STATE OF MICHIGAN

COURT OF APPEALS

ESTATE OF BURR NEEDHAM, Deceased, by ALAN MAY as Personal Representative,

Plaintiff-Appellee/Cross-Appellant,

v

MERCY MEMORIAL NURSING CENTER, a/k/a MONROE COMMUNITY HEALTH SERVICES,

Defendant-Appellant/Cross-Appellee,

and

ARUN GUPTA, M.D., WILLINE BELOW, L.P.N., RETA OBLINGER, L.P.N., S. SCOTT, L.P.N., TINA DALE, L.P.N. and JULIE CEBINA, L.P.N.,

Defendants.

UNPUBLISHED
October 3, 2013

No. 303999
Monroe Circuit Court
LC No. 05-19213-NH

ESTATE OF BURR NEEDHAM, Deceased, by ALAN MAY as Personal Representative,

Plaintiff-Appellee,

v

ARUN GUPTA, M.D.,

Defendant-Appellant,

and

MERCY MEMORIAL NURSING CENTER, a/k/a MONROE COMMUNITY HEALTH SERVICES, WILLINE BELOW, L.P.N., RETA OBLINGER, L.P.N., S. SCOTT, L.P.N., TINA DALE, L.P.N.

No. 304832
Monroe Circuit Court
LC No. 05-19213-NH

and JULIE CEBINA, L.P.N.,

Defendants.

Before: MURPHY, C.J., and JANSEN and MURRAY, JJ.

PER CURIAM.

In Docket No. 303999, defendant Mercy Memorial Nursing Center a/k/a Monroe Community Health Services, appeals as of right a judgment of no cause of action against defendant Arun Gupta, M.D., and plaintiff Estate of Burr Needham by Alan A. May, personal representative cross appeals. We affirm the jury's verdict, vacate the jury's economic damages award, and remand for application of the lower tiered cap to the noneconomic damages. In Docket No. 304832, Gupta appeals as of right the trial court's order denying case evaluation sanctions and costs. We affirm the trial court's order in that appeal.

I. FACTUAL BACKGROUND & PROCEEDINGS

In *Needham v Mercy Mem Nursing Ctr*, unpublished opinion per curiam of the Court of Appeals, issued January 20, 2009 (Docket No. 280174), unpub op, pp 1-2, this Court previously summarized the relevant facts of this case:

> Decedent [Burr Needham] fractured his hip on April 24, 2002. He received non-surgical treatment from the University of Michigan Hospital and was transferred on April 26, 2002, to defendant Mercy Memorial Nursing Center (Mercy Memorial) for rehabilitation. Decedent had not been a candidate for surgical treatment due to existing health problems, which included, in part, diabetes, coronary artery disease, Parkinson's disease, and orthostatic hypotension. Although decedent was alert and oriented upon admission to Mercy Memorial, his health began to decline fairly rapidly, and he died on May 2, 2002.
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> When decedent was admitted to Mercy Memorial, he was considered "full code," meaning that the nursing home should take all possible steps to revive him in an emergency situation. He did not, however, sign the paperwork indicating his resuscitation preferences; rather, "full code" was a default status. Decedent was treated with narcotic medications to ease his pain upon admission to Mercy Memorial and throughout his entire stay. As decedent's health began to decline, defendant Dr. Arun Gupta[1] recommended that decedent be transferred to a hospital for testing and diagnosis. At around this time, decedent's wife, Betty Needham, began making healthcare decisions for decedent under a durable power of attorney (DPOA). Mrs. Needham refused to have decedent transferred to a hospital setting for testing, stating that as a Jehovah's Witness, decedent would not want additional medical procedures to be undertaken.

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[1] Dr. Gupta was decedent's attending physician and the medical director at Mercy Memorial.

> Mrs. [Betty] Needham, [decedent's wife,] while refusing to consent to the decedent's transfer to a hospital, did permit the nursing home to continue administering pain relief medications to her husband. Mrs. Needham claimed that she was never fully informed about the seriousness of her husband's condition. Decedent's condition kept deteriorating, he continued to receive pain medications in the nursing home, and when his health worsened further on May 1, 2002, Dr. Gupta again recommended transfer to a hospital. The doctor stated that decedent would be transferred unless Mrs. Needham produced the DPOA paperwork. Mrs. Needham then brought in the DPOA and continued to refuse to allow for decedent's transfer. Dr. Gupta prescribed additional pain medications for decedent. Burr Needham died on May 2, 2002, while at Mercy Memorial.

A jury trial eventually began on plaintiff's allegations of professional negligence against Mercy Memorial and Gupta. Following plaintiff's presentation of evidence, Mercy Memorial and Gupta filed two motions for directed verdict, both of which the trial court denied. Subsequently, the jury found Mercy Memorial professionally negligent and awarded plaintiff $350,000 in economic damages, $1,500,000 in noneconomic damages for Needham's conscious pain and suffering, and $3,000,000 in noneconomic damages to Betty for the loss of society and companionship until her death. The jury returned a verdict of no cause of action against Gupta.

On September 2, 2010, the trial court entered an order of judgment against Mercy Memorial only. The trial court reduced the jury's verdict to present value and awarded plaintiff $451,935 in economic damages (including interest) and $941,316 in noneconomic damages (including interest). In January 2011, after the trial court denied Mercy Memorial's motion for JNOV or alternatively new trial and remittitur, Mercy Memorial appealed as of right the September 2, 2010, order, and plaintiff cross-appealed (Docket No. 302096).

In February 2011, Gutpa filed a motion for entry of judgment. Although plaintiff opposed the motion, on April 20, 2011, the trial court entered a judgment of no cause of action against Gupta. The order stated that the jury found no proximate causation between Gupta's action and Needham's injuries. Subsequently, Gupta filed a motion for leave to file a motion for sanctions and costs and a motion for sanctions and costs, which the trial court denied. Thereafter, Gupta appealed as of right the trial court's order denying case evaluation sanctions and costs (Docket No. 304832). Then, on May 11, 2011, Mercy Memorial appealed as of right the trial court's April 20, 2011, order of judgment of no cause of action as to Gupta (Docket No. 303999).[1]

[1] Plaintiff's assertion that this Court does not have jurisdiction is without merit. This Court's June 29, 2011, order accurately concluded that pursuant to MCR 7.202(6)(a)(i), the final order in this case was the April 20, 2011, order because it was the first order that adjudicated the rights and liabilities of all the parties. *Needham v Mercy Mem Nursing Ctr*, unpublished order of the Court of Appeals, entered June 29, 2011 (Docket Nos. 302096 & 303999).

II. ANALYSIS

A. DOCKET NO. 303999

1. DIRECTED VERDICT & JNOV

Mercy Memorial argues that the trial court erred in denying its motions for a directed verdict or JNOV regarding proximate causation and res ipsa loquitur. The granting or denial of a motion for a directed verdict and a motion for JNOV are reviewed de novo. *Sniecinski v Blue Cross & Blue Shield of Mich*, 469 Mich 124, 131; 666 NW2d 186 (2003). This Court reviews all the evidence and legitimate inferences in the light most favorable to the nonmoving party, and a motion for a directed verdict or JNOV "should be granted only if the evidence viewed in this light fails to establish a claim as a matter of law." *Id*. In determining whether a directed verdict or JNOV is appropriate, the question is for the jury, and the trial court cannot substitute its judgment for that of the jury when the evidence leads reasonable jurors to disagree. *Moore v Detroit Entertainment, LLC*, 279 Mich App 195, 202; 755 NW2d 686 (2008); *Foreman v Foreman*, 266 Mich App 132, 136; 701 NW2d 167 (2005).

a. PROXIMATE CAUSATION

"In a medical malpractice case, the plaintiff bears the burden of proving: (1) the applicable standard of care; (2) breach of that standard by the defendant; (3) an injury; and (4) proximate causation between the alleged breach and the injury." *Gonzalez v St John Hosp & Medical Ctr*, 275 Mich App 290, 294; 739 NW2d 392 (2007) (quotation marks and citation omitted). The applicable standard for proximate causation has been statutorily defined by MCL 600.2912a(2), which provides, in part, that "the plaintiff has the burden of proving that he or she suffered an injury that more probably than not was proximately caused by the negligence of the defendant or defendants." In *Ykimoff v Foote Mem Hosp*, 285 Mich App 80, 87; 776 NW2d 114 (2009), this Court provided the general principles regarding causation in a medical malpractice case:

> "Proximate cause" is a term of art that encompasses both cause in fact and legal cause. "Generally, an act or omission is a cause in fact of an injury only if the injury could not have occurred without (or 'but for') that act or omission." Cause in fact may be established by circumstantial evidence, but the circumstantial evidence must not be speculative and must support a reasonable inference of causation. "'All that is necessary is that the proof amount to a reasonable likelihood of probability rather than a possibility. The evidence need not negate all other possible causes, but such evidence must exclude other reasonable hypotheses with a fair amount of certainty.'" Summary disposition[2]

[2] This Court reviews a motion for directed verdict and/or JNOV under the same standards as a motion for summary disposition because the differences in the motions are merely procedural. *Skinner v Square D Co*, 445 Mich 153, 165 n 9; 516 NW2d 475 (1994) ("While some of these cases involve a motion for directed verdict, the test regarding the sufficiency of causal proof is

> is not appropriate when the plaintiff offers evidence that shows "that it is more likely than not that, but for defendant's conduct, a different result would have been obtained." [Quotation marks and citations omitted; footnote added.]

