

STATE OF MICHIGAN
COURT OF APPEALS

TOMMY MEDINA,

Plaintiff-Appellant,

v

KAYLA MARIE MCCOY and MICHAEL
EVERETT MCCOY,

Defendants,

and

MIC GENERAL INSURANCE CORPORATION,

Defendant-Appellee,

and

ADVANCED SURGERY CENTER LLC,
HUSSEIN HURAIBI MD, PLLC, and SPECTRA
CLINICAL LAB,

Intervening Parties.¹

UNPUBLISHED

October 28, 2021

No. 352849

Wayne Circuit Court

LC No. 16-010585-NI

Before: O'BRIEN, P.J., and STEPHENS and BOONSTRA, JJ.

¹ Tommy Medina and MIC General Insurance Corporation are the only parties involved in this appeal. Advanced Surgery Center, LLC, Hussien Huraibi M.D., PLLC, and Spectra Clinical Lab were dismissed from the case by the trial court. Medina settled his claim with Kayla Marie McCoy and Michael Everett. *Medina v McCoy*, unpublished opinion of the Court of Appeals, issued January, 7, 2020 (Docket No. 344397).

PER CURIAM.

Plaintiff appeals by leave granted² the February 3, 2020 trial court order that: 1) granted defendant's motion for sanctions to pay defendant's costs and attorney fees related to case evaluation; 2) denied defendant's motion for security for costs pursuant to MCR 2.109³; 3) denied plaintiff's motions in limine to introduce into evidence and claim as damages all unpaid medical bills in defendant's claims file; and 4) denied plaintiff's motion to call all treating doctors as expert witnesses. We reverse and remand.

I. FACTUAL BACKGROUND

This case was previously before the Court in *Medina v McCoy*, unpublished opinion of the Court of Appeals, issued January, 7, 2020 (Docket No. 344397) (*Medina I*), wherein plaintiff appealed the trial court's dismissal of his entire first party no fault case as a sanction for plaintiff having failed to submit all of his medical bills and include retained experts on his witness list filed with the court. This Court remanded the matter with the instruction for the trial court to reconsider defendant's motion for sanctions in light of the factors from *Dean v Tucker*, 182 Mich App 27, 32-33; 451 NW2d 571 (1990).

On remand, plaintiff filed two motions; one that requested the court allow him to admit the testimony of his treating doctors as expert witnesses at trial and a second that requested the court allow him to admit the unpaid medical bills from defendant's claims file. Plaintiff argued that this Court's ruling in *Medina I* required the trial court to allow plaintiff to admit both types of evidence. Defendant opposed the motion and argued this Court's prior opinion had only reversed the trial court's dismissal of the case while leaving the trial court's decisions to exclude plaintiff's witness list and documents related to unpaid bills intact. The trial court agreed with defendant and denied plaintiff's motions in a February 3, 2020 order. Plaintiff appeals from that order.

II. STANDARD OF REVIEW

"Whether a trial court followed an appellate court's ruling on remand is a question of law that this Court reviews de novo. A trial court's factual findings are reviewed for clear error and its conclusions of law are reviewed de novo." *Schumacher v Dept of Nat Res*, 275 Mich App 121, 127; 737 NW2d 782 (2007) (internal citation omitted). "A finding is clearly erroneous where, after reviewing the entire record, this Court is left with a definite and firm conviction that a mistake has been made." *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003).

III. ANALYSIS

²*Medina v McCoy*, unpublished order of the Court of Appeals, issued July 8, 2020 (Docket No. 352849).

³ In the motion hearing transcript, the trial court stated, "The Court gave a sanction, it's going to be a bond security for costs for what you want to the Jury and good luck." The order however, denied the motion. "[I]t is axiomatic that a court speaks through its orders." *People v Kennedy*, 384 Mich 339, 343; 183 NW2d 297 (1971).

Plaintiff argues that the trial court erred on remand by not following the law of the case in *Medina I*. We agree.

The law of the case doctrine holds:

if an appellate court has passed on a legal question and remanded the case for further proceedings, the legal questions thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case where the facts remain materially the same. The appellate court's decision likewise binds lower tribunals because the tribunal may not take action on remand that is inconsistent with the judgment of the appellate court. [*Grievance Administrator v Lopatin*, 462 Mich 235, 259-260; 612 NW2d 120 (2000) (citation omitted).]

"It is the duty of the lower court ..., on remand, to comply strictly with the mandate of the appellate court." *Rodriguez v Gen Motors Corp (On Remand)*, 204 Mich App 509, 514; 516 NW2d 105 (1994). "A trial court fails to follow the law of the case when it revisits a matter on which this Court has already ruled." *Schumacher*, 275 Mich App at 128. "Law of the case applies, however, only to issues actually decided, either implicitly or explicitly, in the prior appeal." *Grievance Adm'r*, 462 Mich at 260.

