

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

AMY L. DEWILDT,

Plaintiff,

v

File No. 00-19933-CK
HON. PHILIP E. RODGERS, JR.

RELIANCE NATIONAL INSURANCE
COMPANY, an Ohio corporation, licensed
to do business in the State of Michigan,

Defendant.

/

George R. Thompson (P29289)
Attorney for Plaintiff

Michael J. Swogger (P42905)
Attorney for Defendant

**DECISION AND ORDER DENYING
DEFENDANT'S MOTION OBJECTING TO MEDIATION EVALUATION**

Plaintiff filed the instant lawsuit seeking a declaration that her no-fault automobile insurance coverage with the Defendant was in full force and effect when she was injured in a motor vehicle accident on July 11, 1999 and monetary damages for breach of contract for Defendant's failure to pay first-party personal injury protection benefits.

The case was ordered to mediation pursuant to MCR 2.403.¹ Neither party objected as permitted by MCR 2.403(C). The mediation took place on August 9, 2000 and the panel

¹ This case was submitted to mediation pursuant to MCR 2.403. That Court Rule has since been amended effective August 1, 2000. The procedure that was called Court Rules "mediation" has been renamed "case evaluation." Since this case involves issues arising under the pre-amended Court Rules, the former nomenclature will be used herein.

evaluated the case as “50K for Plaintiff, does not include any equitable claim.” The Plaintiff accepted the award “provided it does not dismiss the Plaintiff’s equitable claim.” The Defendant rejected the evaluation by failing to respond.

More than thirty (30) days after the mediation, the Defendant filed a Motion Objecting to the Mediation Evaluation. The Defendant contends that the mediation panel “issued an improper evaluation” and “it was not possible to accept the award.” The Defendant claims that the evaluation violated the Court Rules because “it expressly did not dispose of all claims in the action.” Instead, “[i]t expressly excluded the equitable claims Plaintiff is making for defense and indemnification in the event any third parties should sue her for injuries they sustained in the July 11, 1999 motor vehicle accident.”

This is a case of first impression. This Court is being called upon to interpret and construe the provisions of MCR 2.403 in a case involving claims for both equitable relief and monetary damages.

The pertinent provisions of MCR 2.403 are as follows:

(A) Scope and Applicability of Rule.

(1) A court may submit to mediation any civil action in which the relief sought is primarily money damages or division of property. However, MCR 3.216 governs mediation of domestic relations actions.

(2) Mediation of tort cases filed in circuit court is mandatory beginning with actions filed after the effective dates of Chapters 49 and 49A of the Revised Judicature Act, as added by 1986 PA 178; however, the court may except an action from mediation on motion for good cause shown if it finds that mediation of that action would be inappropriate.

* * *

(C) Objections to Mediation.

(1) To object to mediation, a party must file a written motion to remove from mediation and a notice of hearing of the motion and serve a copy on the attorneys of record and the mediation clerk within 14 days after notice of the order assigning the action to mediation. The motion must be set for hearing within 14 days after it is filed, unless the court orders otherwise.

(2) A timely motion must be heard before the case is submitted to mediation.

* * *

(K) Decision.

* * *

(3) The evaluation may not include a separate award on any claim for equitable relief, but the panel may consider such claims in determining the amount of an award.

* * *

(M) Effect of Acceptance of Evaluation.

(1) If all the parties accept the panel's evaluation, judgment will be entered in accordance with the evaluation, unless the amount of the award is paid within 28 days after notification of the acceptances, in which case the court shall dismiss the action with prejudice. The judgment or dismissal shall be deemed to dispose of all claims in the action and includes all fees, costs, and interest to the date it is entered.

(2) In a case involving multiple parties, judgment, or dismissal as provided in subrule (1), shall be entered as to those opposing parties who have accepted the portions of the evaluation that apply to them.

(N) Proceedings After Rejection.

(1) If all or part of the evaluation of the mediation panel is rejected, the action proceeds to trial in the normal fashion.

