

266 Mich. App. 452, \*; 702 N.W.2d 671, \*\*;  
2005 Mich. App. LEXIS 1275, \*\*\*

17 of 20 DOCUMENTS

**KARLENE S. HARBOUR, as Personal Representative of the Estate of KEVIN DANIEL HARBOUR, Deceased, Plaintiff-Appellant, v CORRECTIONAL MEDICAL SERVICES, INC., a/k/a CORRECTIONAL MEDICAL SYSTEMS, INC., Defendant-Appellee. KARLENE S. HARBOUR, Personal Representative of the Estate of KEVIN DANIEL HARBOUR, Deceased, Plaintiff-Appellee, v CORRECTIONAL MEDICAL SERVICES, INC., a/k/a CORRECTIONAL MEDICAL SYSTEMS, INC., Defendant-Appellant.**

**No. 252857, No. 257012**

**COURT OF APPEALS OF MICHIGAN**

*266 Mich. App. 452; 702 N.W.2d 671; 2005 Mich. App. LEXIS 1275*

**April 13, 2005, Submitted at Detroit  
May 24, 2005, Decided**

**SUBSEQUENT HISTORY:** Appeal denied by *Harbour v. Corr. Med. Servs.*, 475 Mich. 859; 713 N.W.2d 777; 2006 Mich. LEXIS 975 (Mich., May 24, 2006)

**PRIOR HISTORY:** [\*\*\*1] Macomb Circuit Court. LC No. 2000-003451-NH.

**DISPOSITION:** Affirmed.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Plaintiff personal representative of a decedent's estate appealed from the order of the Macomb Circuit Court (Michigan) granting the motion for directed verdict filed by defendant correctional medical services company in plaintiff's wrongful death action that arose when the decedent was arrested for driving under the influence, was evaluated by an employee of defendant, then died in his cell two hours later of acute alcohol withdrawal.

**OVERVIEW:** Plaintiff alleged medical malpractice, intentional misconduct, and ordinary negligence. The trial court held that *Mich. Comp. Laws § 600.2955a* precluded recovery because the evidence established that the decedent's intoxication was the proximate cause of his death. Defendant appealed the denial of its motion for case evaluation sanctions. There was no dispute that the decedent's blood alcohol level was .32. Expert medical witnesses uniformly agreed that withdrawal is the natural and expected, even inevitable, outcome of excessive alcohol consumption. The court affirmed, and held that as a matter of law, defendant satisfied the requisite elements of § 600.2955a and was entitled to the absolute defense. Plaintiff's expert admitted that what might have

happened had the nurse treated the decedent differently was pure speculation. As to sanctions under *Mich. Ct. R. 2.403(O)(11)*, the court found that defendant's failure to raise the *Mich. Comp. Laws § 600.2955a* defense earlier guaranteed the need for a five-day trial. The trial court did not abuse its discretion in finding that defendant's actions constituted gamesmanship that was costly to plaintiff.

**OUTCOME:** The court affirmed the decision of the trial court.

**LexisNexis(R) Headnotes**

*Civil Procedure > Trials > Judgment as Matter of Law > Directed Verdicts*

*Civil Procedure > Appeals > Standards of Review > De Novo Review*

[HN1] A trial court's decision on a motion for a directed verdict is reviewed de novo to determine whether all of the evidence and inferences, viewed in the light most favorable to the nonmovant, fail to establish a claim as a matter of law. Issues of law are also considered de novo on appeal.

*Torts > Negligence > Defenses > Comparative Negligence > General Overview*

[HN2] See *Mich. Comp. Laws § 600.2955a*.

*Civil Procedure > Appeals > Standards of Review > De Novo Review*

*Governments > Legislation > Interpretation*

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***Torts > Negligence > Defenses > Comparative Negligence > General Overview***

[HN3] Issues of statutory construction present questions of law and receive review de novo. Every word or phrase of a statute will be assigned its plain and ordinary meaning unless defined in the statute. *Mich. Comp. Laws* § 8.3a. Courts may consult dictionary definitions when terms are not expressly defined by statute. "Event" for purposes of *Mich. Comp. Laws* § 600.2955a means something that happens or is regarded as happening; an occurrence, especially one of some importance or the outcome, issue, or result of anything.

