

STATE OF MICHIGAN
COURT OF APPEALS

CHATHAPURAM S. RAMANATHAN,

Plaintiff-Appellant,

v

WAYNE STATE UNIVERSITY,

Defendant-Appellee,

and

LEON CHESTANG,

Defendant.

UNPUBLISHED

June 17, 2014

No. 303171

Wayne County Circuit Court

LC No. 98-810999-NO

CHATHAPURAM S. RAMANATHAN,

Plaintiff-Appellee,

v

WAYNE STATE UNIVERSITY,

Defendant-Appellant.

No. 304643

Wayne County Circuit Court

LC No. 98-810999-NO

Before: METER, P.J., and BORRELLO and STEPHENS, JJ.

PER CURIAM.

In Docket No. 303171, plaintiff Chathapuram Ramanathan appeals as of right from the trial court's judgment of no cause of action on his employment-retaliation¹ claim following a jury verdict.

¹ This case began as a discrimination lawsuit as well, but that claim was dismissed by the Michigan Supreme Court. *Ramanathan v Wayne State University Bd of Governors (Ramanathan III)*, 480 Mich 1090, 1090-1091; 745 NW2d 115 (2008).

In Docket No. 304643, defendant Wayne State University (WSU, or “defendant”), as the prevailing party, challenges the trial court’s denial of certain costs and interest. We affirm in Docket No. 303171 and we affirm in part and reverse in part in Docket No. 304643.

Plaintiff primarily argues that the trial court erred in excluding certain allegedly relevant evidence, while admitting allegedly prejudicial and irrelevant evidence. The sole claim at trial upon which plaintiff proceeded was that he was denied tenure at WSU by Provost Marilyn Williamson and that her decision was either (1) in retaliation for plaintiff’s having filed a complaint with WSU’s Office of Equal Opportunity (OEO), or (2) substantially influenced by Dean Leon Chestang’s negative tenure recommendation, which would not have been negative but for the Dean’s retaliatory animus due to plaintiff’s complaints of racial discrimination and harassment. *Ramanathan v Wayne State University Bd of Governors (Ramanathan IV)*, unpublished opinion per curiam of the Court of Appeals, issued April 6, 2010 (Docket No. 289147), slip op at 14.²

BACKGROUND FACTS

This case has an extensive history. We will borrow some of the background facts from this Court’s opinion in *Ramanathan v Wayne State University Bd of Governors (Ramanathan I)*, unpublished opinion per curiam of the Court of Appeals, issued April 12, 2002 (Docket No. 227726), and *Ramanathan IV*.

In 1992, defendant Wayne State University (WSU) hired plaintiff as an associate professor in the School of Social Work. Plaintiff is of Asian Indian descent. In October 1993, plaintiff met with his supervisor, Leon Chestang, Dean of the School of Social Work, to share concerns about interactions with Professor Alison Favorini, plaintiff’s colleague. Plaintiff alleged that Favorini had made discriminatory remarks to him based on his race and culture. After the meeting, plaintiff sent a follow-up memorandum to Chestang, indicating that he planned to file a complaint with WSU’s Equal Opportunity Office (EEO), as Chestang had suggested during their meeting. In turn, Chestang responded by memorandum, denying that he had recommended that plaintiff approach the EEO. He instead characterized the situation as plaintiff’s problem in communicating with others.

In October 1993, plaintiff filed a[n] [informal] complaint with WSU’s EEO . . . [,] list[ing] two race-based comments made by Favorini. He contended that he was discriminated against based on his gender and race or national origin.

In two faculty meetings in late 1993, Chestang allegedly characterized a sitar as an ‘obscure’ instrument and commented about a sacrificial lamb and

² Central to plaintiff’s assertion that the Provost was substantially influenced by the Dean’s negative recommendation, which plaintiff asserts was retaliatory, was that “it becomes virtually impossible to achieve tenure at WSU in the face of a negative recommendation from the pertinent dean.” *Ramanathan IV*, slip op at 16.

added that he would not want to be ‘curried.’ Several other faculty members heard these remarks and felt that they were negatively directed toward plaintiff’s race. [*Ramanathan I*, slip op at 1-2.]

In December 1993, before the expiration of plaintiff’s initial two-year contract, Dean Chestang offered plaintiff a non-renewable, six-month contract to remain teaching until December 1994. Chestang testified that he did not offer plaintiff this short contract because plaintiff had gone to the OEO, but rather that he simply thought it was within his authority to offer a six-month contract.

After plaintiff refused to accept the six-month contract, on April 20, 1994, Chestang offered plaintiff a one-year contract. Chestang testified that plaintiff signed the contract under protest, instead requesting a two-year contract. As stated in *Ramanathan I*, slip op at 2:

In May 1994, plaintiff filed a [] [formal] complaint with the EEO alleging discrimination and a hostile work environment. That complaint reflected that plaintiff believed that he was the victim of continuing retaliation for his previous complaints to the EEO.

Chestang testified that WSU refused to accept contracts signed under protest, which Chestang conveyed to plaintiff by letter on May 19, 1994. Chestang testified that three times throughout the summer he offered plaintiff the one-year contract, but plaintiff continued to insist on a two-year contract. On August 30, 1994, Chestang again offered plaintiff the one-year contract, which plaintiff signed.

Chestang denied all allegations of discrimination or hostile work environment alleged in plaintiff’s complaint to the OEO. *Id.* at 2. The OEO investigated plaintiff’s complaint, and on September 30, 1994, the OEO issued a Notice of Disposition, “where it closed the matter with no finding of probable cause for discrimination or retaliation.” See *id.* “On October 31, 1994, before the expiration of his teaching contract, plaintiff applied for tenure at WSU.” *Id.* Plaintiff compiled a tenure dossier that included external review letters; two of nine were negative. *Ramanathan IV*, slip op at 3.

