STATE OF MICHIGAN

COURT OF APPEALS

NICOLE BALL,

Plaintiff-Appellee/Cross-Appellant,

v

STEPHEN FOURMENT and KIMBERLY FOURMENT,

Defendants-Appellees/Cross-Appellees,

and

WESTLAND DOG FOOD CO., INC.,

Defendant-Appellant/Cross-Appellee.

UNPUBLISHED
February 21, 2017

No. 331670
Wayne Circuit Court
LC No. 13-012563-NO

Before: JANSEN, P.J., and BECKERING and GADOLA, JJ.

PER CURIAM.

Defendant Westland Dog Food Co., Inc. (Westland) appeals as of right a judgment for plaintiff following a jury trial in this dog bite action. Plaintiff has filed a cross-appeal raising issues concerning the award of case evaluation sanctions. We affirm the judgment, but remand the case to the trial court to address and decide plaintiff's request for additional case evaluation sanctions for attorney fees and other costs incurred below after the entry of judgment.

Westland first argues that it was entitled to dismissal of plaintiff's claims against it because defendants Stephen Fourment (Stephen) and Kimberly Fourment (Kimberly) (collectively, the Fourments), as owners of the dog that bit plaintiff, are liable under the dog bite statute, MCL 287.351, such that no liability can be shifted to Westland. Westland's argument is unavailing.

This Court reviews de novo a trial court's decisions regarding motions for directed verdict or judgment notwithstanding the verdict (JNOV). *Sniecinski v Blue Cross & Blue Shield of Mich*, 469 Mich 124, 131; 666 NW2d 186 (2003). This Court "review[s] the evidence and all

legitimate inferences in the light most favorable to the nonmoving party. A motion for 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*. (quotation marks and citations omitted).

A party is permitted to pursue alternative theories of liability. MCR 2.111(A)(2) provides, in relevant part:

> Inconsistent claims or defenses are not objectionable. A party may
>
> * * *
>
> (b) state as many separate claims or defenses as the party has, regardless of consistency and whether they are based on legal or equitable grounds or on both.

See also *Bryant v Oakpointe Villa Nursing Centre*, 471 Mich 411, 432-433; 684 NW2d 864 (2004) (encouraging the filing of alternative claims of medical malpractice and ordinary negligence in certain cases).

In the present case, plaintiff pursued alternative claims of liability under the dog bite statute and common-law negligence. While shopping at Westland's store, plaintiff was bitten by a dog owned by the Fourments, who were employees of Westland. The trial court ruled that Westland was not subject to vicarious liability under the dog bite statute because Westland was not an owner of the dog, but determined that Westland could be held vicariously liable for the negligence of its employees, the Fourments. In response to a question on the verdict form regarding whether "any" defendants were negligent, the jury answered in the affirmative.

MCL 287.351(1) provides:

> If a dog bites a person, without provocation while the person is on public property, or lawfully on private property, including the property of the owner of the dog, the owner of the dog shall be liable for any damages suffered by the person bitten, regardless of the former viciousness of the dog or the owner's knowledge of such viciousness.

"The dog-bite statute places absolute liability on the dog owner, except where the dog bites after having been provoked. Absolute liability equates to liability without fault." *Hill v Sacka*, 256 Mich App 443, 448; 666 NW2d 282 (2003) (citations omitted). The enactment of the dog bite statute did not supersede or extinguish common-law negligence claims related to dog bites; rather, the common-law remedy was retained. See MCL 287.288 ("Nothing in this act shall be construed as limiting the common law liability of the owner of a dog for damages committed by it."); *Nicholes v Lorenz*, 396 Mich 53, 59; 237 NW2d 468 (1976) (opinion by COLEMAN, J.); *Hiner v Mojica*, 271 Mich App 604, 609; 722 NW2d 914 (2006); *Bradacs v Jiacobone*, 244 Mich App 263, 265 n 1; 625 NW2d 108 (2001). Therefore, a plaintiff may pursue alternative claims under the dog bite statute and the common law. *Nicholes*, 396 Mich at 59. See also *Veal v Spencer*, 53 Mich App 560, 561, 566; 220 NW2d 158 (1974) (indicating that the plaintiff sued under both the statute and the common law).