***Civil Procedure > Remedies > Costs & Attorney Fees > Costs > General Overview***

***Civil Procedure > Appeals > Standards of Review > Abuse of Discretion***

***Civil Procedure > Appeals > Standards of Review > De Novo Review***

[HN4] A trial court's decision to grant or deny case evaluation sanctions is subject to de novo review on appeal. However, where a trial court's decision whether to award costs pursuant to the "interest of justice" provision set forth in *Mich. Ct. R. 2.403(O)(11)* is discretionary, the appellate court reviews that decision for an abuse of discretion. An abuse of discretion may be found only when the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias.

***Civil Procedure > Remedies > Costs & Attorney Fees > Costs > General Overview***

[HN5] See *Mich. Ct. R. 2.403(O)*.

***Civil Procedure > Settlements > Offers of Judgment > General Overview***

***Civil Procedure > Remedies > Costs & Attorney Fees > Costs > General Overview***

***Civil Procedure > Sanctions > General Overview***

[HN6] Pursuant to *Mich. Ct. R. 2.403(O)(11)*, a trial court may refuse to award sanctions in the "interest of justice" if the verdict is the result of a judgment stemming from a ruling on a motion after rejection of the case evaluation.

***Civil Procedure > Remedies > Costs & Attorney Fees > Costs > General Overview***

[HN7] The "interest of justice" exception of *Mich. Ct. R. 2.403(O)(11)* should be invoked only in unusual circumstances, such as where a legal issue of first impression or public interest is present, the law is unsettled and substantial damages are at issue, there is a

significant financial disparity between the parties, or where the effect on third persons may be significant. These factors are not exclusive. Other circumstances, including misconduct on the part of the prevailing party, may also trigger this exception.

***Civil Procedure > Discovery > Methods > Oral Depositions***

***Civil Procedure > Summary Judgment > Supporting Materials > Affidavits***

[HN8] Parties may not create factual issues by merely asserting the contrary in an affidavit after giving damaging testimony in a deposition.

**COUNSEL:** *Frank K. Penirian, Jr.*, for the plaintiff.

*Chapman and Associates, P.C.* (by *Ronald W. Chapman* and *Brian J. Richtarcik*), for the defendant.

**JUDGES:** Before: Griffin, P.J., and Bandstra and Hoekstra, JJ.

**OPINION BY:** Richard Allen Griffin

**OPINION:** [\*\*673] [\*454] GRIFFIN, P.J.

In these consolidated appeals, plaintiff appeals as of right in Docket No. 252857 the trial court's order granting defendant's motion for directed verdict and dismissing plaintiff's case with prejudice. In Docket No. 257012, defendant appeals as of right the order of the same court denying its motion for case evaluation sanctions. We affirm.

I

This case arose when plaintiff's decedent, Kevin Daniel Harbour, was arrested for driving while under the influence of intoxicating liquor. He was taken to the Macomb County Jail and a Breathalyzer test was administered. He registered 0.32 grams per 210 liters of breath, over three times the then-existing legal limit for operating a motor vehicle while under the influence of liquor (OUIL). At the jail, he was assessed by an employee of defendant Correctional Medical Services, Inc. (CMS), nurse Brenda Froehlich, who placed him on "sick call" in a holding cell, to be seen by a doctor the next morning. Kevin Harbour collapsed in his cell approximately two [\*\*\*2] hours after the assessment and died as a result of irregular heart rhythms caused by acute alcohol withdrawal, a manifestation of chronic alcoholism.