When a plaintiff relies upon circumstantial evidence to establish proximate causation, "the evidence must lead to a reasonable inference of causation and not mere speculation. In addition, the causation theory must demonstrate some basis in established fact." *Ykimoff*, 285 Mich App at 87-88. In other words, "when circumstantial evidence is relied on, it must provide a 'reliable basis from which reasonable minds could infer that more probably than not, but for' the wrong or negligence an injury would not have occurred." *Id*. at 88, quoting *Skinner v Square D Co*, 445 Mich 153, 170-171; 516 NW2d 475 (1994).

After viewing the evidence and reasonable inferences in the light most favorable to plaintiff, we hold that the trial court properly denied Mercy Memorial's motion for a directed verdict or JNOV on the causation issue. Plaintiff's circumstantial evidence admitted through the expert testimony of Dr. Carl Schmidt, a forensic pathologist, provided a reliable basis from which reasonable minds could infer that, more probably than not, but for the negligence of Mercy Memorial employees, Needham's death would not have occurred. Specifically, Schmidt testified that Needham died of acute morphine intoxication and that the acute morphine intoxication was the result of a large dose of morphine administered within a few hours of Needham's death. Plaintiff also established that a Mercy Memorial nurse was the only person able to access the morphine when Needham died. In that regard, Nurse Willine Below, Mercy Memorial's nursing supervisor, testified that all narcotics, including morphine, were locked in the narcotics drawer. The narcotics drawer had a separate key and only the floor nurse on duty, Tina Dale, would have the key to unlock the narcotics drawer. Thus, there is a reasonable inference that but for the actions of Mercy Memorial, Needham would not have died from acute morphine intoxication.

Mercy Memorial erroneously contends that plaintiff's failure to prove whether the administration of morphine was parenteral[3] or oral is fatal to establishing proximate causation. Schmidt testified that Needham received a large dose of morphine shortly before his death. Schmidt also admitted that while the dose was probably administered parenterally, it could have also been administered orally. Because the evidence supports a finding that the morphine was in the exclusive control of Mercy Memorial's nursing staff, and Needham died from acute morphine intoxication, plaintiff's inability to prove whether the administration of morphine was parenterally or oral is not fatal to this case. Rather, the circumstantial evidence allows a reasonable inference that a Mercy Memorial nurse negligently administered a large dose of morphine to Needham, and that dose caused his death. The trial court properly denied Mercy Memorial's motion for a directed verdict and JNOV.

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essentially the same in the contexts of summary judgment and directed verdicts, namely, whether reasonably minds, taking the evidence in a light most favorable to the nonmovant, could reach different conclusions regarding a material fact.").

[3] "Parenteral" means the medicine was injected into the patient either intravenously or intramuscularly.

b. RES IPSA LOQUITUR

The doctrine of res ipsa loquitur, which is Latin for "the thing speaks for itself," is defined as the "[r]ebuttable presumption or inference that defendant was negligent, which arises upon proof that the instrumentality causing injury was in defendant's exclusive control, and that the accident was one which ordinarily does not happen in absence of negligence." *Woodard v Custer*, 473 Mich 1, 6 n 2; 702 NW2d 522 (2005) (quotation marks and citation omitted). There are four factors needed to establish res ipsa loquitur:

> "(1) the event must be of a kind which ordinarily does not occur in the absence of someone's negligence;
>
> (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant;
>
> (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff"; and
>
> (4) [e]vidence of the true explanation of the event must be more readily accessible to the defendant than to the plaintiff." [*Woodard*, 473 Mich at 7, quoting *Jones v Porretta*, 428 Mich 132, 150-151; 405 NW2d 863 (1987) (quotation marks omitted).]

In medical malpractice cases, "the crucial element, and that most difficult to establish, will often be the first factor, i.e., that the event is of a kind that does not ordinarily occur in the absence of negligence. A bad result will not itself be sufficient to satisfy that condition." *Locke v Pachtman*, 446 Mich 216, 230-231; 521 NW2d 786 (1994) (emphasis deleted). "This does not mean that a bad result cannot be presented by plaintiffs as part of their evidence of negligence, but, rather, that, standing alone, it is not adequate to create an issue for the jury." *Id*. at 231 (quotation marks and citation omitted). "Something more is required, be it the common knowledge that the injury does not ordinarily occur without negligence or expert testimony to that effect." *Id*. (quotation marks and citation omitted; emphasis deleted). "Therefore, the fact that the injury complained of does not ordinarily occur in the absence of negligence must either be supported by expert testimony or must be within the common understanding of the jury." *Id*.

Mercy Memorial argues that plaintiff failed to satisfy the first element needed to use the res ipsa loquitur doctrine because he was required to provide expert testimony regarding whether acute morphine intoxication can occur in the absence of negligence while a patient is receiving morphine for pain management.[4] In *Locke*, 446 Mich at 231-232, the Michigan Supreme Court,

[4] As will be discussed in section II.A.2., Mercy Memorial's argument that res ipsa loquitur cannot be used for an intentional tort is misplaced because plaintiff's medical malpractice claim was not converted into a battery claim.

in discussing the first element needed to rely upon the res ipsa loquitur doctrine, concluded that leaving a needle within an incision is carelessness, from which negligence may be easily discerned without expert testimony. But, the Court concluded, a surgeon leaving a needle that broke off during surgery after unsuccessfully looking for the needle tip is an event from which a person could not reasonably ascertain whether the event would occur in the absence of negligence. *Id*. Similarly, in this case, expert testimony was not needed to establish the first element because it is within the common understanding that the proper administration of prescribed morphine does not lead to death in the absence of negligence. Instead, plaintiff's circumstantial evidence establishing that Needham died of acute morphine intoxication while under Mercy Memorial's exclusive care and control was sufficient to create an inference of negligence.

Finally, Mercy Memorial erroneously argues that the third element of res ipsa loquitur was not satisfied because Betty voluntarily contributed to Needham's injury by refusing to transport him to the hospital. To begin, Betty is not a party in this case, and thus, her actions are not a factor in determining whether to apply the res ipsa loquitur doctrine. Moreover, since Mercy Memorial disputes that Needham's death was the result of its negligence, it has failed to adequately explain how Betty's refusal to remove Needham from Mercy Memorial's care contributed to his death. The trial court properly denied Mercy Memorial's motion for directed verdict and JNOV.

2. "HOMICIDE" EVIDENCE & JURY INSTRUCTION

Mercy Memorial argues that the trial court erred in allowing the word "homicide" into evidence and in the wording of the curative "homicide" jury instruction. Unpreserved evidentiary issues are reviewed for plain error affecting substantial rights. *Lenawee Co v Wagley*, 301 Mich App 134, __ ; __ NW2d __ (Docket No. 311255, issued May 21, 2013), slip op, p 16. The trial court's denial of a requested special jury instruction is reviewed de novo. *Hardrick v Auto Club Ins Ass'n*, 294 Mich App 651, 679; 819 NW2d 28 (2011).

Under MRE 402, only relevant evidence is admissible. *Wayne Co v Mich State Tax Comm*, 261 Mich App 174, 196; 682 NW2d 100 (2004). MRE 401 defines relevant evidence as "evidence having 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." But, relevant evidence may be excluded "'if its probative value is substantially outweighed by the danger of unfair prejudice[.]'" *Id.* at 196, quoting MRE 403.