"Under the doctrine of respondeat superior, an employer may be vicariously liable for the acts of an employee committed within the scope of his employment." *Helsel v Morcom*, 219 Mich App 14, 21; 555 NW2d 852 (1996). "Vicarious liability is based upon principal-agent and master-servant relationships and involves the imputation of negligence of the agent or servant to the principal or master without regard to the fault of the principal or master." *McClaine v Alger*, 150 Mich App 306, 316-317; 388 NW2d 349 (1986). "Although an act may be contrary to an employer's instructions, liability will nonetheless attach if the employee accomplished the act in furtherance, or the interest, of the employer's business." *Hamed v Wayne Co*, 490 Mich 1, 11; 803 NW2d 237 (2011).

Westland contends that it cannot be held liable for the negligence of its employees because the concept of fault is generally irrelevant in an action under the dog bite statute. Westland relies on *Hill*, 256 Mich App at 451, in which this Court noted that "[f]ault, outside the context of provocation, is simply not relevant in a dog-bite action pursued under MCL 287.351." This Court in *Hill* thus held that certain statutes governing the allocation of fault among tortfeasors are inapplicable in an action brought pursuant to the dog bite statute. *Id*. at 456. Westland's reliance on *Hill* is misplaced. *Hill* did not address an employer's vicarious liability under a negligence theory. The analysis in *Hill* focused on an action pursued under the dog bite statute alone. The plaintiff's negligence claim had been summarily dismissed earlier in the proceeding, and the jury heard and decided only the claim under the dog bite statute. *Id*. at 446. By contrast, the present case involves an alternative claim of negligence with respect to which the jury found in favor of plaintiff. It is with respect to the negligence claim that vicarious liability was then imposed on Westland as the employer of the Fourments. Westland's argument that it could not be held vicariously liable for the Fourments' negligence is thus unavailing. That is, the Fourments' liability under the dog bite statute did not preclude the imposition of vicarious liability on Westland under the separate theory of negligence of Westland's employees.

In its reply brief, Westland argues that there was insufficient evidence to establish a common-law negligence claim because the dog had never acted viciously before biting plaintiff. This argument is not contained in Westland's principal appellate brief. "Reply briefs must be confined to rebuttal, and a party may not raise new or additional arguments in its reply brief." *Kinder Morgan Mich, LLC v City of Jackson*, 277 Mich App 159, 174; 744 NW2d 184 (2007). Hence, Westland's argument that there was insufficient evidence to support a common-law negligence claim need not be considered because it is not properly before this Court. See *id*.

Even if the argument had been properly presented, we would conclude that Westland's argument lacks merit. Viewing the evidence and all legitimate inferences in favor of plaintiff as the nonmoving party, the evidence did not fail to establish a common-law negligence claim as a matter of law. "[T]he owner of a domestic animal who does *not* have knowledge of the animal's dangerous propensities may be held liable for negligently failing to restrain the animal or prevent harm by the animal." *Hiner*, 271 Mich App at 612. "Dogs . . . are generally regarded as so unlikely to do substantial harm that their possessors have no duty to keep them under constant control. Consequently, a mere failure to do so would not constitute breach of any duty of care." *Trager v Thor*, 445 Mich 95, 105-106; 516 NW2d 69 (1994). But if the possessor of the animal knows of a dangerous propensity unique to that animal or is aware that the animal is in a situation giving rise to a danger of foreseeable harm, "the possessor has a legally recognized duty

to control the animal to an extent reasonable to guard against that foreseeable danger." *Id*. at 106.

> [A] negligence cause of action arises when there is ineffective control of an animal in a situation where it would reasonably be expected that injury could occur, and injury does proximately result from the negligence. The amount of control required is that which would be exercised by a reasonable person based upon the total situation at the time, including the past behavior of the animal and the injuries that could have been reasonably foreseen. [*Id*. (quotation marks and citation omitted; alteration in original).]

"To make a prima facie showing of negligence, a plaintiff need only establish that the defendant failed to exercise ordinary care under the circumstances to control or restrain the animal." *Hiner*, 271 Mich App at 613.

