STATE OF MICHIGAN

IN THE SUPREME COURT

APPEAL FROM MICHIGAN COURT OF APPEALS

BARBARA STANISZ,

Plaintiff-Appellee,

v

FEDERAL EXPRESS CORPORATION,

Defendant-Appellant

and

DENNIS MARKEY,

Defendant-Appellant.

_____/

Supreme Court No. 124377

Court of Appeals No. 236371

Saginaw Circuit Court No. 99-029224-CZ

BRIEF IN SUPPORT OF
DEFENDANTS' APPLICATION FOR LEAVE TO APPEAL

ORAL ARGUMENT REQUESTED

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STATEMENT OF JURISDICTION

Defendant brings this application for leave to appeal pursuant to MCR 7.301(2), which grants this Court jurisdiction over matters decided by the Court of Appeals. Application for leave to appeal was filed on August 5, 2003, 21 days after the July 15, 2003 Order of the Court of Appeals in this matter, within the time required by MCR 7.302(C)(2)(b).

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STATEMENT OF QUESTIONS INVOLVED

I. Whether the Court of Appeals erred in declining to remand this case to the trial court for re-determination of the amount of damages, in light of the Court of Appeals' rejection of one of Plaintiff's four theories of recovery.

II. Whether the Court of Appeals erred in affirming the award of costs and fees in light of its rejection of Plaintiff's sexual harassment claim without remanding for reduction by the amount of costs and fees attributable to the sexual harassment claim on which Defendants ultimately prevailed.

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INTRODUCTION

In this employment discrimination case, the jury found liability in favor of Plaintiff-Appellee, Barbara Stanisz ("Plaintiff"), and against Defendant-Appellant Federal Express Corporation ("Federal Express") on three separate and independent claims arising under the Elliott-Larsen Civil Rights Act, MCL 37.2101 *et seq*: sexual harassment, sex discrimination, and retaliation. The jury also found in favor of Plaintiff and against Defendant Dennis Markey on Plaintiff's claim of assault.

The Court of Appeals overturned the jury verdict against Federal Express on Plaintiff's claim of sexual harassment, finding that Plaintiff's claim was not supported by the evidence and that the trial court should have granted summary disposition and judgment notwithstanding the verdict on this claim. However, although much of the evidence presented at trial pertained to the alleged sexual harassment which should have been dismissed before the case was presented to the jury, the Court of Appeals declined to remand the case for proceedings to review the damages award in light of its rejection of Plaintiff's sexual harassment claim, and similarly declined to remand for review of the attorney fee award. There is no way of knowing what damages the jury would have awarded had the jury only been allowed to consider the evidence relating to the surviving claims. Therefore, the damages award must be reviewed to take into consideration the rejection of one of the grounds on which the jury based the award, and to reduce the attorney fee award by the amount of fees attributable to the sexual harassment claim on which Federal Express prevailed.

Leave to appeal is appropriate pursuant to MCR 7.302(B)(3) because this case presents two issues of major significance to the state's jurisprudence. The first issue presented is whether

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remand to the trial court for a re-determination of damages is required when the Court of Appeals reverses the trial court's denial of summary disposition as to one of three distinct theories of liability, where all three theories of liability were presented to the jury and an undifferentiated damages award entered. The second issue presented is whether remand to the trial court for reduction of the award of costs and fees to Plaintiff is required under the fee-shifting provision of the Elliott-Larsen Civil Rights Act where the award entered by the trial court includes amounts attributable to a claim upon which Defendant ultimately prevailed.

STATEMENT OF FACTS

A. Plaintiff's Complaints

On July 15, 1999, Plaintiff-Appellee, Barbara Stanisz, a former Senior Manager for Defendant-Appellant Federal Express Corporation, filed a Complaint against Federal Express and Dennis Markey, a Federal Express employee and a former subordinate of Plaintiff. Plaintiff's Complaint alleged sex discrimination and harassment based on sex in violation of the Elliott-Larsen Civil Rights Act, MCL 37.2101, *et seq* (Count I), retaliation in violation of the Elliott-Larsen Civil Rights Act (Count II), and assault against Defendant Markey individually (Count III).

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B. Summary Disposition Motion

On October 2, 2000, Defendants filed a motion for summary disposition. Defendants' Motion was denied by conclusory written order of the trial court on February 22, 2001, without analysis of the factual basis or legal grounds for the decision (Exhibit A, February 22, 2001 Order).

C. Jury Trial And Defendants' Motion For Directed Verdict

This case was tried to a jury in the Saginaw County Circuit Court before the Honorable William A. Crane for eight days. At the conclusion of Plaintiff's proofs, Defendants moved for a directed verdict (Exhibit B, 3/6/01 tr. p. 18). The trial court took the motion under advisement (Exhibit B, 3/6/01 tr. p. 39).