The School of Social Work’s Promotion and Tenure (P&T) Committee generally consists of five tenured faculty members who first review a tenure application and issue a recommendation. However, plaintiff’s P&T Committee, which recommended tenure, was composed of four tenured professors, Dr. Creigs Beverly, Dr. Ronald Jirovec, Dr. Alice Lamont, and Dr. Susan Whitelaw, and one student representative. A positive recommendation requires a 2/3 vote of tenured faculty on the P&T Committee. At trial, committee members were allowed to testify that the vote of the tenured professors was actually tied two-to-two, with the student serving as the tie-breaker, and therefore was procedurally invalid.

A negative tenure recommendation letter from Dr. Sheila Akabas was not received until January 23, after the December 20 deadline, and was not considered by the P&T Committee. Dr. Beverly testified that had he known of this letter at the time he voted on the P&T Committee, he would not have voted to recommended tenure. This letter was added to the tenure dossier that

was sent to the University P&T Committee and the Provost. Dr. Jirovec testified that the School of Social Work's P&T Committee should have been allowed to review this letter.

[I]n a January 1995 letter, Dean Chestang recommended against tenure. *WSU's P & T* committee then undertook *the next level* of tenure review and voted *against* tenure. In a letter dated April 27, 1995, Provost Marilyn Williamson informed plaintiff that WSU had decided to deny him tenure. [*Ramanathan IV*, slip op at 3 (emphasis added).]

In the fall of 1995, plaintiff began work in a non-tenured position at Southwest Missouri State University (SMSU). Plaintiff resigned in the spring of 1996 and returned to Michigan

Plaintiff filed the instant suit in April 1998, alleging race discrimination . . . , retaliation . . . , and tortious interference with a contractual relationship.^[3] [*Ramanathan I*, slip op at 2-3.]

PROCEDURAL HISTORY

In *Ramanathan I*, slip op at 11, this Court reversed in part the circuit court's grant of summary disposition to WSU. The Court held that plaintiff's claims were not barred by the limitations period of three years, given the continuing-violations doctrine. *Id.* at 8. The Court also held that plaintiff had established a genuine issue of material fact regarding hostile work environment, *id.* at 5, race discrimination, *id.* at 6, and retaliation for complaining to the OEO, *id.* at 7, but the Court affirmed the dismissal of the tortious-interference claim, *id.* at 11.

In *Ramanathan II*, this Court recognized the abrogation of the continuing-violations doctrine in *Garg v Macomb Co Community Mental Health Services*, 472 Mich 263, 282; 696 NW2d 646 (2005), amended 473 Mich 1205 (2005). *Ramanathan II*, unpublished opinion per curiam of the Court of Appeals, issued January 4, 2007 (Docket No. 266238), slip op at 3. Accordingly, the Court recognized that plaintiff had to remove any claims not falling within the limitations period, leaving only claims predicated on the denial of tenure. *Id.* at 2.

In *Ramanathan III*, the Michigan Supreme Court reversed this Court's decision in part, holding:

In lieu of granting leave to appeal, we REVERSE in part the judgment of the Court of Appeals, and we REMAND this case to the Wayne Circuit Court As the Court of Appeals correctly ruled, the plaintiff's sole actionable claim, by operation of the applicable statute of limitations, is the decision of the Provost of Wayne State University to deny the plaintiff's request for tenure. The plaintiff

³ The complaint alleged interference with a contractual relationship, but "the body of the allegation clearly indicated that the claim was for interference with an *expectancy* or a *business relationship*." *Ramanathan I*, slip op at 3 (emphasis in original).

presented no evidence that the Provost harbored any national origin or racial animus toward the plaintiff in reaching her tenure decision. The plaintiff cannot show any relevant connection between the identified comments of the Dean of the School of Social Work in 1993 and the Provost's tenure decision in 1995. The plaintiff has not presented a genuine issue of material fact to sustain his claim of racial or national origin discrimination in violation of the Civil Rights Act, MCL 37.2101 *et seq.* On remand, the circuit court shall only proceed on the plaintiff's claim that the Provost, by denying tenure to the plaintiff, unlawfully retaliated against the plaintiff for the exercise of his rights under the Civil Rights Act. [*Ramanathan v Wayne State Univ Bd of Governors (Ramanathan III)*, 480 Mich 1090, 1090-1091; 745 NW2d 115 (2008) (citations omitted).]

After remand, the circuit court again granted WSU's motion for summary disposition, finding no prima facie case of retaliation. *Ramanathan IV*, slip op at 6-7. In granting the motion, the circuit court relied on a second review by Provost Tilden Edelstein affirming denial of tenure. *Id.* at 7. This Court reversed, holding that plaintiff's cause of action was "*Provost Williamson's* decision to deny tenure, which occasioned plaintiff's loss of employment[.]" *Id.* at 12 (emphasis in original). The Court held further that "plaintiff has raised genuine issues of material fact regarding retaliatory pretext adequate to defeat summary disposition." *Id.* at 16. The Court remanded for trial to resolve the issue regarding whether defendant had a legitimate business reason for denying tenure or whether it was mere pretext for unlawful retaliation. *Id.*

The jury, after a two-week trial, found that retaliation was not a significant factor in the denial of tenure, and the trial court entered a judgment of no cause of action. The jury never reached the question of damages or mitigation.

EXCLUSION OF EVIDENCE

Plaintiff first argues that the trial court abused its discretion in ruling on several different motions in limine and excluding evidence that was relevant and not prejudicial.

This Court reviews a trial court's evidentiary decisions for an abuse of discretion. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). "An abuse of discretion occurs when the decision results in an outcome falling outside the principled range of outcomes." *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006). "A decision on a close evidentiary question ordinarily cannot be an abuse of discretion." *Aldrich*, 246 Mich App at 113.

Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. Relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence." MRE 403.

To establish a prima face case of retaliation, a plaintiff must show:

"(1) that he engaged in a protected activity; (2) that this was known by the defendant; (3) that the defendant took an employment action adverse to the

plaintiff; and (4) that there was a causal connection between the protected activity and the adverse employment action.” [*Garg*, 472 Mich at 273, quoting *Deflaviis v Lord & Taylor, Inc*, 223 Mich App 432, 436 (1997).]

“[O]nce a plaintiff establishes a prima facie case of [retaliation], the defendant has the opportunity to articulate a legitimate . . . reason for its employment decision in an effort to rebut the presumption created by the plaintiff’s prima facie case.” *Hazle v Ford Motor Co*, 464 Mich 456, 464; 628 NW2d 515 (2001). If the defendant produces a legitimate reason for its action, “the plaintiff must demonstrate that the evidence in the case, when construed in the plaintiff’s favor, is ‘sufficient to permit a reasonable trier of fact to conclude that [retaliation] was a motivating factor for the adverse action taken by the employer toward the plaintiff.’” *Id.* at 465, quoting *Lytle v Malady (On Rehearing)*, 458 Mich 153, 176; 579 NW2d 906 (1998). A plaintiff can establish pretext by demonstrating that the purported reasons for the adverse employment action (1) had no basis in fact, (2) were not the actual factors underlying the decision, or (3) were insufficient to justify the decision. *Dubey v Stroh Brewery Co*, 185 Mich App 561, 565-566; 462 NW2d 758 (1990).

Plaintiff first asserts that the trial court abused its discretion in revisiting motions in limine that had been argued and orally ruled upon earlier, arguing that evidence deemed relevant and admissible years before should not now be excluded, because “[t]he facts of this case have not changed [during the last] 11 years.” Plaintiff’s argument is without merit because the case *has* changed substantially since the motions were originally considered. Originally, plaintiff was able to pursue claims of hostile work environment, disparate treatment and intentional discrimination due to race and national origin, and retaliation for having complained to the OEO.⁴ The continuing-violations doctrine had not yet been abrogated, allowing plaintiff to include claims extending beyond the limitations period. After the Michigan Supreme Court abrogated the continuing-violations doctrine, *Garg*, 472 Mich at 282, and dismissed all claims except for retaliation for filing complaints with the OEO, *Ramanathan III*, 480 Mich at 1090-1091, plaintiff had a significantly different case that actually went to trial. Therefore, the trial court did not abuse its discretion in revisiting motions in limine regarding the relevance or prejudicial effect of evidence that had been admissible when many other claims had existed.

Plaintiff claims that he should have been allowed to testify about the alleged discrimination that led him to file complaints with the OEO, arguing that this information was relevant background evidence. However, the trial court did not abuse its discretion in excluding this evidence because the Supreme Court has found the alleged instances of discrimination

⁴ Plaintiff also asserts that because both discrimination and retaliation claims are subject to the burden-shifting test of *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973), everything that was relevant to prove discrimination *and* retaliation together is relevant to proof of retaliation only. However, plaintiff mistakes method of proof for relevancy to the elements of a cause of action. His retaliation claim does not concern whether the Dean made racially discriminatory comments, but instead concerns whether plaintiff was denied tenure by the Provost because he filed a complaint with the OEO.

unsubstantiated, *Ramanathan III*, 480 Mich at 1091; discrimination (as distinguished from retaliation) was not at issue; and the Provost testified that she never knew or saw the *content* of the OEO complaints.

Plaintiff's initial informal complaint to the OEO concerned alleged discriminatory remarks made by colleague Dr. Favorini and other members of the Dean's administrative staff. Plaintiff's formal complaint in May 1994 alleged hostile work environment and discrimination generally. *Ramanathan I*, slip op at 2. The trial court held that the content of the complaints was not admissible and stated: "I am not saying the content of the EEO complaint can come in, the fact that the complaint⁵ was filed alleging discrimination is certainly admissible. But we are not going to get into its specific content."

The Michigan Supreme Court in *Ramanathan III*, 480 Mich at 1091, stated, "The plaintiff presented no evidence that the Provost harbored any national origin or racial animus toward the plaintiff in reaching her tenure decision. . . . The plaintiff cannot show any relevant connection between the identified comments of the Dean of the School of Social Work in 1993 and the Provost's tenure decision in 1995." Because the Supreme Court essentially stated that the alleged discriminatory comments were not relevant and because retaliation (not discrimination) was at issue in the trial, plaintiff's argument that the discriminatory comments contained in the OEO complaints should have been admitted is without merit. The contents of the OEO complaints are ill-suited to serve as evidence of the Dean's retaliating against plaintiff for having filed those very complaints. Further, Provost Williamson never had any knowledge of the allegations contained in the OEO complaints, further lessening the possible probative value of the allegations.

Plaintiff asserts that testimony regarding the underlying factual basis for filing the OEO complaints would have demonstrated his good faith in filing the complaints. However, the fact that plaintiff engaged in protected activity—the relevant element of his retaliation claim—was *not disputed at the time of the trial court's ruling*, as indicated by defense counsel.⁶ Further, the probative value of the content of the OEO complaints, even if relevant, was substantially outweighed by the possibility of prejudice and confusion of the jury. MRE 403. Plaintiff's claims of discrimination and hostile work environment had already been found to be meritless. See, generally, *Ramanathan III*, 480 Mich at 1090-1091. Injecting testimony concerning the content of the discrimination claims could have confused the jury concerning which decision-maker (the Dean or the Provost) and which claims (retaliation or discrimination) were to be resolved; even assuming that proper jury instructions were provided, the evidence could have

⁵ The court later used the plural "complaints" when discussing its ruling.

