# STATE OF MICHIGAN

# COURT OF APPEALS

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JOHN C. DOUGHERTY and MEGAN G. DOUGHERTY,

Plaintiffs-Appellants,

v

NEW PILOT HOUSE INC, d/b/a/ WHEELER'S BAR & GRILL,

Defendant–Appellee,

and

JOHN NORTON,

Defendant.

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UNPUBLISHED
July 9, 1996

No. 181240
LC No. 93-316946 NS

Before: Cavanagh, P.J., Hood and J.J. McDonald*, JJ.

PER CURIAM.

Plaintiffs appeal as of right the circuit court's October 28,1994 judgment against defendant[1] in the amount of $34,659.53 following a jury trial. We affirm in part, and reverse and remand in part.

This action arose from a barroom altercation between plaintiff John Dougherty and defendant John Norton in Wheeler's Bar & Grill, a tavern operated by defendant. Plaintiffs sought relief from defendant on a premises liability theory and from Norton on a common law assault and battery theory. Plaintiffs also sought relief from both defendant and Norton, jointly and severally, pursuant to the Dramshop Liability Act, MCL 436.22; MSA 18.993.

Plaintiffs first claim that the trial court erred in setting aside the default entered against defendant. Plaintiff argues that the trial court's decision was erroneous because defendant did not comply with the terms of the stipulation to set aside entry of default and because defendant failed to comply with MCR

2.603. The trial court's decision on whether to set aside a default will not be disturbed on appeal absent an abuse of discretion. *Marposs Corp v Autocam Corp*, 183 Mich App 166, 170-171; 454 NW2d 194 (1990).

Plaintiffs in this case stipulated to setting aside the default. Although defendant did not strictly comply with the terms of the stipulation, we find that its compliance was sufficient to justify the trial court's decision to set aside the default. Defendant filed an answer within the time constraints set by the stipulation. Plaintiffs have apparently obtained what they sought from the stipulation, namely an assurance that defendant's liability insurance carrier would not exercise a reservation of rights.

Plaintiffs place great store in the fact that MCR 2.603(D)(1) provides that a motion to set aside a default or a default judgment shall be granted only if good cause is shown and an affidavit of facts showing a meritorious defense is filed. This rule is applicable only when the defendant seeks to avoid a default or default judgment over the plaintiff's objections. Because plaintiffs stipulated to set aside the entry of a default, this rule is inapplicable to the this case. We therefore conclude that the trial court did not abuse its discretion in setting aside the default.

Plaintiffs next argue that the trial court erred in granting defendant's motion for partial summary disposition with regard to their dramshop claim. The "name and retain provision" of the Dramshop Act provides that an action against a retail licensee may not be commenced unless the allegedly intoxicated person (AIP) is a named defendant in the action and is retained in the action until the litigation is concluded by trial or settlement. MCL 436.22(6); MSA 18.993(6).

This Court has not addressed the issue of whether a default judgment against an AIP precludes a dramshop action against the retail licensee. However, the Michigan Supreme Court has held that a plaintiff may not maintain a dramshop action against a retail licensee after reaching a settlement with the AIP, because the dramshop defendant would be disadvantaged in attempting to prove that the person was not intoxicated. *Putney v Haskins*, 414 Mich 181, 188; 324 NW2d 729 (1982). Similarly, the name and retain provision precludes a suit against the retail licensee if the plaintiff and AIP have agreed to limit the AIP's liability. *Riley v Richards*, 428 Mich 198, 211; 404 NW2d 618 (1987). A dramshop action may not be maintained against a tavern owner if the plaintiff cannot meet the no-fault tort liability threshold of serious impairment of bodily function or permanent disfigurement pursuant to MCL 500.3135(1); MSA 24.13135(1). *Spalo v A&G Enterprises (After Remand)*, 437 Mich 406, 408-412; 471 NW2d 546 (1991). However, the name and retain provision does not preclude continued litigation against the retail licensee where the plaintiff and the allegedly intoxicated person (AIP) both accept mediation. *Shay v JohnKal, Inc*, 437 Mich 394, 400; 471 NW2d 551 (1991).

The primary purpose of the name and retain provision is to protect the defendant tavern owner from the fraud and collusion that could result when the defendant AIP has no financial interest in the outcome of the trial. *Putney, supra*. The provision also protects the defendant tavern owner from the disadvantage it might experience in presenting evidence that the AIP did not appear intoxicated when the AIP has no incentive to present such evidence. *Id.* In this case, it can be argued that both of these

detriments to the tavern owner are present when the AIP has been dismissed from the action by an entry of a default judgment. Moreover, a defendant tavern owner in a default case is without the means of protection available to a defendant tavern owner in a mediation case. We therefore conclude that the trial court did not err in granting defendant partial summary disposition on plaintiffs' dramshop claim.

Even if we had found that the trial court erred in granting defendant partial summary disposition, we would conclude that this issue is moot. Res judicata bars a subsequent action between the same parties when the essential facts or evidence are identical. *Bd of County Road Comm'rs for County of Eaton v Schultz*, 205 Mich App 371, 375; 521 NW2d 847 (1994). The doctrine of res judicata holds that an existing final judgment or decree rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction is conclusive upon the rights of the parties or their privies. *Cramer v Metropolitan Sav Ass'n*, 136 Mich App 387, 394-395; 357 NW2d 51 (1983). Res judicata is designed to relieve parties of multiple litigation, conserve judicial resources, and encourage reliance on adjudication. *Bd of County Road Comm'rs for County of Eaton*, *supra*, p 376. In this case, the issue of the amount of damages has been litigated and determined in a jury trial. The trial court has issued a final judgment and defendant has not challenged the issue of the amount of damages on appeal.