Regarding plaintiff's use of the word "homicide" during his opening statement, it is well-settled that the remarks of counsel during a trial are not evidence. *Guerrero v Smith*, 280 Mich App 647, 658-659; 761 NW2d 723 (2008). Furthermore, any prejudice resulting from an improper comment or argument is cured by an instruction from the trial court that the statements and remarks of counsel are not evidence. *Id*. at 659, citing *Tobin v Providence Hosp*, 244 Mich App 626, 641; 624 NW2d 548 (2001). In this case, the trial court instructed the jury that the attorneys' statements and arguments were not evidence. Thus, there is no error because plaintiff's use of the word "homicide" was not part of the evidence, and regardless, any alleged error was cured by the trial court's instruction.

Mercy Memorial also cites to the testimony of Schmidt, and nurses Julie Cebina and Mary Bold, as prejudicial and inflammatory because their testimonies implied that the alleged negligent act in this case—an overdose of morphine—was intentional, and thus actually a battery. Likewise, Mercy Memorial asserts that it was error for the medical examiner's death certificate and autopsy reports to be admitted into evidence without the redaction of the references to morphine overdose, injection, and homicide. After reviewing the cited testimony and records, we cannot conclude that this evidence amounted to plaintiff presenting evidence of an intentional tort as opposed to a negligence action. Instead, this evidence highlights that Mercy Memorial committed an error, and that error led to Needham's death by acute morphine intoxication. While it is true that Mercy Memorial's nurses administered morphine to Needham, this act alone does not elevate a negligence claim to a battery claim. There is no evidence that a nurse intended to overdose Needham with morphine. Instead, the evidence presented at trial highlights that Mercy Memorial's nurses made a mistake or error in their record keeping and administering of the morphine, and that error led to Needham receiving more morphine than actually ordered. In other words, the act of administering morphine was not the basis of plaintiff's claim; rather, plaintiff's allegation was that Mercy Memorial's nurses failed to accurately administer the correct amount of morphine. Consequently, and consistent with this Court's prior opinion, plaintiff presented evidence to support his medical malpractice claim that Mercy Memorial was professionally negligent in the administration of morphine to Needham.

As a corollary argument, Mercy Memorial contends that the trial court erred when it refused to add to the curative instruction that no criminal charges had been filed against Mercy Memorial or its employees. Mercy Memorial argues that without this sentence, the instruction assisted plaintiff in presenting a battery claim.

> The trial court has discretion to give additional instructions not covered by the standard jury instructions as long as they are applicable and accurately state the law and are concise, understandable, conversational, unslanted, and nonargumentative. A supplemental instruction need not be given if it would add nothing to an otherwise balanced and fair jury charge and would not enhance the ability of the jury to decide the case intelligently, fairly, and impartially.
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> On appeal, jury instructions are reviewed in their entirety, rather than extracted piecemeal to establish error in isolated portions. There is no error requiring reversal, if on balance, the theories of the parties and the applicable law were fairly and adequately presented to the jury. The trial court's decision regarding supplemental instructions will not be reversed unless failure to vacate the verdict would be inconsistent with substantial justice. [*Mull v Equitable Life Assurance Society of the United States*, 196 Mich App 411, 422-423; 493 NW2d 447 (1992) (citations omitted).]

The disputed sentence, which Mercy Memorial argues that the trial court improperly excluded from the curative instruction, was: "None of the involved nurses or Dr. Gupta were ever charged criminally for the death of Mr. Needham." The curative instruction read by the trial court to the jury provided:

> Ladies and Gentlemen of the jury, you're going to be hearing statements or viewing documents using the word "homicide". In this case homicide has a very specific meaning in the context of autopsies and medical examiner reports. When you hear the word "homicide" it does not mean that this case involves an intentional killing, murder, euthanasia, or other intentional act that resulted in Mr. Needham's death, because it does not.
>
> This case has been filed as a medical malpractice/wrongful death matter, which involves questions of whether the medical and nursing care breached the standard of care resulting in Mr. Needham's death.
>
> So homicide in this case means a person caused the death of another person by their actions.

The curative instruction regarding homicide was not inconsistent with substantial justice. The instruction contained the applicable law, and it was fairly and adequately presented to the jury. Moreover, the instruction specifically removed intentional acts from the definition of "homicide" by clearly stating that homicide did not mean an intentional killing, murder, euthanasia, or other intentional act. Consequently, the instruction removed any battery-based associations from the jury's consideration and assisted the jury in coming to a fair and impartial decision. Thus, the entire instruction was fair, concise, and unslanted. The trial court acted within its discretion in declining to add to the instruction that no criminal charges had been filed against Mercy Memorial or its employees.

3. DPOA EVIDENCE & JURY INSTRUCTION

Mercy Memorial asserts that the trial court erred in ruling that the durable power of attorney (DPOA) was not effective until presented to Mercy Memorial and in instructing the jury on this issue. Preserved evidentiary issues are reviewed for an abuse of discretion, *Lenawee Co*, 301 Mich App at __ (slip op at 16), and issues of statutory interpretation are reviewed de novo, *In re Temple Marital Trust*, 278 Mich App 122, 128; 748 NW2d 265 (2008). "Claims of instructional error are generally reviewed de novo on appeal." *Silberstein v Pro-Golf of America, Inc*, 278 Mich App 446, 451; 750 NW2d 615 (2008). But, "[t]he determination whether a supplemental instruction is applicable and accurate is within the trial court's discretion." *Id*. Also, an instructional error will not be reversed unless failure to vacate the verdict would be inconsistent with substantial justice. *Guerrero*, 280 Mich App at 660.

"A primary purpose of a power of attorney is to evidence the delegation of authority to perform particular legal acts, which the principal could personally perform, to an appointed agent." *Persinger v Holst*, 248 Mich App 499, 504; 639 NW2d 594 (2001). MCL 700.5506(3), the statute regarding the designation of a patient advocate, provides:

> (3) A patient advocate designation under this section must be in writing, signed, witnessed as provided in subsection (4), dated, executed voluntarily, and, *before its implementation, made part of the patient's medical record with*, as applicable, the patient's attending physician, the mental health professional providing treatment to the patient, *the facility where the patient is located*, or the

> community mental health services program or hospital that is providing mental health services to the patient. The patient advocate designation must include a statement that the authority conferred under this section is exercisable only when the patient is unable to participate in medical or mental health treatment decisions, as applicable, and, in the case of the authority to make an anatomical gift as described in subsection (1), a statement that the authority remains exercisable after the patient's death. [Emphasis added.]

In this case, Mercy Memorial complains that it was not permitted to elicit testimony from its nursing expert, Bold, regarding whether Mercy Memorial's nurses violated the standard of care when they did not transfer Needham on April 30, 2002, based on Betty's wishes. After reviewing Bold's testimony, we conclude that the trial court did not abuse its discretion in limiting Mercy Memorial's standard of care questioning to the information available in the chart. As concluded by the trial court, according to MCL 700.5506(3), a DPOA must be presented to a medical provider before it can be implemented. There is no dispute that Betty did not present the DPOA paperwork to Mercy Memorial until the morning of May 1, 2002. Consequently, in determining whether to send Needham to the hospital on April 30, 2002, Mercy Memorial's nurses were not permitted to rely upon Betty's authority as the patient advocate *through the DPOA*.

Nonetheless, Mercy Memorial argues that because Betty was Needham's next of kin, its nurses were permitted to rely up on Betty's wishes of not transferring Needham to a hospital. Thus, Mercy Memorial erroneously contends that it should have been permitted to introduce evidence through Bold that its nurses also acted within the standard of care in relying on Betty's wishes and not transferring Needham to the hospital. As noted, Gupta specifically testified that it was because Betty claimed to have DPOA papers (but did not have them with her) that Needham was not transferred to the hospital. Because Mercy Memorial relied upon Betty's authority under the DPOA, the trial court correctly concluded that it was to decide the issue of when the DPOA was effective as a matter of law. See *Reed v Yackell*, 473 Mich 520, 528; 703 NW2d 1 (2005) (the interpretation of a statute is a question of law). Consequently, regardless of Betty's relationship to Needham, according to the statute, Mercy Memorial was required to obtain the DPOA paperwork before implementing Betty's decisions. MCL 700.5506(3).[5]

4. JURY VERDICT FORM

Mercy Memorial argues that the trial court abused its discretion in declining to individually list Mercy Memorial's nurses on the jury verdict form. "Claims of instructional

[5] For this reason we also reject Mercy Memorial's corollary argument that the trial court erred in instructing the jury that the DPOA was not valid until Mercy Memorial received the paperwork. The trial court's jury instruction was: "Now, in this case the Court has previously ruled that a durable power of attorney, sometimes referred to as a DPOA, is not effective for the purposes of providing and/or withholding medical care and treatment until such time it has been given to the pertinent medical provider." This was a correct statement of the law, and thus, it was properly read to the jury.

error are generally reviewed de novo on appeal." *Silberstein*, 278 Mich App at 451. "If the jury charge is erroneous or inadequate, reversal is required only where failure to reverse would be inconsistent with substantial justice." *Willoughby v Lehrbass*, 150 Mich App 319, 336; 388 NW2d 688 (1986), citing *Johnson v Corbet*, 423 Mich 304, 327; 377 NW2d 713 (1985); MCR 2.613(A). But, the trial court's decision to use a special verdict form is reviewed for an abuse of discretion. *Wengel v Herfert*, 189 Mich App 427, 435; 473 NW2d 741 (1991). "Jury instructions are reviewed in their entirety to determine whether they accurately and fairly presented the applicable law and the parties' theories." *Guerrero*, 280 Mich App at 660.