D. Jury Verdict

On March 9, 2001, the jury returned a verdict of $1,938,000.00 in favor of Plaintiff and against Federal Express as to Plaintiff's claims of sex discrimination, sexual harassment, and retaliation. This number was broken down as follows:

- $96,000 for past economic loss;
- $342,000 for future economic loss;
- $1,000,000 for past emotional distress;
- $500,000 for future emotional distress.

(Exhibit B, 3/9/01 tr. p. 138).

The jury returned a verdict of $25,000 in favor of Plaintiff and against Dennis Markey as to Plaintiff's claim of assault (Exhibit B, 3/9/01 tr. p. 138).

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E. Defendants' Motion For Judgment Notwithstanding The Verdict Or For New Trial Or For Remittitur

After receiving the jury's verdict, the trial court indicated that Defendants' motion for directed verdict was still under advisement (Exhibit B, 3/9/01 tr. p. 141). Defendants then filed a motion for judgment notwithstanding the verdict or for new trial or for remittitur. Oral argument on Defendants' motion was held on April 30, 2001.

On July 21, 2001, the trial court issued a written Opinion and Order regarding Defendants' motion. (Exhibit C, July 21, 2001 Order). With virtually no discussion of the facts, the court denied Defendants' motion as to all matters relating to liability. As to damages, the trial court did not disturb the jury verdict of $438,000 for past and future economic loss or the verdict of $25,000 against Defendant Markey. However, the court found that the verdict of $1,500,000 for emotional distress damages was excessive. Specifically, the trial court ruled,

> The Court, having heard the argument of counsel and having presided over the trial, is convinced that the $1,500,00.00 award for non-economic damages in this case was, in part, the product of passion against Federal Express and that the jury clearly crossed the line from compensating plaintiff to punishing defendant.

(Exhibit C, July 21, 2001 Order). After a lengthy factual discussion of the basis for its conclusion, in which the trial court noted that the $1,000,000 award for past emotional distress was over ten times that awarded for Plaintiff's out-of-pocket damages for the same time period and that Plaintiff presented no expert testimony in support of her claim for emotional distress, the trial court remitted the non-economic portion of the jury verdict by $900,000, holding that "the evidence presented would support a total award for past and future non-economic damages in the amount of $600,000.00."

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The trial court then gave Plaintiff a choice: she could accept the verdict in the remitted amount, or she could have a new trial on non-economic damages. On August 3, 2001, Plaintiff agreed to the remitted verdict.[1]

F. Plaintiff's Request For Costs And Attorney Fees

Following the entry of the trial court's judgment, Plaintiff requested attorney fees pursuant to MCLA 37.2802. In addition to her attorney fees, Plaintiff requested costs in the amount of $8,169.22. These costs were itemized in the Work in Process Billing Draft attached to Plaintiff's request. Of the total, $3,275.60 was listed as "expense" and $4,893.62 are listed as "disbursements." The costs for which Plaintiff requested reimbursement ran the gamut from filing fees to the cost of the celebratory cocktail after the jury verdict.

Plaintiff's requested costs can be broken down as follows:

Postage expenses:	$ 122.73
Messenger expenses:	$ 133.80
Phone and fax charges:	$ 59.33
Meals and cocktails:	$ 63.22
Copying charges:	$ 655.55
Mileage:	$ 690.24
Travel out of state:	$1,004.59
Secretarial overtime:	$ 427.02
Trial exhibits:	$ 119.12
Filing fees:	$ 160.00
Summons fee:	$ 25.84
Deposition transcripts:	$3,659.64
Mediation fees:	$ 225.00
Conference room rental:	$ 280.00
Record subpoenas and copies:	$ 109.75
Trial witness fees:	$ 20.00
Out of state legal assistance:	$ 163.39
Private investigator:	$ 250.00

[1] Although Plaintiff's Remittitur is dated August 2, 2001, it is undisputed that it was not filed with the trial court until the following day.

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On March 26, 2001, the trial court awarded Plaintiff attorney fees in the amount of $83,238.75. (Exhibit D, March 26, 2001 Order). The trial court also awarded Plaintiff $8,100 in costs. With the exception of some entertainment expenses Plaintiff agreed to withdraw, this award included all costs, not just taxable costs. (Exhibit B, 3/26/01 tr. p. 20).

G. The Parties' Appeals

Defendants filed their Claim of Appeal as of right on August 24, 2001, 21 days after the Saginaw County Circuit Court entered its July 20, 2001 Opinion and Order Regarding Defendants' Motion for Judgment Notwithstanding the Verdict or for a New Trial or for Remittitur became effective. This Claim of Appeal was timely pursuant to MCR 7.204(A)(1). Defendants claimed an appeal from the following orders and judgments entered by the trial court:

- February 22, 2001 Opinion and Order Denying Defendants' Motion for Summary Disposition
- March 26, 2001 Judgment
- March 26, 2001 Order Granting Reasonable Attorney's Fees
- July 20, 2001 Opinion and Order Regarding Defendants' Motion for Judgment Notwithstanding the Verdict or for New Trial or for Remittitur
- August 3, 2001 Remittitur

Plaintiff subsequently filed a cross-appeal from the trial court's order of remittitur.