In this case, there is no indication that the dog had ever previously bitten anyone or acted aggressively before this incident. But reasonable minds could conclude that the Fourments placed the dog in a situation that gave rise to a danger of foreseeable harm and that they failed to exercise the requisite control of the dog. The Fourments, who were working at Westland, used their own dog, an 80-pound German shepherd, to demonstrate the use of a pinch collar in an effort to sell such a collar to plaintiff. The pinch collar pinches the dog's neck when used properly. The Fourments acknowledged that German shepherds can be territorial and that Kimberly failed to control the dog effectively. Following the demonstration of the pinch collar, Kimberly allowed some slack in the dog's leash, and the dog jumped up and bit plaintiff when plaintiff tried to pet the dog. The Fourments acknowledged that they could have demonstrated the pinch collar to plaintiff in other ways that did not expose her to this danger. In the unique circumstances of this case, reasonable minds could find that the Fourments were negligent in failing to exercise the required degree of control of the dog. Westland has not established that it was entitled to a directed verdict or JNOV on the issue of negligence.[1]

Westland next argues that the trial court erred by refusing to submit to the jury the issue whether the Fourments' negligence occurred in the scope of their employment for Westland. We conclude that Westland waived this issue and that, even if the issue had not been waived, Westland failed to preserve the issue and has not established a plain error that affected Westland's substantial rights.

To be properly preserved, an issue must have been raised before, and addressed and decided by, the trial court. *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 443; 695 NW2d 84 (2005). Also, to preserve an instructional error for review, a party must object on the record before the jury deliberates; the party must state the grounds for the objection and the

[1] Westland's argument suggests that it could not be liable under a negligence theory unless the Fourments had turned over possession of the dog to Westland. This argument overlooks the fact that Westland was held vicariously liable for the negligence of its employees, the Fourments.

specific matter to which the party objects. MCR 2.512(C). A party must request a jury instruction before the instructions are given in order to preserve an appellate issue concerning the adequacy of the instructions. *Leavitt v Monaco Coach Corp*, 241 Mich App 288, 300; 616 NW2d 175 (2000).

Westland contends that the jury should have been permitted to consider whether the Fourments were negligent as individuals outside of their employment relationship with Westland. In essence, it appears Westland claims that the jury should have been directed to consider the issue whether the Fourments were acting in the scope of their employment for Westland, but Westland does not identify any instruction that it requested on the issue. We find no indication in the record that Westland proposed an instruction on this issue. Westland did submit a proposed verdict form asking whether Westland was negligent and requiring the jury to include Westland in the allocation of fault, in contrast to the verdict form that was ultimately used asking whether "any" defendant was negligent. This does not amount, however, to a request to instruct the jury to consider whether the Fourments' negligence fell outside the scope of their employment relationship with Westland, which is how Westland seems to frame the issue on appeal. It appears, then, that the issue is unpreserved.

Moreover, we conclude that Westland waived this issue. "[A] waiver is a voluntary and intentional abandonment of a known right." *Quality Prod & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 374; 666 NW2d 251 (2003). A party waives any instructional error by expressing satisfaction with the instruction at issue, including by stating that there is no objection to the instruction. See *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002). "A party who waives a right is precluded from seeking appellate review based on a denial of that right because waiver eliminates any error." *Cadle Co v City of Kentwood*, 285 Mich App 240, 255; 776 NW2d 145 (2009). See also *In re Hudson*, 294 Mich App 261, 264; 817 NW2d 115 (2011) (explaining that a party may not assign as error on appeal something that the party deemed proper in the lower court because this would allow the party to harbor error as an appellate parachute). In *Moore v Detroit Entertainment, LLC*, 279 Mich App 195, 224; 755 NW2d 686 (2008), the defendant's counsel expressed satisfaction with the trial court's instructions to the jury, which omitted an instruction on vicarious liability. This Court held that the defense counsel's expression of satisfaction "constitutes a waiver that extinguishes any error concerning vicarious liability." *Id*.

At the beginning of trial, before jury selection, the trial court noted that "[t]here are no instructions for the jurors in terms of vicarious liability or respondeat superior. It really is something that needs to be applied after the jury determinations, I think, after the final determination by the jury." Westland's counsel agreed that there were no instructions on vicarious liability or respondeat superior. The following exchange then occurred:

> [*Westland's Counsel*]: In that regard, it's my understanding that counsel for the individual Fourments is intending to argue course and scope of employment. I don't think that's relevant because that goes to the elements of respondeat superior.
>
> *The Court*: Elements of respondeat superior, there are no elements.

[*Westland's Counsel*]: You have to show the course and scope of employment and I think that's going to confuse the jury.

The Court: His argument is simply they were working at the time that this occurred. I don't think that's disputed.

[*The Fourments' Counsel*]: They were trying to sell a collar.

The Court: Right. There's no facts in dispute, it's in the argument.

[*Westland's Counsel*]: It's admitted.

[*Plaintiff's Counsel*]: I don't know what the argument is.