⁶ It is true that the defense, on the last day of trial testimony, made an argument, with accompanying testimony, that plaintiff had not filed his complaint in good faith, but, significantly, there is no indication that plaintiff attempted to reargue his position at that time in order to introduce the content of the complaints.

influenced the jury into improperly considering issues that were *clearly and specifically rejected* by the Supreme Court.

Plaintiff asserts that he and other witnesses should have been allowed to testify about the Dean's comments at faculty meetings that the sitar is an "obscure" instrument and that he did not want to be "curried." Plaintiff argues that these comments were relevant to establish the Dean's retaliatory motivation for writing a negative tenure recommendation, which in turn substantially influenced the Provost's decision. The trial court agreed with defense counsel that the fact of filing the complaint was admissible, but the discriminatory *content* was not; the court appeared to accept counsel's argument that because the Provost did not have knowledge of the events complained of, her decision could not have been influenced by the events. The trial court also relied on the Supreme Court's decision in *Ramanathan III*, 480 Mich at 1091, wherein the Court stated that "[t]he plaintiff cannot show any relevant connection between the identified comments of the Dean of the School of Social Work in 1993 and the Provost's tenure decision in 1995." The trial court stated:

I mean I agree the record might end up a little dryer than you might like, but that may be a consequence of what is appropriate in terms of the language, and what is appropriate in terms of the language in the Supreme Court about what can and what shouldn't come in.

This Court in *Ramanathan II*, slip op at 2, held that plaintiff's only actionable claim was for the Provost's denial of tenure. This Court further held that evidence of alleged discriminatory or retaliatory acts occurring outside the limitations period, namely the ethnically-charged comments of the Dean, was "subject to the rules of evidence and other applicable governing law, and its admissibility is within the discretion of the trial court." *Id.* at 4. However, as noted, the Michigan Supreme Court reversed in part, stating that retaliation was the only actionable claim and further stating that "[t]he plaintiff cannot show any relevant connection between the identified comments of the Dean of the School of Social Work in 1993 and the Provost's tenure decision in 1995." *Ramanathan III*, 480 Mich at 1090-1091. Thus, it is reasonable to conclude that the Supreme Court essentially deemed irrelevant all evidence of background discriminatory comments by the Dean. *Id.* Again, *retaliation*, not discrimination, was at issue, and reversal is unwarranted.

Plaintiff argues that the trial court abused its discretion in striking portions of the deposition testimony of Dr. Arthur Antisdell in which the witness stated that the Dean tended to distort things and be vindictive.

Testimony that the Dean had a personal vendetta against plaintiff was admitted, but the Court excluded Dr. Antisdell's opinion that the Dean had a history of "distortion." The excluded testimony involved, in part, Dean Chestang's alleged propensity to "blow up" over small things.

The trial court excluded this testimony, stating:

This is getting a little far afield in terms of, it appears to be remote in time to Ramanathan.

Maybe at the meetings he was justified under the circumstances to blow up. We don't know. I don't think it is particularly helpful to the fact finder here. We will strike that line.

The court clarified its ruling on Dr. Antisdel's testimony by agreeing that "the vendetta, the opinion can come in, but not the underlying facts, not the specific instances."

Plaintiff relies on MRE 701, which provides:

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

Plaintiff argues that the excluded testimony would have provided a foundation for Dr. Antisdel's belief that the Dean had a personal vendetta against plaintiff. However, the trial court did not abuse its discretion in excluding this testimony. Indeed, even if the testimony may have been admissible under MRE 701 as laying the foundation for Dr. Antisdel's opinion that the Dean had a vendetta against plaintiff, because the testimony was inadmissible under MRE 403, the trial court did not abuse its discretion. See, generally, *People v Yost*, 278 Mich App 341, 358-359; 749 NW2d 753 (2008). The specific acts recounted by Dr. Antisdel about the Dean's actions towards other professors were not temporally connected to Ramanathan, therefore providing little probative value concerning whether the Dean was retaliating against Ramanathan. MRE 403. Further, there was no background evidence to establish whether the Dean was justified in becoming upset with any involved professors; there simply was testimony that at certain points, it had happened. The prejudice to the defense of this testimony substantially outweighed any probative value in helping the jury understand Dr. Antisdel's opinion that the Dean had a personal vendetta against plaintiff.

Further, another witness, Dr. Melvyn Raider, testified about the Dean's propensity for intimidation, essentially rendering the proffered testimony cumulative. Reversal is unwarranted.

Plaintiff next asserts that the trial court erred in "excluding testimony by Professor Antisdel that plaintiff was collegial, while at the same time admitting testimony by others that he was not." The excluded testimony of Dr. Antisdel read, "People respected him and respected his point of view." The trial court excluded this testimony for lack of foundation:

MR. MILLER [defense counsel]: How he functioned in the department, whether he was collegial as a general proposition is a completely different foundation for his interactions with other people or his observations as to whether they respected him or not, he just sort of makes this blanket statement without the foundation to be there.

THE COURT: Agreed it is stricken.

The trial court's ruling was not an abuse of discretion, in that the trial court found a lack of foundation for the blanket statement.

Again, under MRE 701,

[i]f the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

Plaintiff fails to address the merits of the trial court's ruling under MRE 701 that Dr. Antisdel lacked foundation for his blanket statement, but rather asserts that *if* evidence of any collegiality or lack thereof was to be admissible, it should have been admissible across the board. Plaintiff argues that because other witnesses testified about plaintiff's lack of collegiality, the trial court should have admitted Dr. Antisdel's testimony. However, testimony about plaintiff's garnering of respect requires foundation, and the trial court did not abuse its discretion in concluding that Dr. Antisdel lacked foundation for the blanket statement that faculty in the department respected plaintiff.