Plaintiff filed suit for the wrongful death of Kevin Daniel Harbour. Plaintiff's first amended complaint alleged medical malpractice, intentional misconduct, and ordinary negligence against defendant CMS. n1 In [\*455] December 2000, both parties rejected a

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unanimous case evaluation of \$ 75,000 in [\*\*674] favor of plaintiff. The trial court thereafter granted in part defendant's motion for summary disposition and dismissed all the plaintiff's claims, with the exception of the count alleging medical malpractice. n2 A jury trial commenced, and at the close of plaintiff's proofs, defendant moved for, and the trial court granted, a directed verdict on the ground that *MCL 600.2955a* precluded recovery because the evidence unequivocally established that the decedent's intoxication was the proximate cause of his death. However, the trial court denied defendant's motion for case evaluation sanctions on the ground that defendant should have raised the statutory defense of impairment provided by *MCL 600.2955a* [\*\*\*3] earlier and, by failing to do so, therefore caused plaintiff and the court to waste resources. The parties now appeal.

n1 Count I of the amended complaint alleged that nurse Brenda Froehlich breached the nursing standard of care owed to plaintiff's decedent by failing to make an adequate assessment and failing to plan for subsequent care, including either monitoring or contacting a physician, and that defendant CMS was vicariously liable for her actions. Brenda Froehlich was never served with a notice of intent to sue pursuant to *MCL 600.2912b* or named as a defendant in this case.

n2 Plaintiff has not appealed that order.

## II

In Docket No. 252857, plaintiff argues that the trial court erred in granting a directed verdict in favor of defendant on the basis of *MCL 600.2955a*. [HN1] A trial court's decision on a motion for a directed verdict is reviewed de novo to determine whether all the evidence and inferences, viewed in the light most favorable to the nonmovant, [\*\*\*4] fail to establish a claim as a matter of law. *Sniecinski v Blue Cross and Blue Shield of Michigan*, 469 Mich. 124, 131; 666 N.W.2d 186 (2003). Issues of law are also reviewed de novo on appeal. *Burba v Burba (After Remand)*, 461 Mich. 637, 647; 610 N.W.2d 873 (2000).

[\*456] The trial court granted the directed verdict on the basis of *MCL 600.2955a*, which provides:

[HN2] (1) It is an absolute defense in an action for the death of an individual or for injury to a person or property that the individual upon whose death or injury the action is based had an impaired ability to function due to the influence of intoxicating liquor or a controlled substance, and as a result of that impaired

ability, the individual was 50% or more the cause of the accident or event that resulted in the death or injury. If the individual described in this subsection was less than 50% the cause of the accident or event, an award of damages shall be reduced by that percentage.

(2) As used in this section:

(a) "Controlled substance" means that term as defined in [ [\*\*\*5] *MCL 333.7104*].

(b) "Impaired ability to function due to the influence of intoxicating liquor or a controlled substance" means that, as a result of an individual drinking, ingesting, smoking, or otherwise consuming intoxicating liquor or a controlled substance, the individual's senses are impaired to the point that the ability to react is diminished from what it would be had the individual not consumed liquor or a controlled substance. An individual is presumed under this section to have an impaired ability to function due to the influence of intoxicating liquor or a controlled substance if, under a standard prescribed by [*MCL 257.625a*], a presumption would arise that the individual's ability to operate a vehicle was impaired.

Thus, pursuant to *MCL 600.2955a*, in order to successfully avail itself of the absolute defense of impairment, defendant in this case was required to establish that (1) the decedent had an impaired ability [\*\*\*6] to function due to the influence of intoxicating liquor or a controlled substance, and (2) that as a result of that impaired ability, the decedent was fifty percent or more the cause of the accident or event that resulted in his death.