In this case, Mercy Memorial argues that *Cox v Bd of Hosp Managers for City of Flint*, 467 Mich 1, 19-22; 651 NW2d 356 (2002), requires each nurse to be individually named on the jury's verdict form in order to hold it vicarious liable. In *Cox*, a baby was born premature. While the baby was in the neonatal intensive care unit, a nurse drew blood from the baby's umbilical arterial catheter and the baby was repositioned. About 20 minutes later, it was discovered that the umbilical arterial catheter had dislodged and the baby had lost half of his blood supply. Efforts were made to stop the bleeding, and a few days later, the baby was transferred to Children's Hospital. Ultimately, the baby was diagnosed with cerebral palsy and mild mental retardation. The plaintiffs sued the defendants, and the jury found in favor of the plaintiffs. *Id*. at 5-7. On appeal, the issue was whether the trial court erred in modifying the standard of care jury instruction by substituting "hospital neonatal intensive care unit" for the specific professions or specialties at issue. *Id*. at 9-10.

The Michigan Supreme Court reversed the trial court's instruction, holding that "in order to find a hospital liable on a vicarious liability theory, the jury must be instructed regarding the specific agents against whom negligence is alleged and the standard of care applicable to each agent." *Cox*, 467 Mich at 15. Specifically, the *Cox* Court concluded:

> In other words, the principal "is only [vicariously] liable because the law creates a practical identity with his [agents], so that he is held to have done what they have done." [*Smith v Webster*, 23 Mich 298, 300 (1871).] See also *Ducre v Sparrow-Kroll Lumber Co*, 168 Mich 49, 52; 133 NW 938 (1911).
>
> Applying this analysis, [the] defendant hospital can be held vicariously liable for the negligence of its employees and agents only. The "neonatal intensive care unit" is neither an employee nor an agent of defendant. At most, it is an organizational subsection of the hospital, a geographic location within the hospital where neonates needing intensive care are treated. No evidence in the record suggests that the neonatal intensive care unit acts independently or shoulders any independent responsibilities. Therefore, because no evidence exists that the neonatal intensive care unit itself is capable of any independent actions, including negligence, it follows that the unit itself could not be the basis for defendant's vicarious liability.
>
> The negligence of the agents working in the unit, however, could provide a basis for vicarious liability, provided plaintiffs met their burden of proving (1) the applicable standard of care, (2) breach of that standard, (3) injury, and (4) proximate causation between the alleged breach and the injury *with respect to*

> *each agent alleged to have been negligent.* The phrase "neonatal intensive care unit" is not mere shorthand for the individuals in that unit; rather, plaintiffs must prove the negligence of at least one agent of the hospital to give rise to vicarious liability. Instructing the jury that it must only find the "unit" negligent relieves plaintiffs of their burden of proof. Such an instruction allows the jury to find defendant vicariously liable without specifying which employee or agent had caused the injury by breaching the applicable standard of care. [*Cox*, 467 Mich at 11-12 (footnote omitted; emphasis in the original).]

In other words, the Supreme Court found error because "[t]he 'unit' instruction failed to ensure that the jury clearly understood 1) which agents were involved, and 2) that it could find professional negligence or malpractice only on the basis of the particular standard of care applicable to each employee's profession or specialty." *Cox*, 467 Mich at 14-15 (footnote omitted).

In this case, the jury's verdict form did not comply with the *Cox* Court's requirements. The jury verdict form stated:

> 1. Was Defendant Mercy Memorial Nursing Center via its nurses professionally negligent in the care and treatment of Burr Needham in one or more ways claimed by Plaintiff?

While it is true the verdict form only presented one standard of care (nursing), it only generally named the group of agents that were involved in the alleged negligence (Mercy Memorial's nurses), and therefore, it "allow[ed] the jury to find defendant vicariously liable without specifying *which* employee or agent had caused the injury by breaching the applicable standard of care." *Cox*, 467 Mich at 12 (emphasis added; footnote omitted). Consequently, the verdict form "failed to specify which agents were involved" and thus "effectively relieved [the] plaintiffs of their burden of proof and was not specific enough to allow the jury to decide the case intelligently, fairly, and impartially." *Id.* at 15 (quotation marks and citation omitted).[6]

However, reversal is not required because the error is not inconsistent with substantial justice. Unlike the plaintiff in *Cox*, plaintiff's complaint named both Mercy Memorial and five of Mercy Memorial's licensed practical nurses as defendants, and plaintiff employed the res ipsa loquitur doctrine at trial, thereby raising an inference of negligent conduct on the part of Mercy Memorial through at least one of the five named nurses. See *Cox*, 467 Mich at 14 n 14. Consequently, because plaintiff presented evidence that Needham died from acute morphine intoxication while under the exclusive care and control of Mercy Memorial, it can be ascertained that the jury found at least one of Mercy Memorial's nurses professionally negligent and the error is harmless. *Id.*

[6] The actual jury instructions also did not identify any of the individual nurses whom plaintiff alleged committed the negligent act.

5. REMITTITUR OF ECONOMIC DAMAGES

Mercy Memorial asserts that the trial court erred in denying its motion for remittitur of economic damages. The granting or denial of a motion for new trial or remittitur is reviewed for abuse of discretion. *Shaw v Ecorse*, 283 Mich App 1, 16-17; 770 NW2d 31 (2009). "An abuse of discretion occurs when a court chooses an outcome that is outside the range of principled outcomes." *Heaton v Benton Constr Co*, 286 Mich App 528, 538; 780 NW2d 618 (2009). This Court views the evidence in the light most favorable to the nonmoving party. *Silberstein*, 278 Mich App at 462. Due deference must be given to the trial court's decision because of its ability to evaluate the credibility of the testimony and evidence presented to the jury. *Unibar Maintenance Serv, Inc v Saigh*, 283 Mich App 609, 629-630; 769 NW2d 911 (2009).

Courts should exercise the power of remittitur with restraint. *Taylor v Kent Radiology, PC*, 286 Mich App 490, 522; 780 NW2d 900 (2009). Thus, the jury's verdict should not be disturbed when the economic damages award falls within the reasonable range of evidence and it is within the limits of what reasonable minds would consider just compensation. *Silberstein*, 278 Mich App at 462. "A verdict should not be set aside simply because the method of computation used by the jury in assessing damages cannot be determined, unless it is not within the range of evidence presented at trial[,]" *Diamond v Witherspoon*, 265 Mich App 673, 694; 696 NW2d 770 (2005), and the highest possible amount that the evidence will support should be awarded on remittitur, *Heaton*, 286 Mich App at 539, citing MCR 2.611(E)(1). "Further, the certainty necessary to establishing the amount of damages is less once the fact of damages is established." *Unibar*, 283 Mich App at 634.

Nevertheless, "appellate review of jury verdicts must be based on objective factors and firmly grounded in the record." *Freed v Salas*, 286 Mich App 300, 334; 780 NW2d 844 (2009) (quotation marks and citations omitted; emphasis deleted). "In determining whether remittitur is appropriate, a trial court must decide whether the jury award was supported by the evidence. This determination must be based on objective criteria relating to the actual conduct of the trial or the evidence presented." *Silberstein*, 278 Mich App at 462 (citation omitted).

> Our Supreme Court has indicated that the [objective] factors that should be considered by this Court are: (1) whether the verdict was the result of improper methods, prejudice, passion, partiality, sympathy, corruption, or mistake of law or fact; (2) whether the verdict was within the limits of what reasonable minds would deem just compensation for the injury sustained; and (3) whether the amount actually awarded is comparable with awards in similar cases both within the state and in other jurisdictions. [*Freed*, 286 Mich App at 334 (citation omitted).]