[*Westland's Counsel*]: I don't see why it has to be argued.

On the second day of trial, during a discussion of the parties' directed verdict motions, Westland's counsel stated that "if there is a finding [of] negligence against the Fourments as employees it flows through to the company." Later, the trial court informed the parties that Westland would not be included on the verdict form with respect to the allocation of fault. Rather, only the Fourments and plaintiff would be allocated fault. The court explained:

> Because if the theory is that they are vicariously liable they cannot be allocated fault. Their liability comes from the actions of the employee. So for that reason Westland Dog Food's name does not appear in the allocation. That's the court's ruling with regard to that.

In response to a suggestion by plaintiff in which the Fourments concurred, the trial court said that it was fine to ask whether "any" of defendants were negligent. The court further stated:

> If you want to group them fine. We can do that. Because that would include the Fourments. If we put Westland Dog Food that's going to be so confusing. We don't have any instructions regarding respondeat superior or vicarious liability or anything. So where are we coming up with, was Westland Dog Food negligent. That would not be appropriate.

On the third and final day of trial, the trial court again noted outside the presence of the jury that there were no instructions for vicarious liability and stated that if the jury found negligence, then vicarious liability would attach to that finding. The court asked whether the parties agreed to that, and Westland's counsel stated, "I believe that to the extent the jury finds negligence based on your previous rulings that all the negligence would go to all defendants." The Fourments' counsel suggested that Westland's name had to appear on the verdict form. The trial court responded:

> Well, that is why I'm asking for the stipulation because if they can't stipulate to a judgment based on vicarious liability on a finding of negligence of the employees, then you're right, I've got a problem. And then I think we need to instruct the jury on vicarious liability and have them appear on the verdict form

with an instruction to them so that the jury can make a determination about whether or not the negligence happened within the scope of the employment.

The following exchange then occurred:

> [*Westland's Counsel*]: Judge, I think if the verdict form says Defendants rather than breaking the Fourments out individually and saying Stephen and Kimberly Fourment. As the Defendants proposal this morning was based on your prior ruling, I think not having the last section is fine.
>
> *The Court*: So you are saying that because it is the broad category of Defendants that will be sufficient to bind Westland Dog Food to this verdict?
>
> [*Westland's Counsel*]: Only based on your previous rulings. Not waiving any of the rulings or any arguments I've already made.
>
> *The Court*: Of course.
>
> [*Westland's Counsel*]: That's correct.

After further input from the other parties, the trial court stated, "All right, so we'll leave it as a board [sic] category of Defendants then." Westland expressed that it had no further objections to the verdict form.

Later, the court stated that plaintiff and Westland had agreed "to group the defendants together even though it is a grouping of active and inactive tort feasors [sic]." The trial court further said, "And then if there is a finding of negligence by either of the employees, Westland Dog Food as agreed by the parties would be vicarious[ly] liable." Westland did not express an objection to this characterization of the parties' agreement. Later, Westland's counsel said that Westland agreed to group defendants on the verdict form "based on the Court's previous ruling. We have agreed at that point to do this. I just don't want to waive for purposes of appeal." The trial court asked Westland what authority there was for naming Westland on the verdict form for purposes of apportionment, and Westland's counsel stated, "I don't know that I want you to separate it out." When asked what she meant by that, Westland's counsel stated, "The defendants individually based on your previous rulings." Westland's counsel said that if the verdict form identified defendants, then the court would have to give a vicarious liability instruction. The trial court said, "Well, this is the first time you brought that out, counsel." The trial court and plaintiff noted Westland had previously agreed that no vicarious liability instruction was needed and that the court would decide the issue of vicarious liability as a matter of law. Following these discussions, all parties agreed to the verdict form that was ultimately used that asked whether "any" defendant was negligent.

We determine that Westland waived the argument that it now makes on appeal. Westland contends that the trial court erred by refusing to allow the jury to consider whether the Fourments were negligent in their individual capacities outside of their employment relationship with Westland. Westland specifically agreed, however, to the verdict form that did not identify Westland by name, perhaps as a strategic move to avoid drawing attention to the corporate

defendant. Moreover, as the previously summarized discussions illuminate, the trial court at one point indicated that, if Westland would not stipulate to a judgment holding it vicariously liable upon a jury finding of negligence of the Fourments, the court was willing to instruct the jury on vicarious liability and have the jury determine whether the Fourments' negligence occurred within the scope of their employment. Westland did not take the opportunity to support such an instruction. Although Westland's counsel repeatedly claimed that her agreement to the verdict form was based on the trial court's previous rulings and that she was not waiving the issue for appeal, the fact remains that she did not accept the court's offer to instruct the jury on vicarious liability and instead stipulated to the verdict form asking whether "any" defendant was negligent. We therefore conclude that Westland waived the argument that the court should have allowed the jury to consider whether the Fourments were negligent outside of their employment relationship with Westland. The waiver thus eliminated any error, precluding appellate review.

