

STATE OF MICHIGAN
COURT OF APPEALS

Estate of MADELLE L. JONES, by its Personal
Representative, SHERYL GALE JONES-
COLLIER,

UNPUBLISHED
April 10, 2014

Plaintiff-Appellee/Cross-Appellant,

v

No. 308266
Wayne Circuit Court
LC No. 04-427696-CH

LOUIS CUNNINGHAM and LEC PROPERTIES
PARTNERSHIP,

Defendants,

and

CUNNINGHAM ADVISORY SERVICES, INC.,
LOUIS CUNNINGHAM TRUST, LEC
PROPERTIES, a/k/a LEC PROPERTIES LTD.,
and LEC PROPERTIES LIMITED
PARTNERSHIP,

Defendants-Appellants/Cross-
Appellees.

Before: M. J. KELLY, P.J., and CAVANAGH and FORT HOOD, JJ.

PER CURIAM.

This case involves claims arising from the decedent's 15 percent interest in a commercial building in the city of Detroit. The case is before this Court for the second time. In a prior appeal, this Court reversed an award of case evaluation sanctions in favor of defendants and remanded for a redetermination of defendants' entitlement to case evaluation sanctions under MCR 2.403(O)(3) and (4)(a). See *Jones-Collier v Cunningham*, unpublished opinion per curiam of the Court of Appeals, issued April 22, 2010 (Docket No. 289915). On remand, the trial court determined that no party was entitled to case evaluation sanctions. Four of the defendants, Cunningham Advisory Services, Inc., Louis Cunningham Trust, LEC Properties, a/k/a LEC

Properties LTD., and LEC Properties Limited Partnership (hereafter “defendants-appellants”) now appeal by right.¹ We reverse the portion of the trial court’s order denying defendants-appellants’ request for case evaluation sanctions and remand for a determination of an appropriate amount of sanctions.

Defendants-appellants’ sole claim on appeal is that the trial court misapplied MCR 2.403(O)(4)(a) to deny their request for case evaluation sanctions during the remand proceedings. We agree.

A trial court’s decision regarding a party’s entitlement to case evaluation sanctions under MCR 2.403(O) presents a question of law, which is reviewed de novo by an appellate court. *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008); *Tevis v Amex Assurance Co*, 283 Mich App 76, 86; 770 NW2d 16 (2009). We also review de novo questions of law concerning whether the trial court properly followed this Court’s prior decision, the meaning of a court order, and whether and to what extent the law of the case doctrine applies in a case. *Augustine v Allstate Ins Co*, 292 Mich App 408, 423-424; 807 NW2d 77 (2011); *Kasben v Hoffman*, 278 Mich App 466, 470; 751 NW2d 520 (2008).

Under the law of the case doctrine, if an appellate court passes on a legal question and remands for further proceedings, the legal question will not be decided differently in a later appeal in the same case if the facts remain materially the same. *Grievance Administrator v Lopatin*, 462 Mich 235, 259-260; 612 NW2d 120 (2000). The appellate court’s decision binds the lower court because the lower court may not take action on remand that is inconsistent with the appellate court’s judgment. *Id.* at 260; *Kasben*, 278 Mich App at 470.

In the prior appeal, this Court reversed an award of case evaluation sanctions in favor of defendants-appellants and remanded for further proceedings. This Court determined that the aggregate verdict for all six defendants, as adjusted under MCR 2.403(O)(3), must be considered to determine whether plaintiff is liable for case evaluation sanctions. *Jones-Collier*, unpub op at 6. This Court directed the trial court to “recalculate the aggregate adjusted verdict, compare it to the aggregate case evaluation award, and award case evaluation sanctions to the dismissed defendants only if appropriate pursuant to MCR 2.403(O)(3) and MCR 2.403(O)(4)(a).” *Id.* On remand, the trial court determined that defendants-appellants were not entitled to case evaluation sanctions because the aggregate adjusted verdict obtained by plaintiff of \$130,631.42 was more favorable than the aggregate case evaluation award of \$120,000.

¹ Although plaintiff filed a cross-appeal, it was dismissed with respect to the defendants-appellants pursuant to the parties’ stipulation. *Jones-Collier v Cunningham*, unpublished order of the Court of Appeals, entered January 4, 2013 (Docket No. 308266). This appeal and plaintiff’s cross-appeal has been administratively closed with respect to the two remaining defendants, Cunningham and LEC Properties Partnership, because of a bankruptcy stay. *Jones-Collier v Cunningham*, unpublished order of the Court of Appeals, entered June 20, 2012 (Docket No. 308266). Therefore, the scope of this appeal is limited to the four defendants-appellants’ claim of appeal.

Under MCR 2.403(O)(4)(a), “costs may not be imposed on a plaintiff who obtains an aggregate verdict more favorable to the plaintiff than the aggregate evaluation.” Although MCR 2.403(O)(4)(a) does not contain a standard for determining what is “more favorable,” MCR 2.403(O)(3) provides that “the verdict . . . is considered more favorable to the plaintiff if it is more than 10 percent above the evaluation” and this Court has previously determined that the “more favorable” standard in MCR 2.403(O)(3) must be applied in determining if an aggregate verdict is more favorable to the plaintiff than the aggregate case evaluation under MCR 2.403(O)(4)(a). *Broadway Coney Island, Inc v Commercial Union Ins Cos (Amended Opinion)*, 217 Mich App 109, 115-116; 550 NW2d 838 (1996); *Frank v William A Kibbe & Assoc, Inc*, 208 Mich App 346, 354; 527 NW2d 82 (1995). This Court explained in *Frank*, 208 Mich App at 354:

We conclude that “more favorable” when used in MCR 2.403(O)(4) should be assigned the same meaning it is given in MCR 2.403(O)(3). We reach this conclusion because it creates the type of internal harmony statutes and court rules seek to establish. Also, it is nearly impossible to read and interpret MCR 2.403(O)(4) without relying heavily upon the definitions in MCR 2.403(O)(3). Provisions must be read in the context of the entire statute so as to produce a harmonious whole. *In re Forfeiture of \$ 5,264*, 432 Mich 242, 251; 439 NW2d 246 (1989). Seeming inconsistencies should be reconciled if possible. *People v Budnick*, 197 Mich App 21, 24; 494 NW2d 778 (1992).

Accordingly, we agree with defendants-appellants that whether an aggravate verdict is more favorable to the plaintiff than the aggregate case evaluation under MCR 2.403(O)(4)(a) must be evaluated under the provision in MCR 2.403(O)(3). Further, we find nothing in this Court’s prior decision in this case that would require that a different construction of MCR 2.403(O)(4)(a) under the law of the case doctrine.

An appellate court will only apply the law of the case doctrine to issues actually decided, explicitly or implicitly, in a prior appeal. *Grievance Administrator*, 462 Mich at 260. And while a trial court must strictly comply with the law of the case established by an appellate court, it must do so according to the true intent and meaning of the appellate court’s mandate. *Kasben*, 278 Mich App at 470. The “last utterance” of an appellate court determines the law of the case. *People v Blue*, 178 Mich App 537, 539; 444 NW2d 226 (1989).

Although this Court’s express direction to the trial court was to “recalculate the aggregate adjusted verdict, compare it to the aggregate case evaluation award, and award case evaluation sanctions to the dismissed defendants only if appropriate pursuant to MCR 2.403(O)(3) and MCR 2.403(O)(4)(a),” the only reason the case was remanded was because further findings of fact were necessary to determine the aggregate adjusted verdict that should be compared to the aggregate case evaluation. *Jones-Collier*, unpub op at 6. This Court defined the word “aggregate” in accordance with its common dictionary definition, see *Random House Webster’s College Dictionary* (2000), as “a sum, mass, or assemblage, a total or gross amount.” *Id.*

Using this definition of “aggregate,” the trial court was required to arrive at a total for all adjusted verdicts and all case evaluations in order to make its comparison between the “aggregate verdict” and the “aggregate evaluation” under MCR 2.403(O)(4)(a). But this Court

did not expressly or implicitly rule that the trial court should make a “more favorable” determination based on some standard other than the standard in MCR 2.403(O)(3). Thus, we conclude that the rule established in *Broadway Coney Island, Inc*, 217 Mich App at 115, and *Frank*, 208 Mich App at 354, governs this case.

Therefore, to the extent that the trial court might have believed it was bound to make its comparison under MCR 2.403(O)(4)(a), without applying the standard in MCR 2.403(O)(3), it incorrectly interpreted this Court’s prior opinion. And to the extent that the trial court failed to use the standard in MCR 2.403(O)(3) in making the “more favorable” comparison, it committed an error of law. Based on its finding that the aggregate adjusted verdict was \$130,631.52 and that the aggregate case evaluation award was \$120,000, it can now be determined as a matter of law that defendants-appellants are entitled to case evaluation sanctions. In sum, because plaintiff rejected the case evaluation and defendants-appellants accepted it, plaintiff was liable for sanctions unless she obtained a verdict more favorable to her than the case evaluation. MCR 2.403(O)(1). For purposes of subrule (O)(1), the verdict was required to be adjusted as prescribed in subrules (O)(3) and (4)(a). Under these subrules, to be more favorable to plaintiff, the aggregate adjusted verdict was required to be more than 10 percent above the aggregate case evaluation of \$120,000. MCR 2.403(O)(3). In other words, the aggregate adjusted verdict needed to be more than \$132,000, which is 10 percent above \$120,000, to be considered more favorable to plaintiff for purposes of subrule (O)(1). Because the aggregate adjusted verdict was only \$130,631.52, it was not more than 10 percent above the case evaluation. Therefore, the verdict was not more favorable to plaintiff, making plaintiff liable to defendants-appellants for case evaluation sanctions. Accordingly, the trial court erred in concluding that defendants-appellants were not entitled to case evaluation sanctions against plaintiff.

We decline to address plaintiff’s argument on appeal that the “interest of justice” exception in MCR 2.403(O)(11) supports the trial court’s decision to deny case evaluation sanctions. Plaintiff did not preserve this issue by raising this exception in the trial court. Further, plaintiff was precluded from doing so pursuant to this Court’s express directive in the prior appeal that “[p]laintiff is not entitled to seek this unpreserved relief on remand.” *Jones-Collier*, unpub op at 6. Thus, under the law of case doctrine, plaintiff is precluded from seeking relief under the interest of justice exception. *Grievance Administrator*, 462 Mich at 259-260.

In sum, we reverse the trial court’s order denying case evaluation sanctions to the defendants-appellants. We remand for determination of the appropriate amount of sanctions to be awarded to defendants-appellants.

Reversed in part and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. Defendants-appellants, having prevailed, may tax costs. MCR 7.219.

/s/ Michael J. Kelly
/s/ Mark J. Cavanagh
/s/ Karen M. Fort Hood