Furthermore, other positive testimony of plaintiff's collegiality *was* admitted, rendering cumulative any additional testimony relating to collegiality that was proffered by Dr. Antisdel. Reversal is unwarranted.

Plaintiff asserts that the trial court abused its discretion in excluding Dr. Antisdel's testimony that it was well known that the Dean and his staff were hostile and rude towards plaintiff. The excluded testimony reads, in pertinent part:

A: I think the fact that there were certain staff members who were rude and sharp with Dr. Ramanathan is evidence that the ground noise in the organization had reached them, that the dean was angry and upset and wanted to punish or retaliate against Dr. Ramanathan, so they were free to do pretty much what they wanted.

* * *

Q: Now for each of those persons you have just named, I want you to describe for me . . . [a]ll the incidents of conflict that you witnessed occurred between those persons and Dr. Ramanathan.

A: Witnessed?

Q: Yes:

A: I do not have firsthand information about that.

The trial court excluded this testimony as speculative and lacking foundation to serve as opinion testimony, see MRE 701, stating:

I am a bit concerned about the speculative nature of this, recognizing the grapevine thus [sic] we all know with any organization, universities, courts, businesses, government I mean there is always rumors and talk, and so and so is this kind of person. But how do we know it's anything more than rumor stage?

* * *

I am going [to] strike that. I am concerned about the foundation [for] what is in effect opinion testimony. All right stricken.

Under MRE 701, a witness offering opinion testimony must offer opinions that are “rationally based on the perception of the witness and . . . helpful to a clear understanding of the witness’ testimony or the determination of a fact in issue.” Because Dr. Antisdel conceded that he did not have personal knowledge of any incidents of rudeness, the trial court did not abuse its discretion in excluding the evidence at issue for lack of foundation.

Plaintiff next asserts that the trial court abused its discretion in excluding Dr. Antisdel’s testimony about awards and publications received by plaintiff after the denial of tenure, which allegedly supported Dr. Antisdel’s opinion that plaintiff should have been awarded tenure because “prospects for continued excellence” is a criterion for tenure.

The trial court did not abuse its discretion in excluding this testimony. The following colloquy took place:

MR. POSNER [plaintiff’s attorney]: . . . I don’t think he says he deserves tenure because he got an award in 1999, I don’t recall that testimony. But and, if he says it that way I think we can probably strike that.

THE COURT: Agreed that should be stricken but the award can come in.

* * *

MR. MILLER: . . . But his opinion as to qualifications for tenure based on something that happened after he left Wayne State should be excluded.

THE COURT: Correct.

First, because plaintiff’s counsel conceded at trial that to the extent Dr. Antisdel said he was basing his tenure opinion on subsequent awards, that testimony should be stricken, the issue is not properly preserved, because “a party opposing the admission of evidence must object at trial and specify the same ground for objection that it asserts on appeal.” *Aldrich*, 246 Mich App at 113.

Second, plaintiff asserts that because granting tenure requires an assessment of a candidate’s “prospects for continued excellence,” Dr. Antisdel’s testimony regarding the awards and publications was relevant to demonstrate plaintiff’s continued excellence, but this argument is without merit. Dr. Antisdel was allowed to offer his *opinion* on plaintiff’s eligibility for tenure in 1995. Any award or publication occurring *after* that date was irrelevant to the opinion Dr. Antisdel would have formulated at the time of the tenure decision. Thus, the trial court did not abuse its discretion in excluding the testimony at issue concerning plaintiff’s subsequent awards and publications.

Plaintiff asserts that the trial court abused its discretion in excluding “all” evidence of disparate treatment, and specifically evidence that Dr. Carolyn Pryor was granted tenure a year after plaintiff, with recommendation by the Dean despite lower teaching scores than plaintiff, and that the faculty and Dean had supported a meeting with the Provost to discuss Dr. Susan Whitelaw’s denial of tenure. The trial court ruled that these individuals were not similarly situated to plaintiff to show disparate treatment because neither individual was considered for tenure by both Dean Chestang and Provost Williamson, stating:

I don’t think they are similarly situated. Just as important, again, I think 403 is implicated here. We really would be getting, even if relevant, we would be getting into issues that would mislead and confuse and [are] necessarily a waste of time, and I don’t think it helps lead to the truth. And you’re not going to go into that kind of evidence.

A plaintiff may use evidence of disparate treatment to show that a nonretaliatory explanation for an adverse employment action is pretextual. See, generally, *Town v Michigan Bell Co*, 455 Mich 688, 699-700; 568 NW2d 64 (1997). To show disparate treatment, a plaintiff must demonstrate that he and a coworker were “similarly situated, i.e., all of the relevant aspects of his employment situation were nearly identical to those of [a coworker’s] employment situation.” *Id.* at 699-700 (internal citation and quotation marks omitted).

As an initial matter, plaintiff asserts that the trial court abused its discretion in excluding *all* evidence of disparate treatment. However, this argument is without merit because it misapplies the trial court’s ruling, which excluded only evidence of disparate treatment with regard to Dr. Pryor and the additional individual, on the grounds that these individuals were not similarly situated to plaintiff. Plaintiff also asserts that in 2005, the trial court specifically ruled that evidence of disparate treatment was deemed admissible upon a proper foundation. However, this assertion does not buttress plaintiff’s argument, because the trial court in 2010 found that these individuals were not similarly situated, and therefore their testimony would not constitute evidence of disparate treatment.

