sic].
>
> *Plaintiff's Counsel II*: No, no. That is pre [sic].

The Court: That is what I'm asking. Let's go through your numbers again.

Plaintiff's Counsel II: All right.

The Court: You have your amendment [sic] judgment $311767?

Plaintiff's Counsel II: That included the $8600 that the Court of Appeals remanded. So I'm saying take the $8600 off that number.

Based upon the above statements, plaintiff was fully aware of his right to review the costs vacated by this Court item-by-item, and explicitly and voluntarily waived that right in favor of addressing his motion for additional fees and costs. Plaintiff had a clear understanding of the right that he was waiving, and accordingly, the trial court did not err in determining that plaintiff waived argument with regard to the costs vacated by this Court. See *Reed*, 293 Mich App at 176, citing *Sweebe*, 474 Mich at 157.

Plaintiff contends that his waiver was conditioned on the court granting his request for additional fees and costs, and that since the court did not ultimately grant his request, he did not waive the vacated costs. A plain reading of the November 16, 2014 transcript, however, suggests that plaintiff waived the vacated costs to "save time," and in consideration of his ability to address the new fees and costs instead. Plaintiff most certainly received the benefit of that bargain, regardless of whether his motion was actually granted. Additionally, plaintiff failed to produce any evidence consistent with this Court's remand order that would serve as a basis for allowance by the trial court of the $8,489.96.

Plaintiff also contends that, assuming arguendo that the vacated costs were waived, plaintiff still requested an additional $12,887.25 in costs in his November 14, 2016 supplemental motion, and those costs should have been addressed by the trial court. For the reasons articulated above, however, those post-December 31, 2014 costs were undoubtedly outside the scope of the remand and untimely requested. Moreover, we note that the issue of taxable costs is moot. Despite being outside the scope of the remand and untimely, the issue of additional costs has been rendered entirely moot by the trial court's decision to allow plaintiff to keep an excess $30,538.23, tendered by State Farm, over the actual award contained in the second amended judgment of sentence. Even were the trial court to award plaintiff the costs vacated by this Court *and* the additional costs requested in his supplemental motion, plaintiff still has already received $10,000 more than that judgment would have prescribed.

Affirmed. Defendant having prevailed in full may tax costs. MCR 7.219(A).

/s/ Stephen L. Borrello
/s/ Mark T. Boonstra

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M. J. KELLY, J. (*concurring*).

I concur in the result only.

/s/ Michael J. Kelly