* * *

(O) Rejecting Party's Liability for Costs.

(1) 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 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.

* * *

(5) If the verdict awards equitable relief, costs may be awarded if the court determines that

- (a) taking into account both monetary relief (adjusted as provided in subrule [O][3]) and equitable relief, the verdict is not more favorable to the rejecting party than the evaluation, and
- (b) it is fair to award costs under all of the circumstances.

Pursuant to MCR 2.403(K)(3), a mediation panel does not have the authority to grant equitable relief. *Dane Constr, Inc v Royal's Wine & Deli, Inc*, 192 Mich App 287, 293; 480 NW2d 343 (1991); *R N West Construction Co v Barra Corp of America, Inc*, 148 Mich App 115; 384 NW2d 96 (1986). A mediation panel can, however, consider equitable issues in reaching its evaluation. MCR 2.430(K)(3). Pursuant to MCR 2.403 (M)(1), if both parties accept the mediation evaluation, a judgment is entered in accordance with the evaluation or, if the amount awarded is paid, the case is dismissed. **The judgment or dismissal is deemed to dispose of all claims in the action.** If either party rejects the mediation evaluation, the case proceeds to trial. If the ultimate verdict awards equitable relief, the Court may award costs if, taking into account both monetary relief and equitable relief, the verdict is not more favorable to the rejecting party than the mediation and it is fair to award costs. MCR 2.403(O)(5)(a) and (b).

According to the Defendant, the dilemma it faced in the instant case was whether to accept the mediation award and risk having the Plaintiff's equitable claim deemed disposed of in the Plaintiff's favor pursuant to MCR 2.403(M)(1) or whether to reject the mediation evaluation and be liable for sanctions if the Plaintiff does better at trial pursuant to MCR 2.403(O).

First, the Defendant could have and should have objected to the mediation before the case was submitted to mediation. MCR 2.403(C)(1). In *Bien v Venticinque*, 151 Mich App 229; 390 NW2d 702 (1986), the Court said: "We believe that if the relief sought by a party is outside the purpose of the mediation rule, an objection should be raised to submitting a cause to mediation in the first place. See MCR 2.403(C); see also Michigan Court Rules Practice, *supra*,

pp. 437-438. We believe that an after-the-fact inquiry into motivations for rejection and a corresponding equitable reduction of attorney fee awards is improper.”

Second, MCR 2.403(N)(1) provides that, if all **or part** of the evaluation of the mediation panel is rejected, the action proceeds to trial in the normal fashion. [Emphasis added.] Thus, the Defendant could have accepted the mediation evaluation of monetary damages and rejected any implication that the award resolved the Plaintiff’s claim for equitable relief. After all, the Plaintiff accepted the mediation evaluation “provided it does not dismiss the Plaintiff’s equitable claim.” See, *Hensley v Investors Four, Inc*, 228 Mich App 701, 706; 580 NW2d 5 (1998) in which the Court held that the plaintiffs in a dramshop action could avoid violating the name and retain provision of the Dramshop Act and still promote their settlement interest by filing a conditional acceptance of the mediation award. MCR 2.403(L)(3)(b).²

Third, legal and equitable matters have always been treated differently which explains why mediation panels may consider equitable claims, but may not award equitable relief, and why acceptance of an award of monetary damages cannot affect the resolution of a request for equitable relief.

The following language from *Anzaldua v Band*, 457 Mich 530; 578 NW2d 306 (1998), indicates that specific performance is an equitable remedy and that, absent consent of the parties to a jury trial, a claim for specific performance alone is to be decided by a trial court without a jury:

‘The parties have a constitutional right in Michigan to have equity claims heard by a judge sitting as a chancellor in equity. If a plaintiff seeks only equitable relief, he has no right to a trial by jury. However, in this case, the plaintiff sought both equitable relief in the form of specific performance and legal relief in the form of damages. In this situation the plaintiff had a right to have a jury hear his damage claim.’ *Id* at 538, n 6; 578 NW2d 306, quoting *Dutka v Sinai Hosp of Detroit*, 143 Mich App 170, 173; 371 NW2d 901 (1985). [citations and emphasis omitted].