Even if the issue was not waived, Westland would not be entitled to relief. If this issue is only unpreserved rather than waived, our review is for plain error. See *Demski v Petlick*, 309 Mich App 404, 426-427; 873 NW2d 596 (2015). "Plain error occurs at the trial court level if (1) an error occurred (2) that was clear or obvious and (3) prejudiced the party, meaning it affected the outcome of the lower court proceedings." *Duray Dev, LLC v Perrin*, 288 Mich App 143, 150; 792 NW2d 749 (2010).

As our Supreme Court explained in *Hamed*, 490 Mich at 10-11:

> The doctrine of respondeat superior is well established in this state: An employer is generally liable for the torts its employees commit within the scope of their employment. It follows that an employer is not liable for the torts . . . committed by an employee when those torts are beyond the scope of the employer's business. This Court has defined "within the scope of employment" to mean "engaged in the service of his master, or while about his master's business." Independent action, intended solely to further the employee's individual interests, cannot be fairly characterized as falling within the scope of employment. Although an act may be contrary to an employer's instructions, liability will nonetheless attach if the employee accomplished the act in furtherance, or the interest, of the employer's business. [Quotation marks and citations omitted.]

"While the issue of whether the employee was acting within the scope of his employment is generally for the trier of fact, the issue may be decided as a matter of law where it is clear that the employee was acting to accomplish some purpose of his own." *Bryant v Brannen*, 180 Mich App 87, 98; 446 NW2d 847 (1989). By the same token, it is therefore logical to conclude that the issue may be decided as a matter of law where it is clear that the employees were acting within the scope of their employment.

In the present case, the evidence irrefutably establishes that the Fourments were acting within the scope of their employment. It is undisputed that the Fourments were employed by Westland and that the dog bite incident occurred at the store owned by Westland at which the Fourments were working at the time of the incident. It is also undisputed that plaintiff was a customer and that the Fourments were attempting to sell a pinch collar to plaintiff to benefit

Westland. The Fourments used their own dog to demonstrate the use of the pinch collar to plaintiff in an effort to convince her to buy such a product. Westland argues that the demonstration of the pinch collar had ended by the time the dog bit plaintiff. This does not alter the fact that the Fourments were nonetheless acting in the scope of their employment by interacting with plaintiff, a customer, in the hope of convincing her to buy the product. The Fourments' conduct of greeting or talking with customers in the effort to sell Westland's products is certainly in the interest of Westland's business. The Fourments were not acting to further their own interests at the time the dog bite occurred. Accordingly, the trial court did not err by concluding as a matter of law that Westland was vicariously liable for the negligence of the Fourments. Even if the issue should have been submitted to the jury such that the trial court erred, Westland has not established that the error affected the outcome of the lower court proceedings. Given the overwhelming evidence in support of a finding that the Fourments were acting within the scope of their employment, it is not reasonably likely that the jury would have reached a different conclusion. See *Duray Dev, LLC*, 288 Mich App at 150 (requiring a showing of prejudice under the plain error rule); MCR 2.613(A) (indicating that vacating a judgment or granting a new trial is not required unless failure to do so is inconsistent with substantial justice).

Westland next argues that the trial court erred by refusing to instruct the jury to allocate fault between the Fourments and Westland. Westland again contends in this argument that it is entitled to dismissal of all counts because the Fourments' absolute liability under the dog bite statute precludes any apportionment or shift of fault or liability to Westland. This argument is devoid of merit for the reasons set forth earlier. That is, in addition to her claim under the dog bite statute, plaintiff pursued a claim of common-law negligence with respect to which the jury found in her favor. Westland's vicarious liability for the Fourments' negligence is thus the result of a jury finding in plaintiff's favor on a separate negligence claim and was not an improper apportionment or shift of liability to Westland related to the Fourments' absolute liability under the dog bite statute.