[\*457] [\*\*675] As a preliminary matter, we note that under the version of *MCL 257.625a(7)* in effect at the time of the incident in question, legal intoxication was 0.10 grams or more of alcohol in each 210 liters of breath or 100 milliliters of blood. There is no dispute that plaintiff decedent's blood alcohol level was 0.32, or three times the legal limit. Therefore, the decedent presumptively had an "impaired ability to function due to the influence of intoxicating liquor" under *MCL 600.2955a(2)(b)*. At trial, plaintiff presented no evidence to refute that presumption. On the contrary, plaintiff's expert addictionist, Dr. Berger, testified that, although the decedent was a chronic alcoholic with a very high alcohol tolerance, the decedent had an impaired ability to function due to the influence of intoxicating liquor at the

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time of the incident in question. Therefore, the first element of the statute was established beyond dispute. [\*\*\*7]

Plaintiff, however, argues that the directed verdict contradicts the statute's requirement that there must be an "accident or event" resulting in death, distinct and apart from the decedent's initial voluntary intoxication that caused impairment. Plaintiff maintains that alcohol withdrawal should not be considered an "accident or event" under *MCL 600.2955a(1)*. Plaintiff contends that this case is distinguishable from *Piccalo v Nix (On Remand)*, 252 Mich. App. 675; 653 N.W.2d 447 (2002), and *Wysocki v Felt*, 248 Mich. App. 346; 639 N.W.2d 572 (2001), both of which were cited by defendant in support of its motion for a directed verdict. Plaintiff claims that in those cases, intoxication was followed by a discrete injurious "event," arguably influenced by the insobriety of the injured party, whereas in the present case there was no "accident or event" independent of the decedent's alcohol-induced impairment and resultant withdrawal. We disagree.

[\*458] In *Piccalo*, the plaintiff brought an action against the defendant, alleging that, as a result of the defendant's negligence, she sustained injuries [\*\*\*8] in an automobile accident on her way home from a party hosted by the defendant. The plaintiff had become intoxicated at the party and then left the party as a passenger in a van driven by a drunken driver. The plaintiff was seated in the back of the van, with no seat and no seat belt, when the van left the roadway and struck a tree. The trial court entered a judgment of no cause of action pursuant to *MCL 600.2955a* after the jury found the plaintiff to be fifty-three percent negligent. On appeal, this Court ultimately affirmed the judgment of no cause of action, holding that the defendant was entitled to the absolute defense of impairment provided by *MCL 600.2955a* because there was sufficient evidence from which the jury could conclude that the plaintiff was fifty percent or more the cause of the event that resulted in the injury. In so holding, this Court explained:

[HN3] Issues of statutory construction present questions of law and receive review de novo. *Oakland Co Bd of Co Rd Comm'rs v Michigan Property & Casualty Guaranty Ass'n*, 456 Mich. 590, 610; 575 N.W.2d 751 (1998). Every word or phrase of a statute [\*\*\*9] will be assigned its plain and ordinary meaning unless defined in the statute. See *MCL 8.3a*; *Robertson v DaimlerChrysler Corp*, 465 Mich. 732, 748; 641 N.W.2d 567 (2002). We may consult dictionary definitions when terms are not expressly defined by statute. *Oakland Co, supra* at 604. "Event" means "something that

happens or is regarded as happening; an occurrence, especially one of some importance" or "the outcome, issue, or result of anything." *The Random House Dictionary of the English Language: Unabridged Second Edition* (1998), p 671.

Given this broad definition, there was evidence from which the jury could conclude that plaintiff was fifty percent, or more, the cause of the "event" that resulted in the injury. Plaintiff, who was over eighteen years of age but [\*459] under the legal drinking age of twenty-one, elected to consume alcohol and become intoxicated. Plaintiff freely chose to accept a ride home from an intoxicated driver. Plaintiff also chose to ride in an automobile that did not have proper seating or restraints in the rear compartment and was filled with unrestrained materials including a tire and several [\*\*\*10] tools. Under these circumstances, defendant was entitled to the absolute defense of impairment, and the judgment of no cause of action must be affirmed. [ *Piccalo, supra* at 679-680.]

In this case, the expert medical witnesses uniformly agreed that withdrawal is the natural and expected, even inevitable, outcome of excessive alcohol consumption. However, the testimony of these experts also indicated that withdrawal, although caused by drinking alcohol, is a process or syndrome distinct from alcohol consumption; withdrawal has a detectable onset, is manifested by specific symptoms, and eventually passes. Therefore, as the trial court properly concluded, alcohol withdrawal meets the broad definition of an "event," as defined in *Piccalo*, for the purposes of *MCL 600.2955a(1)*.