Zurcher v Herveat, 238 Mich App 267, 297-298; 605 NW2d 329 (2000).

² It should be noted that MCR 2.403(L) expressly applies only to mediations involving multiple parties.

The Court of Appeals discussed the operation of the mediation sanction rules in the context of a mixed legal/equitable case in *Forest City Enterprises, Inc v Leemon Oil Co*, 228 Mich App 57, 79-81; 577 NW2d 150 (1998), saying:

The purpose of the mediation sanction rule, MCR 2.403(O), is to encourage settlement by placing the burden of litigation costs upon the party who insists upon trial by rejecting a proposed mediation award. *Watkins v Manchester*, 220 Mich App 337, 344; 559 NW2d 81 (1996). A court may submit to mediation any civil action when the relief sought is primarily money damages or division of property. MCR 2.403(A)(1).

Although a mediation panel can determine an equitable claim in determining the amount of damages, it cannot make a separate award for equitable relief. MCR 2.403(K)(3); *Dane Constr, Inc v Royal's Wine & Deli, Inc*, 192 Mich App 287, 293; 480 NW2d 343 (1991).

Forest City contends that because the finder of fact at trial considered 'equitable issues,' the verdict necessarily is one for 'equitable relief' within the meaning of MCR 2.403(O). Forest City correctly notes that, if equitable relief is awarded in an action, this does become a relevant factor in determining if mediation sanctions should be ordered pursuant to MCR 2.403(O)(5), which states:

If the verdict awards equitable relief, costs may be awarded if the court determines that

(a) taking into account both monetary relief (adjusted as provided in subrule [O][3]) and equitable relief, the verdict is not more favorable to the rejecting party than the evaluation, and

(b) it is fair to award costs under all of the circumstances.

The problem with Forest City's approach is that 'equitable relief' (as used in MCR 2.403(O)(5)) is not the same as an 'equitable issue.' Black's Law Dictionary (5th ed), p. 484, defines 'equitable relief' as '[t]hat species of relief sought in a court with equity powers as, for example, in the case of one seeking an injunction or specific performance instead of money damages.' In other words, the fact that the MERA claim required an equitable apportionment (i.e., an 'equitable issue') does not change the fact that the resulting judgment was for monetary relief only (i.e., not for 'equitable relief' such as specific performance, an injunction, and so forth).

Accordingly, Forest City's claim based on MCR 2.403(O)(5) fails because Forest City did not receive a verdict for equitable relief. Although the trial court may have considered 'equitable issues' in determining the amount of contribution under the MERA, in the resulting verdict Forest City received only monetary relief. There was no error in the trial court's award of mediation sanctions.

Likewise, in *Gelman Sciences, Inc v Fireman's Fund Ins Cos*, 183 Mich App 445; (1990), Gelman's complaint requested equitable relief by way of specific performance of the duties to defend and to indemnify based on its insurance contract with the defendant. The Court of Appeals held that "it is within the province of the judge to decide whether Fireman's owes Gelman a duty to indemnify it under the terms of the contract. However, Gelman has also requested damages for breach of contract and bad faith. These are legal issues requiring factual resolutions, and Fireman's is entitled to have them submitted to a jury. *Ecco, Ltd v Balimoy Mfg Co Inc*, 179 Mich App 748, 749-751; 446 NW2d 546 (1989)." Therefore, Gelman was entitled to a jury trial on the allegations of breach of contract and bad faith even though it was within the province of the judge sitting as a chancellor in equity to determine whether the defendant insurer had a duty to indemnify Gelman.