On July 15, 2003, the Court of Appeals issued its Opinion, affirming in part and reversing in part the decisions of the trial court. (Exhibit E, July 15, 2003 Order of the Court of Appeals).

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1. Motion For Summary Disposition

The Court of Appeals affirmed the trial court's denial of summary disposition as to Plaintiff's claims of sex discrimination and retaliation, but reversed the denial of summary disposition as to the claim of sexual harassment, finding that the conduct at issue was "gender-based but was not sexual in nature," and thus did not support a claim of sexual harassment under Haynie v State of Michigan, 468 Mich 302; 664 NW2d 129 (2003).

2. Motion for JNOV

With regard to Defendants' Motion for Judgment Notwithstanding The Verdict, the Court of Appeals reviewed the evidence presented at trial and affirmed the trial court's denial of JNOV with regard to Plaintiff's claims of sex discrimination, retaliation and assault. However, the Court of Appeals reversed the trial court's denial of JNOV as to Plaintiff's claim of sexual harassment, reiterating its conclusion that the evidence of harassment presented was not sexual in nature and, therefore, could not support a sexual harassment claim.

3. Damages

The Court of Appeals acknowledged that its rejection of Plaintiff's sexual harassment claim necessitated review of the jury's damages award against Federal Express, which was based on "three distinct theories of liability, . . . (1) sex discrimination, (2) sex harassment, and (3) retaliation." (Exhibit E at p. 12). In reviewing this issue, the Court of Appeals opined:

> **Our review of the record indicates that the manner in which the case was submitted to the jury makes it impossible to separate the bases of liability with respect to damages.** Defendant counsel did not object to the special verdict form that required findings on all three theories but did not separate out damage determinations per claim, or request a verdict form that required separate damage determinations per claim. In fact, after closing arguments, prior to

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> instructing the jury, the trial court asked counsel for both parties if they had any comments regarding the jury instructions which included the special verdict form. Defense counsel made one comment regarding one of the instructions but did not object or make any comments about the special verdict form. Furthermore, when the trial court completed instructing the jury, upon questioning from the court, defense counsel explicitly stated that he had no objections to the jury instructions including the special verdict form.
>
> MCR 2.516(C) provides that a "party may assign as error the giving of or failure to give an instruction only if the party objects on the record before the jury retires to consider the verdict." MCR 2.514(A) states that if a special verdict form is required, the trial court shall settle the form of verdict in advance of argument and in the absence of the jury. As such, we find that defendants have waived any claim of error concerning the apportionment of damages.
>
> Our Supreme Court distinguished waiver and forfeiture, stating, "[w]aiver has been defined as the intentional relinquishment or abandonment of a known right. It differs from forfeiture, which has been explained as the failure to make the timely assertion of a right." *People v Riley*, 465 Mich 442, 449; 636 NW2d 514 (2001)(internal citations omitted). The Court went on to explain the different effects of waiver versus forfeiture. "One who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error. Mere forfeiture, on the other hand, does not extinguish the error." *Id*. Therefore because defendant specifically stated it had no objection to the jury instructions and special verdict form, we find that it has waived review of any issue regarding the apportionment of damages claim. Because waiver has extinguished any error, we affirm both the economic and noneconomic damages award in total despite our reversal of one of the three theories of recovery.

(Exhibit E at pp. 12-13, emphasis added).

In a footnote to this section, the Court offered dicta:

> We note that as it relates to economic damages, even in the absence of defendant's waiver of the issue, remand on the issue of economic damages would not be required since the jury found in favor of all three theories of recovery, any one of which would support the award of economic damages in its entirety. Moreover, because the

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> same conduct gave rise to the noneconomic damages, regardless whether that conduct was labeled sex discrimination or sexual harassment, the entire damage award is supported despite our reversal of the sexual harassment claim.

(Exhibit D at p. 13, n.2).

Its express recognition of the necessity of reviewing the damages award because of its rejection of one theory of liability notwithstanding, the Court of Appeals affirmed without review the jury's award of damages. The Court rejected Federal Express's appeal on the ground that its acceptance of a special verdict form that did not apportion damages to the three theories of liability presented foreclosed the Company's right to seek reduction of the damages award to conform to post-trial proceedings that rejected one of the Plaintiff's three theories of liability.

4. Remittitur

The Court of Appeals reviewed the trial court's decision on remittitur for abuse of discretion and, finding none, affirmed its $900,000 reduction of the non-economic damages award. It rejected Defendants' argument that Plaintiff was improperly compensated for lost insurance benefits because the issue was not raised in the court below, and thus was not preserved for review on appeal.