Plaintiff intended to present evidence of alleged comparable Dr. Pryor to show that the Dean’s stated reasons for not recommending plaintiff for tenure, which substantially influenced the Provost’s denial of tenure, were pretextual. The Dean recommended Dr. Pryor for tenure a year after plaintiff had left, even though she had lower teaching scores than plaintiff. Plaintiff and Dr. Pryor both had an international focus in social work. However, Dr. Pryor’s tenure application was reviewed by different P&T committees, as well as a different Provost.⁷

Plaintiff also invokes Dr. Whitelaw as evidence of disparate treatment. Dr. Whitelaw was previously denied tenure by the then-Provost over the Dean’s recommendation that she be

⁷ The record has no further indication of Dr. Pryor’s qualifications for tenure, including her scholarship, length of employment, and letters of recommendation. Plaintiff evidently believes that these issues should have been explored at trial.

granted tenure. Faculty members and also, apparently, the Dean,⁸ subsequently sent a letter to the Provost requesting a meeting, and Dr. Whitelaw was granted tenure. In the instant case, faculty members sent a letter to Provost Williamson requesting a meeting regarding plaintiff's denial of tenure, but the Dean did not join.

Because plaintiff and Dr. Pryor and Dr. Whitelaw were not evaluated by the same Dean *and* the same Provost, their situations were not particularly similar to plaintiff's. Plaintiff argues that it was the Dean's retaliatory animus that caused him to issue a negative tenure recommendation and that the Provost substantially relied on this recommendation. However, because the other professors were evaluated by different Provosts, the state of mind of each Provost and the reliance placed on the Dean's recommendation would necessarily be different. In addition, plaintiff does not provide a sufficient factual basis in his appellate brief to establish enough similarities (even aside from the Provost issue) such that Dr. Pryor and Dr. Whitelaw should have been considered as comparables.⁹

Under the circumstances, we conclude that the trial court did not abuse its discretion in concluding that the evidence of alleged disparate treatment may have misled and confused the jury. MRE 403. Admitting this evidence would have required the jury to make full determinations of not only plaintiff's qualifications for tenure, but also the qualifications of Dr. Pryor and Dr. Whitelaw, which would have taken up a great deal of time with questionable probative value.

ADMISSION OF EVIDENCE

The trial court admitted testimony of Professors Whitelaw, Lamont, and Beverly regarding plaintiff's qualifications for tenure.¹⁰ These professors were members of the School of Social Work's P&T Committee and evaluated plaintiff's application for tenure. Plaintiff argues that these non-ultimate decision-makers should not have been allowed to testify about plaintiff's qualifications because the only issue at trial was the Dean's recommendation and the Provost's reason for denying plaintiff tenure. However, this argument is without merit, because, as the trial court found, the testimony was "relevant in terms of defense," namely to demonstrate that the Dean's and Provost's legitimate business reasons for denying plaintiff tenure were not pretextual. Because the members of the P&T Committee were intimately involved in evaluating plaintiff's qualifications for tenure, their testimony about his qualifications was relevant to the defense's assertion that the Dean and Provost had non-pretextual, legitimate business reasons for denying plaintiff tenure. The evidence was relevant to the defense, and the trial court did not abuse its discretion in admitting the testimony.

⁸ The record is somewhat confusing on this point.

⁹ It is noted that the jury *did* hear that the Dean had recommended Dr. Whitelaw for tenure.

¹⁰ The trial court had previously excluded this testimony during a hearing in 2005; however, as stated *supra*, the case changed drastically from the case in 2005 to the date of trial, and the trial court had never issued a written order.

Plaintiff argues that the School of Social Work's P&T Committee's deliberations and votes are to be kept secret and that members of the School's P&T Committee should not have been allowed to testify concerning their personal opinions that plaintiff was not, *contrary to their signed recommendation*, qualified for tenure. Plaintiff argues that this evidence was not relevant because the *Dean* did not know about the deliberations or the vote. However, the trial court did not abuse its discretion in admitting this evidence, because it was "relevant in terms of defense."

Tenure recommendations require a 2/3 vote of the P&T Committee. Professors Whitelaw, Beverly, and Lamont were allowed to testify that the vote of the tenured professors was actually tied two-to-two, with the student serving as the tie-breaker, and therefore was procedurally invalid.¹¹ The vote was procedurally invalid because under the terms of the collective bargaining agreement, there must be a 2/3 vote of tenured faculty members, which would have required three of the four faculty members to vote to recommend tenure in order to make the vote procedurally valid. Dr. Whitelaw testified that due to the procedurally invalid vote, the Committee thought it had voted to recommend tenure and that even though she had voted no, "we all kind of lined up and presented a united front to the university" by signing the recommendation.

Because plaintiff relies on the unanimous vote of the P&T Committee as evidence of his qualification for tenure, contrary to the Dean's recommendation, the trial court did not abuse its discretion in allowing WSU to refute that evidence by offering testimony that in fact the recommendation was neither unanimous nor procedurally valid. This evidence, while not relevant to what the Dean knew,¹² was relevant to WSU's defense that the Dean and the Provost had non-pretextual, legitimate business reasons for denying plaintiff tenure by showing that even the School of Social Work's P&T Committee was not sure on plaintiff's qualifications for tenure. Excluding this evidence would have been unduly prejudicial to defendant because plaintiff would have been able to use the School's P&T Committee's "unanimous" recommendation as evidence that the only reason the Dean did not recommend tenure was retaliation, and defendant would not have had an opportunity to rebut this evidence. Evidence of the secret deliberations tends to make more probable the fact that plaintiff was a weak tenure applicant; therefore, the trial court did not abuse its discretion in admitting it.

Plaintiff argues that members of the School of Social Work's P&T Committee should not have been allowed to testify about their private interpretations of the nine external review letters in plaintiff's tenure dossier by discussing in detail the language used and the strength of each recommendation. Plaintiff argues that *only* the two "decision-makers," the Dean and the

¹¹ Dr. Beverly testified that he believed the required vote was 3/5, not 2/3, and that the student could serve as the tie-breaker.