On appeal, Mercy Memorial argues that remittitur is appropriate because there was no evidence establishing the loss of services or the loss of financial support. In looking at the evidence related to economic damages presented at trial, we agree there is not sufficient evidence to support the jury's verdict of $350,000 for economic damages because the award does not fall "reasonably within the range of the evidence and within the limits of what reasonable minds would deem just compensation[.]" *Silberstein*, 278 Mich App at 462.

To begin, as conceded by plaintiff at oral argument, plaintiff waived the loss of financial support as an economic damage. Specifically, about one month before trial, plaintiff's counsel stated to the court that "we are not going to be asserting a claim for a loss of wages or a loss of earnings." While plaintiff's counsel went on to say, "I don't want to waive all economic damages until I look at it one more time before trial," he also indicated that "as I sit here before you right now, Judge, I don't even know of an economic damage that we have." Thus, although plaintiff did not waive a claim for all economic damages, plaintiff cannot use the loss of wages or earnings as a basis for economic damages because a party is bound by his attorney's waiver. *Sampeer v Boschma*, 369 Mich 261, 266; 119 NW2d 607 (1963).

The evidence also fails to establish the existence of the loss of services as economic damages. Specifically, Betty and both of her daughters, Joy Peoples and Maria Martin, testified that Betty exclusively maintained the household without Needham's assistance. And, plaintiff has provided no citation to the record supporting the argument that evidence of economic damages existed.

The jury's verdict form also indicates that plaintiff sought burial expenses and the loss of gifts or other valuable gratuities as part of economic damages. However, there was no evidence of burial expenses, as Joy and Maria testified that no memorial service was held for Needham. Instead, he was cremated and no evidence of the cost of cremation was admitted. Finally, while the loss of gifts or other valuable gratuities may be considered an economic damage in a medical malpractice case, see *Taylor*, 286 Mich App at 520, quoting MCL 600.2945(c) (there are several types of economic damages available in medical malpractice cases, including "other objectively verifiable monetary losses"), no evidence was presented to support this award. Specifically, while Maria and Joy testified that Needham continuously gave Betty gifts, no numerical figures were provided to allow the jury to perform the calculation of this damage. See *Shivers v Schmiege*, 285 Mich App 636, 643-645; 776 NW2d 669 (2009). The jury's verdict does not fall within the reasonable range of evidence or within the limits of just compensation. Therefore, the trial court abused its discretion in denying Mercy Memorial's motion for remittitur regarding economic damages. We vacate the entire economic damages award because plaintiff waived part of the economic damages, and there is no evidence to support the award.

6. STATUTORY CAP ON NONECONOMIC DAMAGES

Mercy Memorial argues that the trial court erred in applying the upper tiered cap of the noneconomic damages cap from MCL 600.1483(1). The interpretation and application of a statute is a question of law that is reviewed de novo. *Shivers*, 285 Mich App at 646. "However, in deciding whether plaintiff's injuries qualify for the higher cap, 'the trial court is the finder of fact with regard to these unique elements of damage." *Id*. (citation omitted).

"The goal of statutory interpretation is to give effect to the intent of the Legislature." *Ykimoff*, 285 Mich App at 110. "If statutory language 'is clear and unambiguous, judicial construction is neither required nor permitted, and courts must apply the statute as written.'" *Id*. at 110-111 (citation omitted). "It is a fundamental rule of statutory construction that unless defined in the statute, a word or phrase used in a statute should be accorded its plain and ordinary meaning." *Shivers*, 285 Mich App at 647.

In a wrongful death medical malpractice action, noneconomic damages are limited by MCL 600.1483. *Jenkins v Patel*, 471 Mich 158, 165-166; 684 NW2d 346 (2004) remanded 263 Mich App 508 (2004) ("[A] wrongful death action grounded in medical malpractice is a medical malpractice action in which the plaintiff is allowed to collect damages related to the death of the decedent."). MCL 600.1483(1) provides:

> In a claim for damages alleging medical malpractice by or against a person or party, the total amount of damages for noneconomic loss recoverable by all plaintiffs, resulting from the medical malpractice of all defendants, shall not exceed $280,000.00 unless, as the result of the negligence of 1 or more of the defendants, 1 or more of the following exceptions apply as determined by the court pursuant to section 6304, in which case damages for noneconomic loss shall not exceed $500,000.00:
>
> (a) The plaintiff is hemiplegic, paraplegic, or quadriplegic resulting in a total permanent functional loss of 1 or more limbs caused by 1 or more of the following:
>
> (*i*) Injury to the brain.
>
> (*ii*) Injury to the spinal cord.
>
> (b) The 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.
>
> (c) There has been permanent loss of or damage to a reproductive organ resulting in the inability to procreate.

Thus, according to the language of the statute, the lower tier cap in MCL 600.1483(1) applies unless the trial court determines that the upper tier cap in MCL 600.1483(1)(a), (b), or (c) applies. See MCL 600.6304(5).[7] In this case, it is clear that MCL 600.1483(1)(a) does not apply because no evidence was presented that Needham's alleged brain injury caused him to be hemiplegic, paraplegic, or quadriplegic that resulted in the loss of a limb function. See *Shivers*, 285 Mich App at 646-649 (for MCL 600.1483(1)(a) to apply, the plaintiff must show both an injury (being hemiplegic, paraplegic, or quadriplegic) and a symptom (the resulting loss of limb function)). Similarly, there is no evidence suggesting that MCL 600.1483(1)(c) applies, see *Ykimoff*, 285 Mich App at 111-112 (to apply MCL 600.1483(1)(c), the plaintiff must provide

[7] MCL 600.6304(5) provides: "In an action alleging medical malpractice, the court shall reduce an award of damages in excess of 1 of the limitations set forth in section 1483 to the amount of the appropriate limitation set forth in section 1483. The jury shall not be advised by the court or by counsel for either party of the limitations set forth in section 1483 or any other provision of section 1483."

evidence of injury to a reproductive organ and an inability to procreate). Therefore, in order for the upper tier cap to apply, there must be evidence that Needham had "permanently impaired cognitive capacity rendering him . . . incapable of making independent, responsible life decisions and permanently incapable of independently performing the activities of normal, daily living." MCL 600.1483(1)(b).

This Court has previously examined the requirements of MCL 600.1483(1)(b) and concluded that a plaintiff must present evidence establishing that one's mental ability has been forever damaged or diminished:

> Because the statute does not provide its own glossary, we may consult dictionary definitions for guidance. *Koontz v Ameritech Services, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002). First, the meaning of the word "permanent" includes "existing perpetually; everlasting." *Random House Webster's College Dictionary* (1997). The meaning of the word "impaired" includes "weakened, diminished, or damaged." *Id*. The meaning of the word "cognitive" includes "of or pertaining to the mental processes of perception, memory, judgment, and reasoning, as contrasted with emotional and volitional processes." *Id*. And, the meaning of the word "capacity" includes the "power of receiving impressions, knowledge, etc.; mental ability." *Id*.
>
> Considered together, then, 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. Turning back to MCL 600.1483(1)(b), to establish this qualifying injury 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." *Id*. And, this permanently impaired cognitive capacity must be "the result of the negligence of 1 or more of the defendants. . . ." MCL 600.1483 (1).
>
> In this case, plaintiff failed to set forth any evidence establishing that Young [the decedent] suffered permanent damage to or diminishment of her mental abilities to perceive, memorize, judge, or reason that rendered her "incapable of making independent, responsible life decisions and permanently incapable of independently performing the activities of normal, daily living" as the result of the negligence of either or both of the defendant doctors. Although Young died, death itself is not this qualifying injury.
>
> Plaintiff argues on appeal that because Young was on a ventilator and medically sedated, she suffered the requisite impaired cognitive capacity. Plaintiff also appears to argue that, during the course of her decline, Young was not able to make medical decisions on her own behalf, which was evidence of her impaired cognitive capacity. Neither of these arguments tends to establish that Young suffered permanently impaired cognitive capacity within the contemplation of the statute. *But for her clinical decline and the associated or*

> *necessary medical interventions, the evidence did not suggest that Young suffered damage to or diminishment of her mental ability to perceive, memorize, judge, or reason that was expected to be permanent*. For example, there was no evidence to suggest that, if Young had lived, she would have been incapable of making independent, responsible life decisions and that she would have been permanently incapable of performing the activities of normal, daily living. *That she may have temporarily or unnaturally experienced impaired cognitive capacity at some point before her death does not establish entitlement to the higher noneconomic damages cap*. Therefore, we reverse the trial court's award that was based on this higher cap and remand the matter for the purpose of imposing the lower cap on the noneconomic damage award pursuant to MCL 600.1483(1). [*Young v Nandi*, 276 Mich App 67, 79-81; 740 NW2d 508 (2007) vacated in part on other grounds 482 Mich 1007 (2008) (emphasis added).]