In *Medina I*, the Court concluded:

The trial court dismissed this first-party no-fault case as a sanction for plaintiff's failure to name an expert witness and to supplement its production of the medical and attendant care bills at issue. Defendant's claims adjuster's file contained copies of many unpaid bills and an expert's report supporting that plaintiff's injuries were related to his accident. The trial court did not consider these facts before dismissing the case, and failed to evaluate on the record the appropriateness of a lesser sanction. We reverse and remand so that the court may fulfill both obligations. [*Medina I*, unpub op at 1].

This Court remanded the case with instructions for the trial court to review its prior sanction of dismissal under the *Dean* factors:

(1) whether the violation was willful or accidental; (2) the party's history of refusing to comply with previous court orders; (3) the prejudice to the opposing party; (4) whether there exists a history of deliberate delay; (5) the degree of compliance with other parts of the court's orders; (6) attempts to cure the defect; and (7) whether a lesser sanction would better serve the interests of justice. [*Medina I*, unpub op at 3, quoting *Vicencio v Ramirez*, 211 Mich App 501, 506-507; 536 NW2d 280 (1995), citing *Dean v Tucker*, 182 Mich App 27, 32-33; 451 NW2d 571 (1990).]

The trial court was also required to consider whether plaintiff's first-party case could survive based on evidence already in the record:

The record contains medical bills that are allegedly unpaid and related to Medina's accident. Further, the record includes Dr. [James] Pollina's reports. These

evidentiary items, standing alone, arguably provide Medina with evidentiary support for a prima facie first-party no-fault claim. Regardless of whether the trial court struck bills produced in an untimely fashion, it appears that Medina would have been able to present a jury-submissible claim even without the contested bills. If medical records in MIC's possession contain opinions rendered by Medina's treating physicians, the trial court must consider whether the plaintiff should be permitted to name the physicians as experts under MCR 2.401(I)(1)(b). [*Medina I*, unpub op at 4.]

The trial court erred on remand, when it determined that this Court's opinion reversed only the trial court's dismissal of the case and did not disturb the trial court's decisions excluding evidence of plaintiff's unpaid medical bills and treating doctors' testimony at trial. The trial court's decisions to exclude were part and parcel of the trial court's decision to dismiss. The trial court's decision to dismiss plaintiff's claim came after it reasoned that its decisions to exclude left plaintiff with nothing to present to the jury. The court dismissed the case because of the lack of evidence. Per this Court's instructions in *Medina I*, the trial court was required to review its entire sanction decision on remand. This necessarily included the trial court's underlying reasons for dismissal. In contravention of this Court's instructions however, the trial court skirted analysis of its sanction by choosing to reverse only the dismissal.

As for the portion of its order excluding medical bills and expert testimony, the court restated its prior reasoning that both pieces of evidence were requested but not turned over during the discovery period and therefore precluded from presentation at trial. It later stated it would not revisit the issue, because those portions of the order were not affected by the Court's opinion. The trial court failed to follow the instructions from *Medina I*, to consider the discovery violation in light of dismissal and against the administration of justice. *Medina I*, unpub op at 3-4. For example, that "[w]hile rules of practice give direction to the process of administering justice and must be followed, their application should not be a fetish to the extent that justice in a particular case is not done." *Id.* quoting *Dean*, 182 Mich App at 32. The Court also specified that " 'the mere fact that a witness list was not timely filed does not, in and of itself, justify the imposition' of a sanction that occasions the dismissal of the case." *Medina I*, unpub op at 3 quoting *Dean*, 182 Mich App at 32. "[D]iscovery sanctions are to be proportionate and just . . ." *Kalamazoo Oil Co v Boerman*, 242 Mich App 75, 87; 618 NW2d 66 (2000). We again instruct the trial court to "give 'careful consideration' to the *Dean* factors on the record, as well as options for just punishment of a discovery violation short of dismissal." *Medina I*, unpub op at 4. "[I]t is imperative that the trial court balance the factors and explain its reasons for imposing such a [] sanction in order to allow for meaningful appellate review." *Kalamazoo Oil Co*, 242 Mich App at 88.

We reject plaintiff's assertion that the trial court was **required** to allow him to submit all of the unpaid medical bills in defendant's claim's file and call all of plaintiff's treating doctors as experts at trial if they met the requirements of MRE 702 to offer expert testimony. The Court's opinion in *Medina I* was clear that this Court's instruction to the trial court was for it to *consider* whether defendant was in possession of unpaid medical bills, medical records, and Dr. Pollina's reports. This Court instructed the trial court to consider these facts when deciding an appropriate discovery sanction, applying the *Dean* factors. *Medina I*, unpub op at 3-4. The facts were relevant to a determination of whether plaintiff had a prima facie case in spite of the court's exclusion of evidence for discovery violations and whether defendant would be prejudiced or could claim

surprise by facts that were in its own files. There was no mention of MRE 702. On remand, the trial court gave no consideration to the evidence in defendant's possession or the adjuster's claim's file, thereby warranting a second remand to the trial court for consideration of this evidence.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Colleen A. O'Brien
/s/ Cynthia Diane Stephens
/s/ Mark T. Boonstra