In the alternative, Westland seeks a new trial limited to the allocation of fault between the Fourments and Westland. Westland waived this argument by ultimately agreeing to the verdict form that was used at trial and by suggesting that Westland was no longer interested in being identified by name on the verdict form, as explained earlier. The verdict form asked the jury to decide only whether "any" defendant was negligent and did not identify Westland by name or require any allocation of fault between Westland and the Fourments. Appellate review of this issue is therefore precluded because waiver eliminates any error. *Cadle Co*, 285 Mich App at 255; *Moore*, 279 Mich App at 224.

Even if the issue had not been waived, Westland's argument would lack merit. A trial court's decision regarding a motion for a new trial is reviewed for an abuse of discretion. *Meyer v Center Line*, 242 Mich App 560, 564; 619 NW2d 182 (2000). An abuse of discretion occurs when the trial court's decision falls outside the range of principled outcomes. *Pontiac Fire Fighters Union Local 376 v Pontiac*, 482 Mich 1, 8; 753 NW2d 595 (2008). It is true that "[t]he tort-reform statutes have replaced joint and several liability in most cases, with each tortfeasor now being liable only for the portion of the total damages that reflects that tortfeasor's percentage of fault." *Kaiser v Allen*, 480 Mich 31, 37; 746 NW2d 92 (2008). See also MCL 600.2956 (abolishing joint and several liability for actions "based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death "). Therefore, in most

cases, the trier of fact is required to allocate liability for damages on the basis of fault. See MCL 600.6304(1). But the Legislature explicitly stated that it was not abolishing "an employer's vicarious liability for an act or omission of the employer's employee." MCL 600.2956. Moreover, our Supreme Court has explained that "[i]n vicarious-liability cases, in which the latent tortfeasor's fault derives completely from that of the active tortfeasor, there can be no allocation of fault." *Kaiser*, 480 Mich at 36. Stated differently, "the tort-reform allocation-of-fault provisions do not apply to vicarious-liability cases because a vicariously liable tortfeasor is not at 'fault' as defined by MCL 600.6304(8)." *Id*. at 37. MCL 600.6304(8) defines "fault" as "an act, an omission, conduct, including intentional conduct, a breach of warranty, or a breach of a legal duty, or any conduct that could give rise to the imposition of strict liability, that is a proximate cause of damage sustained by a party."

> In vicarious-liability cases, one tortfeasor is at fault, and the other tortfeasor, through legal obligation, is entirely liable for the active tortfeasor's negligent actions; that is, the actions of the vicariously liable tortfeasor are not a "natural" cause of the injury. Accordingly, the actions of a vicariously liable tortfeasor do not constitute a proximate cause of that injury. [*Kaiser*, 480 Mich at 38.]

Therefore, Westland's argument that it was entitled to an allocation of fault is devoid of merit. Westland was held vicariously liable for the negligence of its employees, the Fourments, committed in the scope of their employment. As such, Westland is entirely liable for the active negligence of the Fourments, and there can be no allocation of fault. See *Kaiser*, 480 Mich at 36-39. The fact that the Fourments are absolutely liable pursuant to the dog bite statute does not alter the fact that Westland was held vicariously liable under plaintiff's separate claim of negligence, and it is with respect to this negligence claim, and not the statutory dog bite claim, that Westland has been held vicariously liable. As discussed earlier, a party is permitted to pursue alternative claims.[2]

Westland briefly suggests that the jury verdict could be construed as containing a finding that Westland itself was actively negligent, such that Westland would thus be entitled to an allocation of fault. But there is no evidence of such negligence by Westland; it is only the acts or omissions of Westland's employees that constituted active negligence. And as discussed earlier, Westland itself ultimately agreed to the verdict form that asked only whether "any" defendant was negligent. Westland is thus barred from claiming on appeal that the verdict was insufficiently clear in identifying which defendant the jury found to be negligent. See *In re Hudson*, 294 Mich App at 264 (a party may not assign as error on appeal something that the party deemed proper in the lower court because this would allow the party to harbor error as an appellate parachute).