¹² In fact, plaintiff's counsel repeatedly elicited testimony that the Dean had no knowledge of the deliberations or vote of the P&T Committee in making his recommendation.

Provost, should have been permitted to testify about their interpretations of the external review letters.¹³ The trial court ruled:

[I]f we are going to let people come in to give us their opinions about his qualification, then obviously the other side can cross examine them with regard to the bases for those opinions.

* * *

Which may include those letters.

* * *

It may turn out that during the trial one of you stands up and says object, judge, I mean this is not proper testimony.

Plaintiff also argues that the trial court abused its discretion in admitting a portion of Provost Williamson's deposition that concerned an external review letter written by Dr. Yvonne Asamoah, which incorrectly stated that plaintiff's research was *currently* being funded by a grant, rather than stating that a grant had been sought. Plaintiff argues that because Williamson testified that she "[did] not think [she] went into that great detail in reading her letter," the testimony that Dr. Asamoah's letter was based on an erroneous assumption should not have been admitted at trial. Plaintiff argues that testimony about the external review letters was misleading to the jury and improperly impeached plaintiff's credibility and that the letters were irrelevant to the ultimate decision-makers.

Similar to the issue of testimony concerning plaintiff's qualifications and the secret deliberations and vote of the School's P&T Committee, interpretation of the external review letters was relevant to the defense presented by WSU that the denial of tenure was not motivated by retaliation, but rather was based on plaintiff's weak qualifications. As stated by defense counsel, professors writing external review letters "choose[] their words very carefully . . . , and they often read almost like resumes [with] sort of [their] own language." The trial court appeared to agree with this statement when it referred to "academic speak." Although only the Dean's and Provost's interpretation or use of the external review letters could have borne on their ultimate decisions not to recommend tenure, testimony from the P&T Committee members who were also offering testimony about plaintiff's qualifications for tenure was relevant to the jury's understanding of what review letters may actually mean and whether plaintiff was actually qualified for tenure.

Further, plaintiff's counsel was the first to introduce testimony intricately detailing review letters, essentially rendering this issue unpreserved or waived. When plaintiff objected to defendant's later questioning of Dr. Beverly regarding the interpretation of an external review letter, the court ruled that because Dr. Jirovec had been examined by plaintiff's counsel

¹³ Chestang testified that the external review letters did not have a great deal of influence on his recommendation.

regarding the letter, defendant could proceed. Because plaintiff first introduced this evidence, the trial court did not abuse its discretion in allowing defendant to embark on the same line of questioning.

Plaintiff argues that because the School's P&T Committee members admitted that they did not remember how they reviewed or regarded the letters at the time of deliberations, nor did they parse each line of every letter, the testimony should have been excluded. However, the trial court did not abuse its discretion in concluding that the testimony was relevant to whether plaintiff was in fact qualified or not qualified for tenure, a key element of the defense of proving that the Dean's negative recommendation and the Provost's denial of tenure were not based on retaliation.

Plaintiff argues that the trial court abused its discretion in admitting testimony that plaintiff was not collegial, because collegiality is not a requirement for tenure. The issue arose when defendant moved to exclude testimony by plaintiff's witnesses and friends that plaintiff was collegial. Plaintiff wished to include testimony that plaintiff *was* collegial; the following colloquy took place:

MS. THOMPSON [plaintiff's attorney]: Part of -- part of that is also what he -- what he was like to work with as a colleague, in other words his collegiality. Again, I am anticipating that the dean is going to say one of the reasons he didn't want him around is because he was not collegial. And there is [sic] all kinds of people who will testify that's not true. If the dean doesn't say that then their testimony on that score wouldn't be necessary. But if he does, then --

THE COURT: I agree with you.

Plaintiff's counsel then elicited testimony at trial that described plaintiff as collegial and professional, and the Dean as not collegial. Because plaintiff asserted that testimony of plaintiff's collegiality and professionalism was admissible, and the trial court agreed, the trial court did not abuse its discretion in allowing testimony of plaintiff's *lack* of collegiality to be elicited at trial.

Plaintiff argues that the trial court abused its discretion in admitting the *de bene esse* deposition of Grafton Hull, the Director of the School of Social Work at Southwest Missouri State University (SMSU), where plaintiff was employed the year after leaving WSU. Dr. Hull's testimony was limited to demonstrating "whether Plaintiff's [sic] failed to mitigate his damages."

Plaintiff secured a non-tenured position with SMSU after leaving WSU. Dr. Hull was his supervisor and reviewed plaintiff's performance, ultimately recommending that plaintiff not be reappointed. Plaintiff's objection to the admission of Dr. Hull's testimony is moot because the jury never reached the issue of damages. MCR 2.613(A) provides:

An error in the admission or the exclusion of evidence . . . is not grounds for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take this action appears to the court inconsistent with substantial justice.

See also *Knoper v Burton*, 383 Mich 62, 68; 173 NW2d 202 (1970) (“[w]e hold that where it appears from the evidence disclosed by the record that the errors could not have affected the result, this Court will not reverse”). Because Dr. Hull’s deposition testimony was only admissible as evidence of plaintiff’s failure to mitigate damages, and the jury never reached the issue of damages (instead finding no cause of action), admission of the deposition, even if erroneous, was not inconsistent with substantial justice.

Plaintiff contends that Hull’s deposition testimony contained hearsay statements. However, as noted, Dr. Hull’s deposition was only relevant to the issue of mitigation of damages, which the jury never reached, and therefore plaintiff’s objections are moot and any error in the admission of the testimony was not inconsistent with substantial justice.