Plaintiff further argues that this Court's reasoning in *Shinholster v Annapolis Hospital*, 255 Mich. App. 339; 660 N.W.2d 361 (2003), aff'd in part and rev'd in part, 471 Mich. 540; 685 N.W.2d 275 (2004), mandates reversal of the trial court's order directing a verdict in defendant's favor. In *Shinholster*, a [\*\*\*11] medical malpractice case, this Court ruled that the trial court did not err in limiting the jury's consideration of the plaintiff's decedent's comparative negligence (i.e., the decedent's failure to follow doctors' orders or take prescribed medication) to the period following her first visit to the defendant hospital. Specifically, this Court held that defendant could not argue that plaintiff was comparatively negligent by creating the condition that caused plaintiff to [\*460] seek treatment. *Shinholster*, 255 Mich. App. 342-348. "Given the preventable nature

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of many illnesses, to accept the contrary position would allow many health-care professionals to escape liability for negligently treating ill patients." *Id.* at 348. Plaintiff herein argues that *Shinholster* dictates that the decedent's conduct, before his incarceration should not be considered in determining the issue of malpractice or the apportionment of damages. We disagree.

Initially, we note that *MCL 600.2955a* was not at issue in *Shinholster*. That case involved an interpretation of *MCL 600.6304*. Moreover, on further appeal, our Supreme Court overruled in pertinent [\*\*\*12] part this Court's holding in *Shinholster*, concluding that, pursuant to *MCL 600.6304*, the trier of fact in a medical malpractice action may consider plaintiff's pretreatment negligence in offsetting a defendant's fault, where reasonable minds could differ with regard to whether such negligence constituted a proximate cause of plaintiff's injury and damages. *Shinholster*, 471 Mich. 551-552. Thus, the Supreme Court ultimately held that the trier of fact may reduce a plaintiff's recovery on the basis of the plaintiff's own contributions to his or her injury. Plaintiff's reliance on *Shinholster* is therefore misplaced and inapplicable to the facts of this case.

Indeed, as this Court has explained in *Wysocki*, the absolute defense of impairment [\*\*677] provided by *MCL 600.2955a* serves a unique legislative purpose. In *Wysocki*, the plaintiff was leaning on the railing of a home deck constructed four years before the incident, when the railing gave way and the plaintiff was injured. At the time of the accident, plaintiff had a blood alcohol level of 0.21 percent. Plaintiff sued on [\*\*\*13] the basis of premises liability and negligent design and construction of the deck. At trial, the jury found that plaintiff was [\*461] fifty percent or more at fault because of intoxication, barring his recovery under *MCL 600.2955a*. The jury's verdict of no cause of action was affirmed on appeal to this Court. In affirming the judgment in favor of defendants, the *Wysocki* Court first noted the Legislature's objective in enacting the intoxication statute:

Rather plainly, the intoxication statute sought to place more responsibility on intoxicated plaintiffs who are equally or more to blame for their injuries, therefore marking a shift toward personal responsibility envisioned by overall tort reform. This legislative intent is clear from the language of the statute itself, which bars recovery for some intoxicated plaintiffs and reduces recovery for other intoxicated plaintiffs.

The 1995 tort reform package was a series of bills that overhauled the tort system in Michigan. To this end, the Legislature enacted several laws that

abolished joint and several liability, imposed damages caps on pain and suffering, and--in the intoxication statute--limited intoxicated [\*\*\*14] plaintiffs' recovery.

\* \* \*

Here, the Legislature did not act without consideration of principles or circumstances in enacting the intoxication statute. If a plaintiff is half or more at fault because of that plaintiff's own voluntary intoxication, then shifting the burden from the defendant to the plaintiff who was at least [fifty percent] or more responsible aligns with beneficial principles and societal circumstances. [ *Id.* at 358-359.]