In *Dutka v Sinai Hospital of Detroit*, 143 Mich App 170; 371 NW2d 901 (1985), a physician filed suit against a hospital seeking specific performance of an alleged implied contract granting him active staff privileges or, in the alternative, damages. The trial court struck the demand for a jury trial and, after the matter was heard by the court, found for the hospital. The physician appealed. The Court of Appeals held, among other things, that the physician was entitled to a jury trial on his claim for damages because he sought both equitable relief in the form of specific performance and legal relief in the form of damages. The Court said:

Defendant relies on cases in which a chancellor awarded equitable relief and damages as part of his decree. *Rickle v Dow*, 39 Mich. 91 (1878); *Chase v Boughton*, 93 Mich 285; 54 NW 44 (1892); *Godwin v Lindbert*, 101 Mich App 754; 300 NW2d 514 (1980). Defendant suggests that this indicates plaintiff had no right to a jury trial. We must strongly disagree. These cases, which allow a chancellor to award consequential damages along with equitable relief, do not bar plaintiff's demand for a jury where legal remedies are sought along with equitable relief. The cases defendant relies on only suggest that in some instances a chancellor may also award money damages in fashioning the appropriate remedy. The cases do not bar a jury trial on legal claims when it has been properly demanded.

We are not suggesting that a jury trial should have been held on all of the issues. Clearly, defendant had a right to a hearing before a chancellor on the specific performance claim. *Abner A Wolf, Inc, supra* However, plaintiff also had a right to a jury trial on his legal claim.

Id at 174-175.

The Plaintiff in the instant case refers the Court to *Larson v Auto-Owners Ins Co*, 194 Mich App 329; 486 NW2d 128 (1992), lv den 442 Mich 912 (1993),³ in which the court said:

In interpreting court rules, we apply the rules of statutory construction. *Taylor v Anesthesia Associates of Muskegon, PC*, 179 Mich App 384, 386; 445 NW2d 525 (1989). Hence, a court rule should be construed in accordance with the ordinary and approved usage of the language, in light of the purpose to be accomplished by its operation. *Knoke v Michlin Chemical Corp*, 188 Mich App 456, 459; 470 NW2d 420 (1991). In general, the purpose of MCR 2.403 is to expedite and simplify the final settlement of cases to avoid a trial. *Smith v Elenges*, 156 Mich App 260, 263; 401 NW2d 342 (1986). An accepted mediation evaluation serves as a final adjudication of the claims mediated, and is therefore binding on the parties similar to a consent judgment or settlement agreement. *Espinosa v Thomas*, 189 Mich App 110, 117; 472 NW2d 16 (1991).

The Plaintiff claims that *Larson* supports an interpretation of MCR 2.403 that cases with a significant equitable component are nonetheless appropriate for mediation because an accepted evaluation is a final adjudication of only the claims mediated and, since the mediation panel has no authority to grant equitable relief, only legal issues can be mediated. The Court agrees.

Because of the separate treatment that has historically been afforded equitable claims and legal claims and because of the distinction drawn between equitable and legal claims in the context of mediation, the Court concludes that MCR 2.403 must be interpreted as follows: (1)

³ It should be noted that *Larson* was decided under MCR 2.403(M)(1) when it provided as follows: If all the parties accept the panel's evaluation, judgment will be entered in that amount, which includes all fees, costs, and interest to the date of judgment. Effective March 31, 1990, MCR 2.403(M)(1) now provides: If all the parties accept the panel's evaluation, judgment will be entered in that amount. The judgment shall be deemed to dispose of all claims in the action and includes all fees, costs, and interest to the date of judgment.

Cases involving both requests for monetary damages and requests for equitable relief may be submitted to mediation; (2) When cases involving both monetary damages and requests for equitable relief are submitted to mediation, the mediation panel may award monetary damages, but the request for equitable relief must be heard by the Court. The request for equitable relief may be heard by the Court on a motion for summary disposition or at a bench trial; (3) When cases involving both monetary damages and requests for equitable relief are submitted to mediation, acceptance or rejection of the evaluation goes to the monetary damages only; (4) When cases involving both monetary damages and requests for equitable relief are submitted to mediation and one of the parties rejects the evaluation, sanctions are determined by whether the rejecting party does better at trial on the legal issues only; and (5) The grant or denial of equitable relief on a claim that was not mediated nor taken into consideration by the mediation panel in arriving at its evaluation does not factor in to an award of mediation sanctions.