Plaintiffs also claim that the trial court erred in refusing to reallocate the uncollectible judgment against Norton to defendant. Because plaintiffs have failed to provide this Court with a copy of the transcript of the motion hearing, they have waived this issue for appellate review. *Baker v Wayne County Bd of Road Comm'rs*, 185 Mich App 82, 89; 460 NW2d 566 (1990).

Even if we were to consider this issue, we would find that it is without merit. Contrary to plaintiffs' assertions, MCL 600.6304; MSA 27A.6304 makes no mention of default judgments and does not support plaintiffs' argument that default judgments may be reallocated to the other defendants. Furthermore, this statute requires the jury to determine the percentage of the total fault of each party based on the nature of each party's conduct and the extent of the causal relation between the conduct and the damages claimed. MCL 600.6304(1)(b), (2); MSA 27A.6304(1)(b), (2). This determination is incongruous with a default judgment, which is entered on the assumption that the plaintiff's factual allegations are truthful. *Ackron Contracting Co v Oakland County*, 108 Mich App 767, 774; 310 NW2d 874 (1981). If MCL 600.6304; MSA 27A.6304 were, as plaintiffs argue, applicable to default judgments, it would impose an unfair burden on the non-defaulting defendants, who could become liable for a judgment based on factual allegations which have not been challenged.

Plaintiffs next argue that the trial court erred in awarding defendant mediation sanctions. MCR 2.403(O)(1) provides:

> If a party has rejected an evaluation and the action proceeds to trial, that party must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the mediation evaluation. However, if the opposing party has also rejected the evaluation, a party is entitled to costs only if the verdict is more favorable to that party than the mediation evaluation.

The amount of the verdict is determined as follows:

> [A] verdict must be adjusted by adding to it assessable costs and interest on the amount of the verdict from the filing of the complaint to the date of the mediation evaluation. [MCR 2.403(O)(3).]

Plaintiffs contend that the trial court misinterpreted this rule and improperly limited assessable costs to those which accrued from the filing of the complaint to the date of the mediation evaluation. Court rules are interpreted according to the principles of statutory construction. *St George Greek Orthodox Church v Laupmanis Associates, PC,* 204 Mich App 278, 282; 514 NW2d 516 (1994) The purpose and object of these rules must be considered. *Id.* The purpose of the mediation rule is to encourage settlement and deter protracted litigation by placing the burden of litigation upon the party which requires a trial by rejecting a proposed mediation award. *Detroit v Kallow Corp,* 195 Mich App 227, 230; 489 NW2d 500 (1992). If the cost of the litigation were included in the amount of the adjusted verdict, the risk of going to trial would be minimized. The reduction of the risk would undermine the rule's purpose of discouraging litigation. We therefore conclude that the trial court properly interpreted MCR 2.403(O)(3).

Plaintiffs also claim that the trial court erred in reducing the jury's award of future damages to present value by using a compound interest rate of 5% contrary to MCL 600.6306(1)(d); MSA 27A.6306(1)(d). Plaintiff argues that the trial court should have utilized a simple interest rate of 5%. We disagree. In assessing damages for future economic and noneconomic losses, an award must be reduced to its present cash value. *Nation v W D E Electric Co,* 213 Mich App 694, 699; 540 NW2d 788 (1995). This Court has recently held that a compound discount rate, rather than a simple discount rate, is used in reducing future economic and noneconomic damages to present value under MCL 600.6306; MSA 27A.6306. *Id.*, p 700. Therefore, the trial court did not err.

Plaintiffs finally challenge the trial court's award of attorney fees, arguing that defendant's attorney fee was unreasonable and that the schedule of attorney fees was deficient in specifying which costs and services were actually necessitated by the rejection of the mediation evaluation. Plaintiffs seek a remand for an evidentiary hearing to determine appropriate attorney fees. Although plaintiffs arguably waived this issue by failing to list it in their statement of questions presented, *Hammack v Lutheran Social Services*, 211 Mich App 1, 7; 535 NW2d 215 (1995), we will consider the matter. MCR 7.2116(A)(7). This Court will reverse a trial court's award of attorney fees or costs only for an abuse of discretion. *Haberkorn v Chrysler Corp,* 210 Mich App 354, 379; 533 NW2d 373 (1995).

There is no precise formula for computing the reasonableness of an attorney's fee. *Crawley v Schick*, 48 Mich App 728; 211 NW2d 217 (1973). However, the factors to be taken into consideration in determining the reasonableness of a fee include, but are not limited to, the following:

> (1) the professional standing and experience of the attorney; (2) the skill, time and labor involved; (3) the amount in question and the results achieved; (4) the difficulty of the

> case; (5) the expenses incurred; and (6) the nature and length of the professional relationship with the client. [*Id.*, p 737.]

The Michigan Supreme Court adopted the *Crawley* standard in *Wood v DAIIE*, 413 Mich 573, 588; 321 NW2d 653 (1982).

We note that the court need not detail its findings as to each specific factor considered. *Id.* However, in the present case, the trial judge considered none of the *Crawley* factors on the record. Instead, when asked by plaintiffs' counsel where he "got those figures," the trial court stated "[i]t's simple. You are the ones that submitted all this paperwork." Based on the record, we are not satisfied that the trial court considered the appropriate factors in determining the reasonableness of the attorney fees. We therefore reverse the trial court's award of attorney fees, and remand for a hearing on the reasonableness and appropriateness of the attorney fees.

Affirmed in part, and reversed and remanded in part.

/s/ Mark J. Cavanagh
/s/ Harold Hood
/s/ John J. McDonald

[1] Unless otherwise noted, we use the term "defendant" to refer only to defendant New Pilot House, Inc.