Westland's reliance on *Tate v Grand Rapids*, 256 Mich App 656; 671 NW2d 84 (2003), is misplaced. This Court's opinion in that case merely held that a claim under the dog bite

[2] Although plaintiff may pursue alternative claims, she is entitled to only one recovery. See *Kaiser*, 480 Mich at 39 (noting that "a single injury can lead to only a single compensation").

statute constitutes a tort action in the context of governmental immunity. See *id*. at 660-661. The holding and analysis in *Tate* has no relevance to this case. Westland's citation of *Hashem v Les Stanford Oldsmobile, Inc*, 266 Mich App 61; 697 NW2d 558 (2005), is similarly unavailing. *Hashem* involved the interpretation of a statute, MCL 600.6312, imposing joint and several liability for an act or omission of a defendant causing injury or death that involves the use of alcohol or a controlled substance and constitutes a crime for which that defendant was convicted. *Id*. at 78-79. This Court held that the owner of the vehicle in *Hashem* was not subject to joint and several liability. *Id*. at 79-80. The analysis in *Hashem* hinged on an interpretation of the language of MCL 600.6312. It has no bearing on the issue presented here: whether allocation of fault is permitted in vicarious liability cases, an issue resolved by *Kaiser*.

On cross-appeal, plaintiff argues that the trial court erred by refusing to award case evaluation sanctions to plaintiff against Westland. We disagree. "A trial court's interpretation of a court rule and decision to award case evaluation sanctions are questions of law we review de novo." *Ayre v Outlaw Decoys, Inc*, 256 Mich App 517, 520; 664 NW2d 263 (2003). Issues of statutory interpretation are reviewed de novo. *Feyz v Mercy Mem Hosp*, 475 Mich 663, 672; 719 NW2d 1 (2006). Unambiguous language in a statute or court rule is applied as written. *Ligons v Crittenton Hosp*, 490 Mich 61, 70; 803 NW2d 271 (2011); *Linden v Citizens Ins Co of America*, 308 Mich App 89, 92; 862 NW2d 438 (2014).

MCR 2.403(O)(1) addresses the liability for costs of a party that rejected a case evaluation award. It states:

> 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)(1).]

Separate case evaluation awards were rendered against Westland and the Fourments. It is undisputed that Westland accepted the case evaluation award rendered against it. Hence, because Westland did not reject the case evaluation award rendered against it, Westland is not required to pay plaintiff's actual costs under the plain language of MCR 2.403(O)(1).

Plaintiff argues that the liability of Westland and the Fourments must be viewed as a single liability because they are jointly and severally liable. In support of this argument, plaintiff cites MCR 2.403(K)(2) and MCR 2.403(H)(3). MCR 2.403(K)(2) provides:

> Except as provided in subrule (H)(3), the evaluation must include a separate award as to each plaintiff's claim against each defendant and as to each cross-claim, counterclaim, or third-party claim that has been filed in the action. For the purpose of this subrule, all such claims filed by any one party against any other party shall be treated as a single claim.

MCR 2.403(H)(3) states: "If one claim is derivative of another (e.g., husband-wife, parent-child) they must be treated as a single claim, with one fee to be paid and a single award made by the

case evaluators." Plaintiff argues that her claim against Westland was derivative of her common-law negligence claim against the Fourments, such that separate awards were improper.

Plaintiff cites no authority to support this interpretation. MCR 2.403(K)(2) generally requires a separate award with respect to each plaintiff's claim against each defendant. The only exception to this principle under MCR 2.403(H)(3) is for a claim that is "derivative," with the court rule referring to "husband-wife" and "parent-child" as examples of the types of "derivative" claims contemplated as falling within the exception. Both examples are of situations in which one plaintiff's claim is derivative of another plaintiff's claim. For instance, if two plaintiffs are spouses, one plaintiff's loss of consortium claim for the other plaintiff's injury would constitute a derivative claim. See *Auto Club Ins Ass'n v Hardiman*, 228 Mich App 470, 474; 579 NW2d 115 (1998) (noting that "a claim of loss of consortium is contingent upon the injured person's recovery of damages"). Plaintiff's claims are not derivative of anyone else's claims; she is the only plaintiff in this case, and her claims are for her own injuries.

Plaintiff suggests that her claim against Westland is nonetheless "derivative" under MCR 2.403(H)(3) because Westland is being held vicariously liable for the negligence of the Fourments. Even assuming that plaintiff's vicarious liability claim against Westland constitutes the type of "derivative" claim contemplated under MCR 2.403(H)(3), thereby requiring a single award to have been made against Westland and the Fourments, the fact remains that the case evaluation panel instead issued a separate award against Westland. This purported error was not corrected during the case evaluation process, and Westland was not put on notice that it was required to respond to the separate case evaluation award that was rendered against the Fourments. Therefore, Westland cannot be deemed to have rejected the case evaluation award rendered against the Fourments. Accordingly, because Westland did not reject any case evaluation award, the trial court properly refused to award case evaluation sanctions against Westland.