Applying the reasoning of the *Young* Court, the trial court erred in applying the upper tier cap of noneconomic damages because there is no evidence that Needham suffered permanent damage or diminishment of his mental ability to perceive, memorize, judge, or reason that rendered him incapable of making independent, responsible life decisions and independently performing the activities of normal, daily living. Rather, while the evidence revealed that Needham suffered a brain injury (the loss of brain cells from low blood pressure) and unconsciousness shortly before his death, there was no evidence establishing that had Needham lived, his mental diminishment would have been permanent, and he would not have been able to make independent, responsible life decisions or perform the activities of normal, daily living. Additionally, the evidence that Mercy Memorial's nurses turned to Betty to make Needham's medical decisions also does not establish that Needham suffered from a permanent mental inability to perceive, memorize, judge, or reason. *Young*, 276 Mich App 67, 79-81. Therefore, the lower tier cap on noneconomic damage found in MCL 600.1483(1) should have been applied by the trial court.

7. CONSTITUTIONALITY OF THE STATUTORY CAP

On cross appeal, plaintiff contends that the noneconomic damages cap from MCL 600.1483 violates his constitutional right to trial by jury, equal protection, substantive due process, and the separation of powers. In the alterative, plaintiff asserts that this Court should express disagreement with *Jenkins*, 471 Mich 158, which held that the damages cap applied to wrongful death claims that are based upon medical malpractice. Preserved constitutional issues are reviewed de novo. *Harvey v Michigan*, 469 Mich 1, 6; 664 NW2d 767 (2003).

In *Zdrojewski v Murphy*, 254 Mich App 50, 75; 657 NW2d 721 (2002), we previously upheld this statute against these same constitutional challenges. We held that MCL 600.1483 does not violate the right to a trial by jury:

> In sum, we hold that the noneconomic damages limitation of MCL 600.1483 is not a violation of plaintiff's right to a jury trial because the Legislature has the authority to limit remedies in tort actions, and the limitations of this statute impede neither plaintiff's ability to present her case to a jury nor the

jury's ability to determine the factual extent of plaintiff's damages. [*Zdrojewski*, 254 Mich App at 78.]

We likewise held that MCL 600.1483 does not violate equal protection:

> The statute at issue here [MCL 600.1483] is rationally related to a legitimate governmental purpose. The 1993 legislation that created the current finite limitation scheme was prompted by the Legislature's concern over the effect of medical liability on the availability and affordability of health care in the state. See House Legislative Analysis, SB 270 and HB 4033, 4403, and 4404, April 20, 1993, pp 1-2. The purpose of the damages limitation was to control increases in health care costs by reducing the liability of medical care providers, thereby reducing malpractice insurance premiums, a large component of health care costs. *Id.* Controlling health care costs is a legitimate governmental purpose. By limiting at least one component of health care costs, the noneconomic damages limitation is rationally related to its intended purpose. Because the noneconomic damages cap of MCL 600.1483 is rationally related to a legitimate governmental purpose, the statute does not violate plaintiff's right to equal protection. [*Zdrojewski*, 254 Mich App at 80-81.]

Additionally, because the test for equal protection and substantive due process are essential the same, and MCL 600.1483 does not violate equal protection, we also held that MCL 600.1483 does not violate due process. *Zdrojewski*, 254 Mich App at 78 n 12.

Finally we also held that the separation of powers doctrine, derived from Const 1963, art 3, § 2, was not violated by the enactment of MCL 600.1483:

> [I]t is apparent that the statutes in question reflect legislative policy considerations other than court practice and procedure. As stated above, these statutes are intended to address perceived crises in the health care system. The purpose of the statutes is to control health care costs by reducing medical malpractice liability. Because the statutes are substantive in nature, rather than procedural, they do not infringe the Supreme Court's rulemaking authority. [*Zdrojewski*, 254 Mich App at 82.]

Alternatively, plaintiff argues that *Jenkins*, 471 Mich 158, was wrongly decided and requests that this Court express disagreement with *Jenkins*. We decline to do so as a plain reading of the statutes reveals that "the medical malpractice noneconomic damages cap does apply to wrongful death actions where the underlying claim is medical malpractice." *Jenkins*, 471 Mich at 173 (footnote omitted).

B. DOCKET NO. 304832:

CASE EVALUATION SANCTIONS & COSTS

Gupta argues that the trial court erred in denying his motion for leave to file a motion for case evaluation sanctions and costs. "A trial court's decision whether to grant case evaluation sanctions presents a question of law, which this Court reviews de novo." *Tevis v Amex*

Assurance Co, 283 Mich App 76, 86; 770 NW2d 16 (2009). The interpretation and application of a court rule is also a question of law that is reviewed de novo. *Snyder v Advantage Health Physicians*, 281 Mich App 493, 500; 760 NW2d 834 (2008).

"Our goal when interpreting and applying statutes or court rules is to give effect to the plain meaning of the text." *Ligons v Crittenton Hosp*, 490 Mich 61, 70; 803 NW2d 271 (2011). When the language of a court rule is clear and unambiguous, this Court must apply the language as written. *Id*. MCR 2.403(O)(8) provides: "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 for a new trial or to set aside the judgment."

In *Braun v York Props, Inc*, 230 Mich App 138, 150-151; 583 NW2d 503 (1998), this Court clarified that, for purposes of timeliness under MCR 2.403(O)(8), a party's period for filing a motion for sanctions and costs begins to run on the day the court enters a judgment adjudicating the rights and/or liabilities of that particular party:

> In unambiguous terms, MCR 2.403(O)(8) provides that the *period for requesting costs begins on the date the court enters judgment* or the date the court enters an order denying a timely motion for a new trial or to set aside the judgment. *For purposes of the court rule*, the *judgment is the judgment adjudicating the rights and liabilities of particular parties*, regardless of whether that judgment is the final judgment from which the parties may appeal. See MCR 2.604(A). The court rule includes a provision allowing twenty-eight days after the order disposing of a motion for a new trial or to set aside the judgment in which to request sanctions because these motions may affect whether a party is entitled to the sanctions. *When these motions do not pertain to the parties involved in the request for sanctions, extending the period for filing a motion for sanctions would serve no purpose*.
>
> In this case, the trial court entered judgment for defendants on plaintiffs Kathy, Thomas, and Bryan Braun's claims on February 1, 1995, and judgment for plaintiff Nicholas Braun on February 6, 1995. Defendants' motions for a new trial, judgment notwithstanding the verdict, and remittitur were denied in an order entered March 16, 1995. However, those motions concerned only Nicholas' claims. Therefore, under MCR 2.403(O)(8), the twenty-eight day period for defendants to request mediation sanctions against Kathy, Thomas, and Bryan Braun commenced on February 1, 1995. Defendants filed their motion for mediation sanctions on April 6, 1995. Accordingly, the trial court properly denied defendants' motion as untimely. [Emphasis added.]

In this case, the jury rendered a verdict on June 24, 2010. On September 2, 2010, the trial court entered an order against Mercy Memorial only. Thereafter, Mercy Memorial filed a motion for JNOV and/or new trial, which the trial court denied on December 29, 2010. Thus, Mercy Memorial had 28 days after December 29, 2010, to file a motion for sanctions and costs under MCR 2.403(O)(8). However, contrary to plaintiff's argument, this timeline does not apply to Gupta because, although the jury rendered a verdict regarding Gupta in June 2010, the trial court's September 2, 2010, order did not adjudicate Gupta's rights. Rather, the first order

entered by the trial court adjudicating Gupta's rights occurred on April 20, 2011, when the trial court entered a judgment of no cause of action. See *In re Contempt of Henry*, 282 Mich App 656, 678; 765 NW2d 44 (2009) (it is well-established that the court speaks through its written orders). Consequently, Gupta had 28 days from April 20, 2011, to file a motion for sanctions and costs under MCR 2.403(O)(8). Gupta filed his motion for sanctions and costs on April 28, 2011, thus, his motion was timely and the trial court should have allowed the motion.

However, as detailed below, we nevertheless affirm the trial court's order because Gupta is not entitled to case evaluation sanctions or costs under MCR 2.403(O)(4). See *Taylor v Laban*, 241 Mich App 449, 458; 616 NW2d 229 (2000) (this Court will not reverse a trial court's order when the right result was reached for the wrong reason).