The *Wysocki* Court then rebuffed plaintiff's challenges to the constitutionality of the statute, stating:

While the enactments [of the 1995 tort reform package], for the most part, are indicative of a comparative fault system, rather clearly the Legislature intended to exclude intoxicated or drug-affected plaintiffs from that comparative fault system if their fault was more than fifty percent the cause of their injuries . . . .

[\*462] \* \* \*

We note that those who voluntarily become intoxicated have historically been considered to have put themselves, and others, at risk of injury. We further note that other jurisdictions have followed the reasoning that intoxicated persons should be limited or barred from recovery [\*\*\*15] under state dramshop acts.

\* \* \*

The intoxication statute abrogates common-law comparative negligence and bars any recovery by *Wysocki*. Regardless of the percentage of *defendant's* negligence, if that percentage was under fifty percent the cause of *Wysocki's* injuries, it is irrelevant under the intoxication statute. A defendant's negligence would only be useful in determining proportional fault if a plaintiff's intoxication was less than fifty percent the cause of the accident and the plaintiff was, therefore, allowed limited recovery under the intoxication statute. [ *Id.* at 364, 368, 371-372 (emphasis in

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original).]

[\*\*678] In an analogous area of the law, our Supreme Court in *Robinson v Detroit*, 462 Mich. 439, 445-446; 613 N.W.2d 307 (2000), held that the phrase "the proximate cause" contained in the governmental immunity act, MCL 691.1407(2), means *the* proximate cause, not *a* proximate cause. Further, the *Robinson* Court defined "the proximate cause" as "the one most immediate, efficient, and direct cause preceding an injury, not 'a proximate cause.'" *Id.* at 446. Similarly, the intoxication statute "refers [\*\*\*16] only to 'the' cause of the incident rather than 'a' cause . . . ." *Wysocki, supra* at 370.

Applying *Wysocki* and, by analogy, *Robinson* to the present facts, it is clear that plaintiff's theory of the case, based on principles of comparative negligence (i.e., defendant could have prevented the decedent's death had its employee taken appropriate medical action), fails under the circumstances. Here, it is undisputed [\*463] that when the decedent was arrested for driving while under the influence, with a blood alcohol level of 0.32, he had "an impaired ability to function due to the influence of intoxicating liquor." MCL 600.2955a(2)(b). Under these circumstances, reasonable minds could not differ that, as a result of that impairment, the decedent was fifty percent or more the cause of the "event"--acute alcohol withdrawal--that resulted in his death. Plaintiff's own evidence was unequivocal that the decedent's chronic alcohol abuse and, on the night in question, his alcohol-related impairment caused the acute withdrawal that was the "most immediate, efficient, and direct cause" of his death. *Robinson, supra* at 446 It is of no consequence that plaintiff argues that the decedent's death [\*\*\*17] could have been prevented by nurse Froehlich, because the decedent's self-induced intoxication was fifty percent or more *the* cause of his death. *Wysocki, supra*. Additionally, plaintiff's expert, Dr. Dragovic, admitted that what might have happened to the decedent had nurse Froehlich treated him differently is pure speculation and that it would have been an illusion for anyone who never had a chance to examine Mr. Harbour to envision exactly what would have happened if he had survived or if he had been taken to an emergency room. As a matter of law, defendant satisfied the requisite elements of MCL 600.2955a and was entitled to the absolute defense provided by that statute. To conclude otherwise would contradict the express language of the statute and its underlying purpose. Therefore, we hold that, pursuant to MCL 600.2955a, and consistently with *Wysocki* and *Piccalo* the trial court properly granted defendant's motion for a directed verdict.