5. Costs and Fees

Pursuant to MCLA 37.2802, a plaintiff must prevail on a claim under the Elliott-Larsen Civil Rights Act in order to obtain an award for "the costs of litigation, including reasonable attorney fees and witness fees." The attorney fees and costs awarded in the trial court must be reviewed because they included amounts expended in connection with the sexual harassment claim upon which Federal Express ultimately prevailed.

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Holding that the Elliott-Larsen Civil Rights Act does not limit awards of costs to statutory or taxable costs, the Court of Appeals affirmed the trial court's award of costs in the amount of $8,100 to Plaintiff. The Court failed to consider whether the case should be remanded to the trial court for a reduction in the award of attorney fees and costs, in light of its rejection of Plaintiff's claim of sexual harassment.

ARGUMENT

I. THE COURT OF APPEALS ERRED IN DECLINING TO REMAND THIS CASE TO THE TRIAL COURT FOR RE-DETERMINATION OF DAMAGES BASED UPON ITS DISMISSAL OF PLAINTIFF'S SEXUAL HARASSMENT CLAIM.

A. The Court Of Appeals Cannot Substitute Its Judgment For The Jury's By Assuming That The Jury Would Have Reached The Same Result As To Damages Had Plaintiff's Sexual Harassment Claim Been Dismissed.

The Court of Appeals erred in affirming the award of damages in this case. Despite its reversal of the trial court's denial of summary disposition on Plaintiff's claim of sexual harassment, the Court of Appeals held that Defendants are not entitled to a re-determination of damages. The Court's refusal to review or remand the damages award is grounded on its conclusion that Defendants waived their right to seek a re-determination of damages by agreeing to a special verdict form that did not provide for the apportionment of damages by claim. The Court of Appeals' reliance upon the doctrine of waiver, and its focus on the verdict form, fails to address and remedy the fundamental error in this case. The underlying error is the trial court's denial of summary disposition on Plaintiff's claim of sexual harassment. The sexual harassment claim was not properly before the jury and an award of damages on that claim cannot stand.

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The Court of Appeals based its decision on Defendants' failure to object to the jury instructions, including specifically the special verdict form. The trial court's error did not arise with its instructions to the jury – it began when the trial court denied Defendants' motion for summary disposition as to Plaintiff's sexual harassment claim. The trial court's error continued when it improperly asked the jury to consider the sexual harassment claim as it determined the amount of damages to award Plaintiff. In order to arrive at a damages amount, the jury necessarily considered Plaintiff's sexual harassment claim. In other words, the problem is not the verdict form; that form correctly asked the jury to assess liability and damages in those claims before the jury. The problem is that the claim of sexual harassment was not properly before the jury. Defendants no more waived the arguments at issue on this appeal by agreeing to the damages portion of the jury verdict form than they waived them by agreeing to jury instructions relating to sexual harassment at all. It is the job of the trial court to make sure that the jury evaluates only those claims properly before it. The Court of Appeals has held that the trial court failed to do so. As the Court of Appeals held, however, it is impossible to separate out the portion of total damages resulting from the sexual harassment claim. Therefore, a new trial on damages is required.

This Court has held that a "general verdict is either all wrong or all right, because it is an inseparable and inscrutable unit." Sahr v Bierd, 354 Mich 353, 364; 92 NW2d 467 (1958) (like the non-apportioned special verdict in the instant case, the general verdict "[i]s a compound made by the jury which is incapable of being broken up into its constituent parts"). Moreover, general instructions are not sufficient to expand the express language of a special interrogatory in a jury verdict form. The jury must be deemed to have answered the questions put to it in the

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form of a jury verdict – no less and no more. See Stewart & Stevenson Service, Inc v Pickard, 749 F2d 635, 643 (CA 11 1984); City of Hartford v Anderson Fairoaks, Inc, 510 A2d 200 (Conn App, 1986). Any attempt to divine the jury's rationale for its award would be improper. It is an error for a court to enter the minds of the jurors to answer a question that was never posed to them. Kinnel v Mid-Atlantic Mausoleums, Inc, 850 F2d 958, 966 (CA 3 1988), quoting Stradley v Cortez, 518 F2d 488, 490 (CA 3 1975). Although the trial jury received a special verdict form, it did not apportion damages regarding each claim.

The Court of Appeals has held that sometimes, "a remand is necessary to ascertain how the jury apportioned damages even in the absence of a timely request at trial." Leavitt v Monaco Coach Corp, 241 Mich App 288, 302; 616 NW2d 175 (2000). For example, in Lalone v Rashid, 34 Mich App 193; 191 NW2d 98 (1971), the Court of Appeals vacated a lower court judgment and remanded the case for a trial on damages alone. In LaLone, neither party requested that the jury verdict be apportioned as to actual damages. The trial court instructed the jury to consider exemplary damages. After a $30,000 verdict was returned, the judge trebled that amount as exemplary damages, because it was not clear whether the jury's $30,000 award included exemplary damages. Id at 199. The Court of Appeals noted "[b]ut since the jury did not specify in its general verdict what amount was actual damage, how can we possibly determine what amount should be trebled?" Id at 204. Thus, the Court vacated the judgment and remanded the case for new trial on the issues of damages alone. Id.