Although the trial court never addressed whether Gupta was entitled to case evaluation and costs under MCR 2.403(O), we will review this issue because it involves a question of law and all necessary facts for a resolution have been presented. *Gen Motors Corp v Dep't of Treasury*, 290 Mich App 355, 387; 803 NW2d 698 (2010). MCR 2.403(O)(1) provides:

> 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.

MCR 2.403(O)(4) applies when a case involves multiple parties, and it provides, in the relevant part:

> (4) In cases involving multiple parties, the following rules apply:
>
> (a) Except as provided in subrule (O)(4)(b), in determining whether the verdict is more favorable to a party than the case evaluation, the court shall consider only the amount of the evaluation and verdict as to the particular pair of parties, rather than the aggregate evaluation or verdict as to all parties. However, costs may not be imposed on a plaintiff who obtains an aggregate verdict more favorable to the plaintiff than the aggregate evaluation.
>
> (b) If the verdict against more than one defendant is based on their joint and several liability, the plaintiff may not recover costs unless the verdict is more favorable to the plaintiff than the total case evaluation as to those defendants, and a defendant may not recover costs unless the verdict is more favorable to that defendant than the case evaluation as to that defendant.

The heart of the parties' dispute centers around whether the second sentence of MCR 2.403(O)(4)(a) applies, which provides, "However, costs may not be imposed on a plaintiff who obtains an aggregate verdict more favorable to the plaintiff than the aggregate evaluation." Gupta contends that the first part of MCR 2.403(O)(4)(a), which states that "[e]xcept as provided in subrule (O)(4)(b)," applies to all of MCR 2.403(O)(4)(a), and because this case involved joint and several defendants, MCR 2.403(O)(4)(b) applies. In other words, Gupta's position is that the

individual case evaluation awards should be compared to the individual jury awards. In doing that, Gupta is clearly the prevailing party and entitled to sanctions and costs.

On the other hand, plaintiff asserts that the phrase "[e]xcept as provided in subrule (O)(4)(b)" within MCR 2.403(O)(4)(a) only applies to the first sentence of MCR 2.403(O)(4)(a) because the second sentence begins with the word "however." Consequently, plaintiff's position is that, regardless of whether defendants are jointly and severally liable, the aggregate case evaluation should be compared to the aggregate jury award. In doing that, plaintiff is clearly the prevailing party, and Gupta is not entitled to sanctions or costs.

A plain reading of MCR 2.403(O)(4) leads to the conclusion that plaintiff's argument regarding MCR 2.403(O)(4)(a) and (b) is accurate. The goal of interpreting a court rule is to "give effect to the plain meaning of the text." *Ligons*, 490 Mich at 70. This Court must apply the clear and unambiguous language of a court rule as written. *Id*. In interpretation a court rule, "common words must be understood to have their everyday, plain meaning." *Marketos v American Employers Ins Co*, 465 Mich 407, 413; 633 NW2d 371 (2001) (quotation marks and citation omitted). When a word is not specifically defined, this Court may use the dictionary definition to determine the plain meaning of the term. *Wardell v Hincka*, 297 Mich App 127, 132; 822 NW2d 278 (2012). Moreover, in construing a court rule, this Court "must avoid constructions that render any part of a court rule surplusage or nugatory." *Yudashkin v Linzmeyer*, 247 Mich App 642, 652; 637 NW2d 257 (2001). Keeping these rules of interpretation in mind, MCR 2.403(O)(4)(a) states:

> Except as provided in subrule (O)(4)(b), in determining whether the verdict is more favorable to a party than the case evaluation, the court shall consider only the amount of the evaluation and verdict as to the particular pair of parties, rather than the aggregate evaluation or verdict as to all parties. However, costs may not be imposed on a plaintiff who obtains an aggregate verdict more favorable to the plaintiff than the aggregate evaluation.

"However" is defined as "nevertheless; yet; on the other hand; in spite of that[.]" *Random House Webster's College Dictionary* (2001). This definition leads to the conclusion that the second sentence of MCR 2.403(O)(4)(a) applies in spite of the rule provided in the first sentence. In other words, the first sentence of MCR 2.403(O)(4)(a) provides that the court shall consider the amount of the evaluation and verdict to the particular parties, except when the defendants are jointly and several liable under MCR 2.403(O)(4)(b). But, because the second sentence begins with "however," the rule in the second sentence—that costs shall not be imposed on a plaintiff who obtains a more favorable aggregate verdict than aggregate evaluation—clearly applies regardless of whether the parties are jointly and severally liable under MCR 2.403(O)(4)(b).

This conclusion is consistent with the 1995 report of the Michigan Supreme Court Mediation Rule Committee. 451 Mich 1205, 1208 (1995). In discussing the consideration of an aggregate verdict in a multiple defendant case, the committee provided the following example as guidance regarding how to apply the second sentence in MCR 2.403(O)(4)(a):

> The controversy involves the last sentence. To illustrate, assume that the mediation panel awards $100,000 to Plaintiff against Defendant A and $50,000 against Defendant B. Plaintiff rejects. If at trial Plaintiff recovers a verdict of $200,000 against Defendant A and nothing against Defendant B, Defendant B has certainly obtained a verdict more favorable to it than the mediation award. However, because of the last sentence of subrule (O)(4)(a), Defendant B may not recover costs from Plaintiff. [451 Mich at 1208.]

In this case, a case evaluation awarded plaintiff $45,000 against Mercy Memorial and $5,000 against Gupta. All parties rejected the panel's awards. Following a jury trial, the jury awarded plaintiff $4,850,000 against Mercy Memorial and found no liability against Gupta. Because the second sentence of MCR 2.043(O)(4)(a) precludes sanctions and costs against a plaintiff regardless of whether joint and several liability applies when the aggregate jury verdict is more favorable than the aggregate case evaluation award, Gupta is not entitled to sanctions and costs under MCR 2.403(O)(4).

III. CONCLUSION

In Docket No. 303999, we affirm the jury's verdict, vacate the jury's economic damages award, and remand for application of the lower tier cap to the noneconomic damages. In Docket No. 304832, we affirm the trial court's order. We do not retain jurisdiction.

No costs to any party, none having prevailed in full. MCR 7.219(A).

/s/ Kathleen Jansen
/s/ Christopher M. Murray

STATE OF MICHIGAN

COURT OF APPEALS

ESTATE OF BURR NEEDHAM, Deceased, by ALAN MAY as Personal Representative,

Plaintiff-Appellee/Cross-Appellant,

v

MERCY MEMORIAL NURSING CENTER, a/k/a MONROE COMMUNITY HEALTH SERVICES,

Defendant-Appellant/Cross-Appellee,

and

ARUN GUPTA, M.D., WILLINE BELOW, L.P.N., RETA OBLINGER, L.P.N., S. SCOTT, L.P.N., TINA DALE, L.P.N. and JULIE CEBINA, L.P.N.,

Defendants.

UNPUBLISHED
October 3, 2013

No. 303999
Monroe Circuit Court
LC No. 05-19213-NH

ESTATE OF BURR NEEDHAM, Deceased, by ALAN MAY as Personal Representative,

Plaintiff-Appellee,

v

ARUN GUPTA, M.D.,

Defendant-Appellant,

and

MERCY MEMORIAL NURSING CENTER, a/k/a MONROE COMMUNITY HEALTH SERVICES, WILLINE BELOW, L.P.N., RETA OBLINGER, L.P.N., S. SCOTT, L.P.N., TINA DALE, L.P.N.

No. 304832
Monroe Circuit Court
LC No. 05-19213-NH

and JULIE CEBINA, L.P.N.,

Defendants.

Before: MURPHY, C.J., and JANSEN and MURRAY, JJ.

MURPHY, C.J. (*concurring in part and dissenting in part*).

I concur with the majority on all matters, except with respect to the analysis and holding concerning loss of financial support in connection with economic damages, and in regard to the applicable tier in MCL 600.1483 for purposes of the medical malpractice caps and noneconomic damages. On those two matters, I respectfully dissent.

We review for an abuse of discretion a trial court's decision to deny a motion for remittitur. *Taylor v Kent Radiology, PC*, 286 Mich App 490, 522; 780 NW2d 900 (2009). "The power of remittitur should be exercised with restraint." *Id.* When a trial court is evaluating a motion for remittitur, the court is required to examine all of the evidence in a light most favorable to the nonmoving party in order to determine whether the evidence supported the jury's damage award. *Id.* "'If the award falls reasonably within the range of the evidence and within the limits of what reasonable minds would deem just compensation, it should not be disturbed.'" *Id.* (citation omitted). In *Hofmann v Auto Club Ins Ass'n*, 211 Mich App 55, 108; 535 NW2d 529 (1995), this Court outlined some basic tenets regarding damages:

> A party asserting a claim has the burden of proving its damages with reasonable certainty. Although damages based on speculation or conjecture are not recoverable, damages are not speculative merely because they cannot be ascertained with mathematical precision. It is sufficient if a reasonable basis for computation exists, although the result be only approximate. Moreover, the certainty requirement is relaxed where the fact of damages has been established and the only question to be decided is the amount of damages. [Citations omitted.]