### III

In Docket No. 257012, defendant contends that the trial court abused its discretion by refusing to award

[\*464] defendant case evaluation [\*\*\*18] sanctions pursuant to MCR 2.403(O). Defendant sought approximately \$ 90,000 in costs and attorney fees. Defendant moved for case evaluation sanctions pursuant to MCR 2.403(O) on the ground that plaintiff rejected the case evaluation award of \$ 75,000 and failed to obtain a verdict more than ten percent greater than the award. However, following a hearing on the matter, the trial court denied defendant's motion for sanctions on the basis of MCR 2.403(O)(11), the "interest of justice" exception, because it opined that the dispositive motion based on MCL 600.2955a should have been raised by defendant earlier during the proceedings. The trial court stated:

The purpose of case evaluation was to encourage settlement of a protracted litigation and expedite and simplify the final settlement of cases. . . .

[\*\*679] In this case, . . . the motion for directed verdict was brought for the first time to this Court's attention on a statutory preclusion for the cause of action at the close of plaintiff's proofs. I inquired as to why at that time the motion was not brought sooner, since other motions for summary [\*\*\*19] disposition were brought and denied by this Court. The record will reflect that at that time counsel explained that they did not wish to give opposing counsel an opportunity to respond and did not trust the Court's decision had it been done prior to the close of proofs. That being the case, the interest[s] of justice are not served.

\* \* \*

[T]he decision not to bring this matter [sooner] was unwarranted and unjustified.

The trial court thereafter denied defendant's motion for reconsideration, reiterating that defendant's election to continue the litigation process, despite being cognizant of the viable defense provided by MCL 600.2955a and to deliberately wait until after plaintiff's [\*465] presentation of proofs and five days of trial to present the dispositive motion was contrary to the purpose of MCR 2.403(O)(11) and was the cause of protracted litigation and expenses incurred following case evaluation.

[HN4] A trial court's decision to grant or deny case evaluation sanctions is subject to review de novo on appeal. *Elia v Hazen*, 242 Mich. App. 374, 376-377; 619 N.W.2d 1 (2000). However, because a trial court's [\*\*\*20] decision whether to award costs pursuant to the "interest of justice" provision set forth in MCR 2.403(O)(11) is discretionary, this Court reviews that decision for an abuse of discretion. *Campbell v Sullins*,

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257 Mich. App. 179, 205 n 9; 667 N.W.2d 887 (2003). An abuse of discretion may be found only when the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias. *Dep't of Transportation v Randolph*, 461 Mich. 757, 768; 610 N.W.2d 893 (2000).

*MCR 2.403(O)* provides in pertinent parts:

[HN5] (1) If a party has rejected an evaluation and the action proceeds to verdict, that party must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the 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.

(2) For the purpose of this rule "verdict" includes,

\* \* \*

(c) a judgment entered as a result of a ruling [\*\*\*21] on a motion after rejection of the case evaluation.

\* \* \*

[\*466] (11) If the "verdict" is the result of a motion as provided by subrule (O)(2)(c), the court may, *in the interest of justice*, refuse to award actual costs. [Emphasis added.]

Thus, [HN6] pursuant to *MCR 2.403(O)(11)*, a trial court may refuse to award sanctions in the "interest of justice" if the verdict is the result of a judgment stemming from a ruling on a motion after rejection of the case evaluation.

In *Haliw v City of Sterling Heights*, 257 Mich. App. 689, 705-709; 669 N.W.2d 563 (2003), rev'd on other grounds, 471 Mich. 700; 691 N.W.2d 753 (2005), this Court interpreted *MCR 2.403(O)(11)* by reference to the analogous "interest of justice" exception found in the offer of judgment rule, *MCR 2.405(D)(3)*, [\*\*680] because both court rules "serve identical purposes of deterring protracted litigation and encouraging settlement." *Id.* at 706. The Court of Appeals in *Haliw* held that [HN7] the "interest of justice" exception should be invoked only in "unusual circumstances," such as where a legal issue of first impression or public interest is present, "where [\*\*\*22] the law is unsettled and substantial damages are at issue," where there is a significant financial disparity between the parties, or "where the effect on third persons may be significant." 257 Mich. App. at 707, quoting *Luidens v 63rd District*

*Court*, 219 Mich. App. 24, 36; 555 N.W.2d 709 (1996). These factors are not exclusive. *Id.* "Other circumstances, including misconduct on the part of the prevailing party, may also trigger this exception." *Id.* at 707, quoting *Luidens*, *supra* at 36.