The Court of Appeals reached a similar conclusion in Rock v Derrick, 51 Mich App 704; 216 NW2d 496 (1974). In Rock, the plaintiff advanced adverse possession and acquiescence claims. Following a jury verdict, the Court of Appeals found that the adverse possession claim

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should have been dismissed by the trial court. Because the general jury verdict prevented it from ascertaining whether the jury award was based upon adverse possession or acquiescence, the Court of Appeals reversed and remanded the case for a determination of the grounds for the award. Id at 709. See also, Miracle Boot Puller Co Limited v Plastray Corp, 84 Mich App 118, 123; 269 NW2d 496 (1978) (Because the jury returned a general verdict, and it is impossible to tell whether it rested upon the conversion claim or one of the other claims, we reverse and remand for a new trial).

More recently, the Court of Appeals has continued to remand cases for a re-determination of damages where lower courts have improperly denied a dispositive motion. See Webb v Greer, unpublished per curiam opinion of the Court of Appeals, decided July 17, 2003 (Docket No. 235424) (Exhibit F). In Webb, plaintiff alleged that the defendant forged deeds, converted property, breached a development agreement, and failed to provide plaintiff with a fair share of profits from the sale of land. Webb, 2003 WL at *1. The jury, through the use of a special verdict form, found that defendant materially breached the agreement, converted property and forged deeds. The trial court denied defendant's motion for directed verdict on the conversion claim. After affirming all other rulings, the appellate court held that the trial court erred in denying the motion for directed verdict. Id at *9. The Court of Appeals concluded its opinion by remanding the case *"so that the circuit court may amend the judgment to reflect the dismissal of the conversion count, and for recalculation of the judgment for plaintiff in light of this dismissal."* Id at *10 (emphasis added).

An analogous conclusion was reached in Greenfield v Trustees for Michigan State University, unpublished per curiam opinion of the Court of Appeals decided October 29, 1996

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(Docket Nos. 180170, 180425), app den 456 Mich 886, reconsideration den 456 Mich 866, where plaintiff alleged sexual harassment, battery, gross negligence, intentional infliction of emotional distress and retaliation (Exhibit G). Defendants filed a motion for summary disposition, which was granted in part and denied as to plaintiff's remaining claims. Greenfield, 1996 WL at *4. On appeal, the Court of Appeals reversed the trial court's order denying summary disposition as to the retaliation claim, *and reversed the trial court's judgment incorporating plaintiff's jury award on the retaliation claim.* Id at *4 (emphasis added).

Federal courts have also held that a verdict must be set aside under such circumstances similar to those presented here. See Virtual Maintenance Inc v Prime Computer, Inc, 11 F3d 660, 666 (CA 6 1993) (reversing the verdict and remanding for a new trial where the general jury verdict provided no indication that the jury relied only upon plaintiff's successful claims); McGriff v Mutual Life Insurance Co, 127 F3d 1410, 1413 (CA 11 1997) (holding that the verdict must be set aside where the trial court improperly denied defendant's motion for judgment notwithstanding the verdict as to one of plaintiff's two claims, where the verdict was not apportioned); Morrison Knudson Corp v Fireman's Fund Insurance Co, 175 F3d 1221, 1255 (CA 10 1999) (holding that because the un-apportioned verdict made it impossible to enter a judgment in plaintiff's favor on only part of the jury's verdict, a retrial was required); Richards v Michelin Tire Corp, 21 F3d 1048 (CA 11 1994) (stating that where two claims are submitted to the jury in a single interrogatory, a new trial may be required if one claim was submitted erroneously, because there is no way to be sure that the jury's verdict was not based solely upon the invalid claim).