Here, there was evidence that the decedent, Burr Needham, operated his own holistic medicine business in the Gibraltar Trade Center. Needham's step-daughter testified that Needham provided financial support to her mother, Needham's wife Betty who died about five and a half years after Needham. The step-daughter indicated that Needham took care of Betty by paying for gifts, clothing, transportation, groceries, and other things needed by Betty, which all ended upon his death. Previous deposition testimony provided by Betty was read into the record at trial, and she stated that Needham's business generated approximately $48,000 per year in gross sales during his good years, although it was getting bad towards the end. Betty took over operation of the business for a couple of years following Needham's death before shuttering it. Betty testified that sales went down after she started running the business. Another one of Needham's step-daughters testified that Needham loved the business, that he had "a big customer base," and that Needham showered Betty with gifts, "always buying her something." There was no evidence that countered the testimony recited above. While lacking some precision, the

evidence firmly established that Needham had an income flow from his business and that it was used, at least in part, to support Betty.

The majority rejects any claim for economic damages predicated on lost wages, earnings, or financial support on the basis that it was waived. Plaintiff's counsel did state in a pretrial hearing that "we are not going to be asserting a claim for a loss of wages or a loss of earnings." But he then proceeded to state, "I don't want to waive all economic damages until I look at it one more time before trial." Regardless of these pretrial remarks, in closing arguments at trial, plaintiff requested an award of economic damages, including damages for "loss of . . . financial support . . . that . . . Needham was . . . giving Betty." There was no objection to the argument. During defendants' closing argument, defense counsel contended that there was no actual evidence of economic damages, which counsel defined as, "for example, lost wages, you know concrete things." The trial court then instructed the jury that if it decided that plaintiff was entitled to damages, those damages could include compensation for losses suffered by the estate, "including loss of financial support." There was no objection by defendants to this instruction, and the record, which includes a lengthy discussion of the instructions, indeed appears to indicate that defendants specifically agreed to the financial support instruction. Therefore, despite the comments by plaintiff's counsel at the pretrial hearing, neither the parties nor the trial court proceeded or acted as if the issue of damages for lost financial support was waived. The bottom line is that the issue was presented to the jury for resolution and there was some supporting evidence when viewed in a light most favorable to plaintiff. Although the evidence did not support the full $350,000 in economic damages awarded by the jury, complete evisceration of the award through remittitur is not, in my view, appropriate under the circumstances.

With respect to the noneconomic damages and whether the lower or higher medical malpractice damages cap applies under MCL 600.1483, issues of statutory construction are reviewed de novo on appeal. *Shivers v Schmiege*, 285 Mich App 636, 646; 776 NW2d 669 (2009). "However, in deciding whether plaintiff's injuries qualify for the higher cap, the trial court is the finder of fact with regard to these unique elements of damage." *Id*. (citation and internal quotation marks omitted). The court's factual finding on the matter is reviewed for clear error. *Id.* at 649.

As indicated by the majority, this issue comes down to whether Needham had "permanently impaired cognitive capacity rendering him . . . incapable of making independent, responsible life decisions and permanently incapable of independently performing the activities of normal, daily living." MCL 600.1483(1)(b). In *Young v Nandi*, 276 Mich App 67, 79-80; 740 NW2d 508 (2007), vacated in part on other grounds 482 Mich 1007 (2008), this Court construed the language in MCL 600.1483(1)(b), and after reviewing dictionary definitions, it ruled:

> 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. Turning back to MCL 600.1483(1)(b), to establish this qualifying injury 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." *Id.* And, this permanently impaired

> cognitive capacity must be the "result of the negligence of 1 or more of the defendants . . . ." MCL 600.1483 (1). [Omission in original.]

In *Shinholster v Annapolis Hosp*, 471 Mich 540, 567-568; 685 NW2d 275 (2004), our Supreme Court observed:

> [O]n the basis of the statutory language previously discussed, we believe that the better interpretation of the statute is that, as long as a plaintiff suffers, while still living and as a result of a defendant's negligent conduct, one of the enumerated conditions set forth in § 1483, the statute's higher damages cap applies.
>
> Because plaintiff in this case presented evidence from which it could be rationally concluded that, "as the result of the negligence of 1 or more of the defendants," it could have been said at some time before her death that she "is hemiplegic, paraplegic, or quadriplegic [as a result of] [i]njury to the brain," or "has permanently impaired cognitive capacity," we agree with the determination made by the lower courts that the higher damages cap of § 1483 applies under the circumstances of this case.

Dr. Karl Steinberg testified that, based on documented low blood pressure measurements, Needham had been in shock for a significant period, and he then testified:

> *Q.* Okay. And, in fact, when you have blood pressure of the magnitude that we're talking about right now, as low as it is, is there, in fact, brain damage to my client?
>
> *A.* There is.

Dr. Carl Schmidt, a forensic pathologist, testified that Needham had suffered brain damage before his death. Dr. Schmidt's diagnosis was "[i]schemic brain injury." He then testified:

> *Q.* And once he had that [ischemic brain injury] on the 30th, how bad was it in terms of future life?
>
> *A.* Well, it was bad enough that the widow was approached about putting him on end-of-life care.
>
> *Q.* Okay. And from what you saw, was his brain ever gonna recover at that point?
>
> *A.* Well, I don't think that he had any hope of recovering.
>
> *Q.* [W]ould that include an injury to his brain, sir?
>
> *A.* Sure.

Dr. Schmidt admitted that there was "no diagnostic laboratory data" to support the conclusion of brain damage; however, the doctor indicated that his opinion was supported by clinical impressions. Dr. Bader Cassin, defendants' expert and a forensic pathologist, testified that Needham was comatose prior to his death, that there was thus at least "a low level of brain damage," and that "the brain [was] not functioning properly." Cassin did indicate that Needham's comatose status did not necessarily mean that he had permanent brain damage. Defendant Dr. Arun Gupta, who was the treating physician, testified that he observed Needham the day before his death and that Needham was unable to respond to any of Dr. Gupta's questions. Dr. Gupta noted that there had been "mental status changes the night before," which were consistent with Needham's inability to respond to the doctor's questions. At one point in his testimony, Dr. Gupta observed that "[b]rain damage, to me, is an irreversible process." Dr. Gupta acknowledged a report by another physician who saw Needham the morning of his death, which report contained a notation that Needham was unable to answer questions and was "totally incompetent." When queried about what being totally incompetent meant, Dr. Gupta stated:

> He cannot comprehend, he cannot answer any questions. You know, he's not able to make any decisions if he can't communicate with the guy. I mean he could have a head injury, he could be, you know, medicines, whatever the situation is.

Dr. Michael Paletta, an expert testifying on behalf of defendants, acknowledged that Needham's brain had been negatively impacted at the time he was comatose. There was also evidence that in the days leading up to his death, Needham had been confused, lethargic, disoriented, and experiencing visual hallucinations before he eventually lapsed into a coma and then passed away.

On this record, I cannot conclude that the trial court committed clear error in its factual finding that Needham's injuries fell within the higher medical malpractice cap. As in *Shinholster*, I would affirm because plaintiff presented evidence from which it could be "rationally concluded" that Needham had "permanently impaired cognitive capacity rendering him . . . incapable of making independent, responsible life decisions and permanently incapable of independently performing the activities of normal, daily living." I note that in *Young*, 276 Mich App at 80, the only evidence presented by the plaintiff was that the decedent had been on a ventilator, was medically sedated, and was unable to make medical decisions on her own behalf. Here, we have testimony, relative to the period before his ultimate death, that Needham suffered visual hallucinations and confusion, that his mental processes continued to deteriorate, that he eventually could not respond to questions and was totally incompetent, that he lapsed into a coma, that he suffered brain damage, and that there was no hope of recovery as to the brain injury. I conclude that there was sufficient evidence to show that Needham suffered damage to or diminishment of his mental ability to perceive, memorize, judge, or reason that was permanent.

For the reasons stated above, I respectfully concur in part and dissent in part.

/s/ William B. Murphy