The *Haliw* Court further noted that in *Stitt v Holland Abundant Life Fellowship (On Remand)*, 243 Mich. App. 461; 624 N.W.2d 427 (2000), this Court, construing the "interest of justice" provision of *MCR 2.405(D)(3)*, held that the combination of two "unusual circumstances"--the unsettled nature of the law and [\*467] the "gamesmanship" evidenced by the considerable disparity between the rejected mediation evaluation and defendant's offer of judgment--warranted invocation of the "interest of justice" exception under the circumstances of the case. 257 Mich. App. at 707-708. The *Haliw* Court concluded that "if the trial [\*\*\*23] court finds on the basis of all the facts and circumstances of a particular case and viewed in light of the purposes of *MCR 2.403(O)* that unusual circumstances exist, it may invoke the 'interest of justice' exception found in *MCR 2.403(O)(11)*." 257 Mich. App. at 709.

In this case, the trial court refused to award case evaluation sanctions on the ground that, "much to the Court's disappointment," defendant could have brought its motion to dismiss pursuant to *MCL 600.2955a* at the same time it brought numerous other motions for summary disposition and, thus, could have avoided the need for plaintiff and the court to expend time and resources on litigation that might have been unnecessary from the outset. Indeed, defendant admitted on the record that it deliberately waited until the close of plaintiff's case in order to prevent plaintiff from being able to defeat an earlier motion for summary disposition by filing affidavits contradicting her experts' sworn deposition testimony, despite the fact that [HN8] "parties may not create factual issues by merely asserting the contrary in an affidavit after giving damaging testimony [\*\*\*24] in a deposition." *Downer v Detroit Receiving Hospital*, 191 Mich. App. 232, 234; 477 N.W.2d 146 (1991). Apparently, defendant doubted the trial court's ability to perceive a discrepancy between plaintiff's experts' sworn deposition testimony and affidavits.

Assuming that defendant had raised *MCL 600.2955a* earlier, and further assuming that plaintiff had indeed filed the affidavits as defendant alleges, the trial court [\*468] might have found a genuine issue of material fact necessitating a trial. However, defendant's failure to do so *guaranteed* the need for a five-day jury trial. Defendant made a tactical decision to incur additional costs that may not have been necessary. In construing the analogous "interest of justice" provision of the offer of judgment rule, *MCR 2.405(D)(3)*, this Court in *Luidens*, *supra* at 35, aptly noted that "evidence of such gamesmanship . . . constitutes a relevant factor in

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determining whether the exception applies."

[\*\*681] We conclude that, under the circumstances, the trial court did not abuse its discretion in finding defendant's trial strategy to be a sufficiently "unusual [\*\*\*25] circumstance" to warrant invocation of the "interest of justice" exception. The trial court's conclusion that defendant's actions constituted "gamesmanship" that was unnecessarily costly to plaintiff, making unjust defendant's recovery of expenses it elected to create, is not "so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias." *Dep't of Transportation, supra* at 768, quoting *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich. 219, 227; 600 N.W.2d 638 (1999). We therefore affirm the trial court's order denying defendant's motion for case evaluation sanctions.

In her supplemental brief filed in this appeal,

plaintiff, for the first time, claims that defendant waived the defense of *MCL 600.2955a* by failing to plead it as an affirmative defense as required by *MCR 2.111(F)(3)*. However, because this issue was not raised before or presented to the trial court, it is not properly preserved for appellate review, [\*\*\*26] and we decline to address it. *Booth [\*469] Newspapers, Inc v University of Michigan Bd of Regents*, 444 Mich. 211, 234; 507 N.W.2d 422 (1993); *City of Taylor v Detroit Edison Co*, 263 Mich. App. 551, 560; 689 N.W.2d 482 (2004).

Affirmed.

/s/ Richard Allen Griffin

/s/ Richard A. Bandstra

/s/ Joel P. Hoekstra