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As a general matter, the Court of Appeals regularly remands cases to the trial court after concluding that the trial court has ruled incorrectly on a dispositive motion or an evidentiary issue. See Peña v Ingham County Road Commission, 255 Mich App 299, 314; 660 NW2d 351 (2003) (where plaintiff alleged multiple employment-related claims, jury awarded monetary damages, and trial court erroneously failed to dismiss plaintiff's retaliation claim, Court of Appeals reversed decision regarding retaliation claim and remanded for further proceedings); Martinez v Ford Motor Co, 224 Mich App 247, 258; 568 NW2d 396 (1997) (reversing the trial court's order denying defendant's motion for partial summary disposition and remanding case with instructions to enter summary disposition on some of plaintiff's claims, and for further proceedings consistent with its opinion); Old Kent Bank of Kalamazoo v Whitaker Construction Co, 222 Mich App 436, 440; 566 NW2d 1 (1997) (reversing trial court's denial of defendant's motion for partial summary disposition and remanding for consistent proceedings); Foehr v Republic Automotive Parts, Inc, 212 Mich App 663, 672; 538 NW2d 420 (1995) (Court of Appeals reversed and remanded proceedings where trial court improperly granted defendant's motion for summary disposition as to plaintiff's age discrimination claim, despite the fact that plaintiff prevailed on her wrongful discharge claim and received damages); Hall v Citizens Insurance Co of America, 141 Mich App 676, 689; 358 NW2d 250 (1985) (Court of Appeals remanded for reconsideration where it found that evidence was sufficient for jury on malicious prosecution and defamation claims, but that trial court should have granted defendant's motion for directed verdicts on plaintiff's intentional infliction of emotional distress and invasion of privacy claims); Harper Woods Federation of Teachers v Board of Education of School District of Harper Woods, 103 Mich App 649, 658-59; 302 NW2d 857 (1981) (affirming in part,

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reversing in part, and remanding case for recalculation of damages where trial court incorrectly found that plaintiff attempted to mitigate her damages); Bledsoe v Auto Owners Insurance Co, unpublished per curiam opinion of the Court of Appeals, decided April 24, 2003 (Docket No. 236735) (Court of Appeals reversed in part, affirmed in part, and remanded case because trial court incorrectly denied defendant's motion for partial summary disposition) (Exhibit H); Petrie v Jones Transfer Co, unpublished per curiam opinion of the Court of Appeals, decided October 24, 1997 (Docket No. 191806) (reversing trial court's summary disposition of plaintiff's fraud claim and remanding for further proceedings) (Exhibit I).

As these cases demonstrate, Michigan jurisprudence has long recognized that remand for recalculation of damages is appropriate when the trial court's decision on a dispositive motion is overturned on appeal. This case presents a situation in which that well-established and long-standing practice should have been followed. The Court of Appeals has correctly held that the trial court should have summarily dismissed Plaintiff's sexual harassment claim. Because the trial court did not, the jury awarded damages based upon a claim it should never have considered. There is no way of knowing whether the jury apportioned a specific percentage or amount of the total award to Plaintiff's sexual harassment claim. In fact, it is entirely possible that the jury awarded a majority of damages or even all damages based upon the sexual harassment claim. As the Court of Appeals ruled, it is impossible to determine the apportionment of damages with any certainty. Under these circumstances, remand for re-determination of damages is proper and necessary. Defendants' perceived failure to object to jury instructions is immaterial, because the root cause of the error began with the trial court's denial of Defendants' motion for summary disposition.

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The effect of the Court of Appeals' ruling is not *de minimis*. Had the trial court ruled correctly, in all likelihood Plaintiff would have been awarded a lesser amount of damages. Defendants submit that a remand for the purpose of determining damages in light of the Court of Appeals' holding is warranted.

B. Defendant Did Not Waive Its Right To A Re-Determination Of Damages By Agreeing To A Jury Verdict Form Based On The Claims Before The Jury At The Time The Form Was Adopted.

In Section IV of its opinion, the Court of Appeals held that, despite the trial court's erroneous refusal to grant summary disposition of Plaintiff's sexual harassment claim, Defendants *intentionally and knowingly* waived any claim of error concerning the apportionment of damages. The fundamental flaw in this holding is that Defendants were not aware that an apportionment would be necessary. At the time the jury verdict was rendered, the need for apportionment was not at issue, because the Court of Appeals had not yet reversed the trail court's denial of Defendants' Motion for Summary Disposition.

As the Court of Appeals recognized, waiver is the **intentional and knowing** relinquishment or abandonment of a known right. Slip Op. at 13, citing People v Riley, 465 Mich 442, 499; 636 NW2d 514 (2001)(emphasis added). Such an act implies an election to forego some known advantage, inducing belief of an intention to waive. See Couper v Metropolitan Life Insurance Co, 250 Mich 540; 230 NW 929 (1930). To constitute a waiver, there must be an "existing right, benefit, or advantage, knowledge, actual, or constructive, of the existence of such right, benefit, or advantage, and an actual intention to relinquish it . . . ." See HJ Tucker & Associates, Inc v Allied Chucker and Engineering Company, 234 Mich App 550, 564; 595 NW2d 176 (1999), quoting Fitzgerald v Hubert Herman, Inc, 23 Mich App 716, 718-

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19; 179 NW2d 252 (1970). Courts have applied waiver in situations where a party affirmatively knew of its right, yet said nothing. See, eg Alibri v Detroit/Wayne County Stadium Authority, 254 Mich App 545, 558; 658 NW2d 167 (2002) (waiver correctly applied where plaintiff was clearly aware that defendant had not performed its part of the contract, yet plaintiff performed anyway).