Plaintiff further contends that Westland must pay case evaluation sanctions under MCL 600.6306(1), which states, in relevant part:

> After a verdict is rendered by a trier of fact in favor of a plaintiff in a personal injury action other than an action for medical malpractice, an order of judgment shall be entered by the court. Subject to [MCL 600.2959, which addresses comparative fault], the order of judgment shall be entered against each defendant, including a third-party defendant, in the following order and in the following judgment amounts:
>
> * * *
>
> (f) All taxable and allowable costs, including interest as permitted by [MCL 600.6013 or MCL 600.6455] on the judgment amounts.

Plaintiff asserts that the judgment in this case fails to make "each defendant" responsible for "[a]ll taxable and allowable costs" as required by MCL 600.6306(1). Plaintiff assumes that the attorney fees and costs awarded as case evaluation sanctions *against the Fourments* constitute "taxable and allowable costs" *against Westland*. As discussed earlier, there was no authority for

awarding case evaluation sanctions against Westland because Westland did not reject a case evaluation award. See MCR 2.403(O)(1). Plaintiff has cited no authority establishing that case evaluation sanctions are "taxable and allowable costs" under MCL 600.6306(1) *with respect to a defendant who did not reject a case evaluation award*, and we have located no such authority. Plaintiff thus incorrectly asserts that MCL 600.6306(1) requires an award of case evaluation sanctions against Westland. Further, because MCL 600.6306(1) is not inconsistent with MCR 2.403(O)(1), it is unnecessary to address plaintiff's cursory assertion that the statute must prevail over the court rule.

Plaintiff also relies on the fact that MCL 600.6013(8) states, in relevant part, that "[i]nterest under this subsection is calculated on the entire amount of the money judgment, including attorney fees and other costs." According to plaintiff, the Legislature's use of the word "the" before "money judgment" reflects that there shall be a single money judgment that must include attorney fees and other costs. Plaintiff then suggests that the liability of Westland and the Fourments for case evaluation sanctions must be coextensive in order for there to be a single judgment that includes costs. We disagree. The award of judgment interest under MCL 600.6013(8) applies to attorney fees and costs ordered as case evaluation sanctions under MCR 2.403(O). *Ayar v Foodland Distrib*, 472 Mich 713, 717-718; 698 NW2d 875 (2005). The trial court entered a single judgment that included an award of case evaluation sanctions to plaintiff against the Fourments only and an award of interest to be calculated on the entire amount of the money judgment, including on the attorney fees and costs awarded as case evaluation sanctions against the Fourments, as required by MCL 600.6013(8) and *Ayar*. There is no language in MCL 600.6013(8) suggesting that each defendant must share the same liability for case evaluation sanctions in order for the trial court to enter a judgment that includes attorney fees and costs and that awards interest on the entire amount of the judgment.

Finally, plaintiff argues on cross-appeal that the trial court erred by failing to grant her request for additional case evaluation sanctions for attorney fees and other costs incurred below after the entry of judgment. A trial court's failure to exercise its discretion when called on to do so amounts to an abdication and thus an abuse of discretion. *Loutts v Loutts*, 298 Mich App 21, 24; 826 NW2d 152 (2012). This Court reviews de novo the interpretation and application of court rules. *In re Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010).

"MCR 2.403 does not limit an award to attorney fees for services performed at the trial itself." *Troyanowski v Village of Kent City*, 175 Mich App 217, 226-227; 437 NW2d 266 (1988). In general, case evaluation sanctions may be awarded for attorney fees and costs incurred in connection with motions filed in the trial court after trial, if the fees were incurred for services necessitated by the rejection of the case evaluation award. See *Zdrojewski v Murphy*, 254 Mich App 50, 71-72; 657 NW2d 721 (2002). The trial court failed to exercise its discretion by ruling on plaintiff's request for additional case evaluation sanctions for fees and other costs incurred below after the entry of judgment. We therefore remand the case to the trial court to exercise its discretion and render a decision regarding plaintiff's request for these additional case evaluation sanctions. As discussed earlier, the trial court properly concluded that case evaluation sanctions should not be imposed against Westland. The proceedings on remand are thus limited to determining whether to impose these additional case evaluation sanctions against the Fourments.

Affirmed, but remanded for a determination regarding plaintiff's request for additional case evaluation sanctions. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Jane M. Beckering
/s/ Michael F. Gadola