This interpretation of the court rules is consistent with Michigan caselaw. In *R N West Construction, supra*, a building contractor sued a roofing supplier because the supplier refused to issue a ten-year guarantee on roofing materials used to construct the roof on a construction project. The supplier counterclaimed seeking payment for the roofing materials. The case was submitted to mediation and both parties accepted. A judgment was sought. The Circuit Court entered a judgment on the award requiring the supplier to warrant the roof upon payment of \$7,000. The supplier appealed. The Court of Appeals held that the mediation award tried to grant equitable relief which was beyond the scope of the applicable Court Rule and the subject-matter jurisdiction of mediation panel and whether the supplier could be ordered to issue a guarantee had to be determined through litigation.

In *Dane Construction, supra*, the plaintiff sued for breach of contract, an in personam action against the corporation and against Mr. Hermiz as an individual, alleging that defendants were responsible for the payment of damages incurred by plaintiff. Plaintiff also sought to foreclose under its construction lien, an in rem action that would permit recovery of damages through the sale of the improved property. Judgment was entered on the basis of the parties' acceptance of the mediation evaluation pursuant to MCR 2.403(M)(1). Although the mediation panel could have considered plaintiff's equitable claim in determining the amount of damages, it could not make a separate award for equitable relief. MCR 2.403(K)(3); *R N West*

Construction, supra at 117-118. Therefore, the mediation evaluation and the resulting judgment could not have provided relief on plaintiff's claim for foreclosure under the construction lien.

The Court said:

If plaintiff had made a claim for equitable relief in lieu of damages (i.e., an injunction) or if the equitable claim was based on an alternative theory of liability (i.e., promissory estoppel), we would be able to conclude that the acceptance of the mediation evaluation implicitly waived the claim for equitable relief. However, in the present case, plaintiff seeks alternative remedies, one at law and one in equity, which supplement each other. Although plaintiff is permitted only one satisfaction for the debt owed to it, *Yerrington v Miller*, 325 Mich 193, 197; 38 NW2d 84 (1949), it should be permitted to utilize all available remedies in order to collect on that debt.

In the instant case, the Plaintiff seeks monetary damages and equitable relief. The equitable relief is for a declaration that her insurance policy was in full force and effect when she was involved in the subject automobile accident so that the Defendant is liable for first party personal injury benefits and is obligated to defend and indemnify her should she be sued by others injured in that accident. The monetary damages are for breach of contract. The Plaintiff is not seeking equitable relief in lieu of damages or based on some alternative theory of liability. The mediation panel had the authority to consider whether the Plaintiff's insurance policy was in full force and effect when she was involved in the subject accident for the purpose of determining if she was entitled to first party benefits and, if so, in what amount. The mediation panel did *not*, however, have the authority to decide whether the Plaintiff's insurance policy was in full force and effect when she was involved in the subject accident for the purpose of determining whether the Defendant had to defend and indemnify her if she is sued by others who were also injured in the accident. The Plaintiff's acceptance of the mediation award cannot be deemed to waive her right to have this determination made by the Court sitting as a chancellor in equity. Likewise, the Defendant's acceptance of the mediation award could not have been deemed to waive its right to defend against the Plaintiff's claim for such equitable relief.

The Defendant's motion objecting to the mediation evaluation is denied. First, it is untimely. Second, the Defendant could have filed a conditional acceptance. Third, the mediation panel could

not grant equitable relief. Acceptance or rejection of the award would not have been determinative of the Plaintiff's equitable claim which must be resolved by the Court.

IT IS SO ORDERED.

HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: _____