The United States Supreme Court has held that a litigant's failure to object to a jury instruction does not always create a jurisdictional bar to review. City of Springfield v Kibbe, 480 US 257, 259; 107 SCt 1114, 94 LEd2d 293 (1987). Further, the Fourth Circuit has refused to apply waiver where the circumstances requiring objection did not arise until after the time for objection passed. See United States v Williams, 89 F3d 165, 167 at n 1 (CA 4 1996). In Williams, the court held that the defendant did not waive his right to challenge his indictment on two counts, even though defendant failed to object to the indictment before trial, where the defect in the indictment was not apparent before the presentation of insufficient evidence at trial to support both counts. Id.

Under Michigan law, waiver may not apply if the failure to object is caused by some error not of the moving party's making. For example, in Spratt v Department of Social Services, 169 Mich App 693; 426 NW2d 780 (1988), the respondent argued that the appellant waived his objection to defective written notice by failing to raise it at the original hearing. The Court of Appeals rejected this argument, holding that, through no fault of his own, the appellant was not aware of the grounds for objecting to defective written notice at the original hearing. Spratt, 169 Mich App at 703-04.

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Here, Defendants argued on their motion for summary disposition that the sexual harassment claim should be dismissed. Defendants renewed this argument at the close of proofs. At the time Defendants agreed to the jury verdict form, their argument had been rejected twice. As a result, Defendants agreed to an instruction to the jury regarding the elements of sexual harassment, even though Defendants did not agree that a sexual harassment claim should remain in the case. Similarly, Defendants agreed to a verdict form that included possible liability for sexual harassment, even though Defendants did not agree that a sexual harassment claim should remain in the case. Nobody is suggesting that those actions by Defendants constituted any kind of waiver.

Likewise, agreeing that the jury could award damages if it found in Plaintiff's favor as to liability does not constitute a waiver. Defendants could not have been aware that the Court of Appeals would reverse the trial court's decision, thus creating an apportionment issue that did not exist at the time the verdict form was determined. Further, Defendants' conduct was not inconsistent with its claim that damages should be re-determined. Indeed, the apportionment issue did not become apparent until the Court of Appeals rendered its opinion. As stated above, operation of waiver requires a knowing relinquishment of an existing right. Defendants' supposed relinquishment was neither knowing, nor of an existing right.

Furthermore, failure to object to a jury instruction before deliberations begin does not waive plain error. Reynolds v Green, 184 F3d 589, 594 (CA 6 1999); Wheeler v McKinley Enterprises, 937 F2d 1158, 1166 (CA 6 1991); Harp v Kroger Co, 489 F2d 1104, 1105 (CA 6 1974). Plain error is defined as obvious and prejudicial error that requires action by the reviewing court in the interests of justice. Further, "[c]onsideration of alleged errors in a jury

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charge may be appropriate even absent objection where necessary to correct a fundamental error or to prevent a miscarriage of justice . . . ." Reynolds, 184 F3d at 594, citing Ivey v Wilson, 832 F2d 950, 955 (CA 6 1987) (quoting O'Brien v Willys Motors, Inc, 385 F2d 163 (CA 6 1967)). The Sixth Circuit also noted that an instruction constitutes plain error when it misapplies the law as to a core issue in the case resulting in substantial prejudice. Reynolds, 184 F3d at 595.

In Reynolds, the Court of Appeals found that the trial court's failure to supply the proper instruction to the jury caused the jury to deliberate under the wrong legal standard and "probably affected the outcome of the trial." Id. at 595-96. The instant matter presents a similar situation. The trial court's failure to dismiss Plaintiff's sexual harassment claim caused the jury to consider damages flowing from that claim, rather than from just Plaintiff's viable claims. Allowing the jury to consider the sexual harassment claim was fundamental error, and probably affected the outcome of not only the trial, but the award of damages. Defendants submit that the trial court committed plain error, remand is necessary in order to avoid a miscarriage of justice and waiver does not apply to the request for a re-trial of damages.

II. AS A RESULT OF THE COURT OF APPEALS' DECISION DISMISSING PLAINTIFF'S SEXUAL HARASSMENT CLAIM, PLAINTIFF'S ATTORNEY FEES MUST BE RE-DETERMINED.

A. Plaintiff Cannot Recover Attorney Fees Generated In Pursuit Of Her Unsuccessful Sexual Harassment Claim.

In this case, Plaintiff was awarded costs and attorney fees as the prevailing party on an Elliott-Larsen Civil Rights Act claim pursuant to MCL 37.2802. It is undisputed that Plaintiff can recover costs and attorney fees only as to those claims on which she prevailed. See, e.g., MCR 2.625(B)(2), which provides,

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> In an action involving several issues or counts that state different causes of action or different defenses, the party prevailing on each issue or count may be allowed costs for that issue or count.

Under Michigan law, prevailing on the claim in question is a prerequisite to any award of costs. See Mitchell v Cole, 196 Mich App 675, 682; 493 NW2d 427 (1992) (plaintiffs were not prevailing parties as to the Department of Corrections for purposes of an attorney fee award, because their claims were barred by governmental immunity). In City of Novi v Woodson, 251 Mich App 614; 651 NW2d 448 (2002), the parties disputed the value of defendant's condemned property. The jury awarded the landowner $160,000 for a taking and $90,000 for business interruption damages. City of Novi, 251 Mich App at 620. The landowner received attorney fees and costs as the prevailing party. On appeal, the Court found that the defendant should not have received damages for business interruption, as his claim was time-barred. Therefore, the Court of Appeals reversed the trial court's award of attorney fees and costs, and remanded the proceedings for a re-determination of attorney fees in light of its ruling. Id at 630.

Pursuant to the July 15, 2003 Court of Appeals Opinion, summary disposition of Plaintiff's sexual harassment claim was granted, and Plaintiff lost her "prevailing party" status as to that claim. Therefore, Plaintiff cannot recover attorney fees incurred as a result of the sexual harassment claim. Many of the hours for which Plaintiff seeks recovery were necessarily incurred in connection with her sexual harassment claim. For example, a great deal of the deposition and trial testimony related a history of alleged harassment by Dennis Markey. The alleged assault claim involved only a single incident of conduct. Virtually all other testimony regarding Markey's behavior related only to sexual harassment, and not to any other claims.

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Plaintiff cannot recover costs and attorney fees for work relating only to her sexual harassment claim.

Because Plaintiff prevailed at trial on all of her claims, the trial court did not make any determination as to what portion of the costs and fees would be recoverable if Plaintiff did not prevail on sexual harassment. The bills submitted by Plaintiff do not describe the services provided with sufficient particularity to determine which services relate to which claims. Therefore, in light of the fact that Plaintiff did not recover on one of her claims, Defendants request a re-determination of the attorney fees to which Plaintiff is entitled.

B. Remand Is Required Because The Trial Court Did Not Rule On Whether Plaintiff's Sexual Harassment, Retaliation, Gender Discrimination, And Assault Claims Constituted A Single Cause Of Action.

Even if Plaintiff can recover attorney fees for her unsuccessful sexual harassment claim, remand is nevertheless required. Under Michigan law, a party may recover attorney fees on all claims, despite not prevailing on one claim, if the trial court determines that the pretrial cost and efforts put forth would not have been different even if the unsuccessful claim had not been alleged. See Grow v WA Thomas Co, 236 Mich App 696, 715; 601 NW2d 496 (1999). In Klinke v Mitsubishi Motors Corp, 219 Mich App 500; 556 NW2d 528 (1996), the plaintiff alleged wrongful death and negligent manufacture claims against the seller of a vehicle, manufacturer, and corporation associated with the manufacturer. Klinke, 219 Mich App at 505. Plaintiff prevailed on less than all of his claims. Defendant argued that the attorney fees and costs should have been awarded only as to Plaintiff's successful claims. Id at 538. The Court of Appeals rejected this argument, finding that "where alternative theories or claims might be stated, if they arise out of the same transaction or occurrence, there is only a single cause of

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action, even though each alternative claim or theory might involve technically different liabilities and duties and slightly different factual elements." Id at 539. Using this rationale, the Court held that Plaintiff was entitled to attorney fees on all claims, because "the trial court correctly found that there was essentially a single cause of action." Id at 538.

In the instant matter, the Court of Appeals erred by failing to remand the case to the trial court for a re-determination of attorney fees. The decision to award fees, and the amount of fees, are left to the trial court's discretion. See Wood v DAIIE, 413 Mich 573, 588; 321 NW2d 653 (1982). In Klinke, the Court of Appeals possessed the discretion to affirm the award of fees on all claims only because the trial court had already determined that plaintiff's claims constituted a single cause of action. No such circumstances are present here. The trial court never made a finding that Plaintiff's claims comprised a single cause of action, entitling Plaintiff to fees on all claims. Through its failure to remand for a re-determination of fees, the Court of Appeals erroneously substituted its judgment for that of the trial court, implicitly finding that plaintiff was entitled to attorney fees on all claims because they formed a single cause of action. Although the trial court may eventually agree with the Court of Appeals, neither party has had the chance to present argument, nor has the trial court considered argument, on this issue. Defendants submit that a failure to remand for a re-determination of attorney fees runs contrary to established Michigan law.

CONCLUSION

WHEREFORE, Defendants-Appellants respectfully pray that this Honorable Court reverse that portion of the July 15, 2003 Order of the Court of Appeals declining to vacate the

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damages award and remand this case to the trial court for further proceedings on damages, costs and fees consistent with the decision of this Court.

Respectfully submitted,

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