Plaintiff makes an additional hearsay claim with regard to a document introduced toward the end of trial. On January 31, 2011, the second-to-last day of trial, defendant sought to read into evidence a memo dated June 3, 1994, prepared by Mr. Trey Greene, an OEO intake officer, and sent to Mr. Jim Lee, then the Director of WSU’s OEO. The document detailed Greene’s interaction with plaintiff in May 1994 when plaintiff was filing his formal written complaint with the OEO. The memo contained Greene’s observations of plaintiff while he was filing his formal complaint and included statements made by plaintiff such as, “Well, I don’t want the Dean to know where he’s vulnerable. I can’t give you specifics” and, “I don’t want the Dean to know how I’m going to defeat his defenses.” The memo also noted that plaintiff refused to leave the OEO office, forcing the officer to call campus police. The memo was explained by former intake specialist Amy Stirling Lammers. Lammers stated that “. . . you document every interaction, all the information that you obtain from a potential complainant.” She testified, “[E]specially under the circumstances described in the memorandum, that is something that the director of the office would need to know about. It’s a rather extraordinary circumstance, which is why I think Mr. Greene documented it this way.”

The trial court admitted the memo under the business-record exception to inadmissible hearsay, MRE 803(6). MRE 803(6) provides that the following are not excluded by the hearsay rule:

A memorandum, report, record, or data compilation, in any form, of acts, transactions, occurrences, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness

Although the document at issue was drafted in light of extraordinary circumstances, as Lammers testified, it was still created in the regular course of business, wherein intake specialists were “always told to document interactions with complainants, especially, when problems such as this would arise.” This was, as noted by the trial court, “an extraordinary situation leading to an extraordinary report,” but that does not destroy admissibility, because, as also stated by the trial court, “it was clearly a duty on the part of the a [sic] responsible specialist to be complete

and accurate.” The trial court did not abuse its discretion in determining that this report was part of regularly conducted business activity.

The trial court also did not abuse its discretion in determining that Lammers was a qualified witness. She had worked for several years for the OEO, including having worked as an equal opportunity specialist. The position of an equal opportunity specialist was substantially the same in 2007 as it was in 1994, and it was the specialist’s job to document every interaction and piece of information obtained from potential complainants during the intake process. Lammers had also documented another extraordinary situation in the same way Greene had. The trial court did not abuse its discretion in ruling that Lammers was a qualified witness under MRE 803(6) because of her firsthand knowledge of the OEO intake office and its processes.

Plaintiff states that the document should have been produced in response to its broad discovery requests. However, defendant notes that plaintiff never requested a document of this sort during discovery. Plaintiff also fails to cite a specific discovery request that would have warranted production of the document.

Plaintiff asserts that Lammers should not have been allowed to testify because she was in violation of the trial court’s witness sequestration order. However, “[t]rial courts have discretion to order sequestration of witnesses and discretion in instances of violation of such an order to exclude or to allow the testimony of the offending witness.” *People v Roberts*, 292 Mich App 492, 502; 808 NW2d 290 (2011) (internal citations and quotation marks omitted). The trial court did not abuse its discretion in permitting Lammers to testify despite any violation of a witness sequestration order. Lammers was a qualified witness concerning the processes at the OEO office, and the bulk of her testimony merely required reading into the record Greene’s memo. Plaintiff fails to show how Lammers’s presence during trial would have affected her testimony such as to render it prejudicial to plaintiff when she was only testifying about a business record.

Plaintiff contends that the document was irrelevant. However, the trial court instructed the jury that “Plaintiff has the burden of proving that, one, that he made a good faith complaint of discrimination.” As such, the document was relevant to an issue at trial. Plaintiff argues that the prejudicial effect of the document outweighed its relevance. See MRE 403. However, plaintiff *did not object below* on grounds of relevance or invoke MRE 403; instead, he focused on the hearsay, discovery, and sequestration issues and on whether Lammers was a qualified witness. Under the circumstances, we find no basis for reversal.

JURY INSTRUCTION

Plaintiff argues that he was entitled to a special instruction on mitigation of damages because Dr. Hull offered damaging testimony concerning plaintiff’s interim employment, despite the fact that plaintiff was not obligated in the first place to take employment so far away from his home. This Court reviews jury instructions in their entirety to determine if an error requiring reversal occurred. *Aldrich*, 246 Mich App at 124. “[R]eversal is not required as long as [the instructions] fairly presented the issues to be tried and sufficiently protected the [party’s] rights.” *Id.*

Plaintiff proposed giving the instruction that “[a] plaintiff does not violate the duty to mitigate damages by refusing to accept [a] position that is an unreasonable distance from his home. . . .” The trial court declined to provide this instruction. Plaintiff argues that the instruction was consistent with Michigan law. However, the jury never reached the issue of mitigation of damages, and therefore failing to provide this jury instruction did not impact the result of the trial. Where the jury returns a verdict of no cause of action and never reaches the issue of damages, the “absence of [this] alleged error[] would not have changed the result and reversal on this basis is not required.” *Beadle v Allis*, 165 Mich App 516, 525; 418 NW2d 906 (1987).

COSTS

Defendant argues that the trial court erred in denying costs associated with five depositions on the basis that they were not filed before trial. This issue essentially involves statutory interpretation, which we review de novo. *Burton v Reed City Hosp Corp*, 471 Mich 745, 751; 691 NW2d 424 (2005).

MCL 600.2549 states:

Reasonable and actual fees paid for depositions of witnesses filed in any clerk’s office and for the certified copies of documents or papers recorded or filed in any public office shall be allowed in the taxation of costs only if, at the trial or when damages were assessed, the depositions were read in evidence, except for impeachment purposes, or the documents or papers were necessarily used.

Defendant sought costs for five depositions, all of which were filed after trial but before the motion for costs. The trial court denied the costs, stating, “it certainly is a reasonable inference that the filing has to occur before trial. The way the paragraph is set up it seems that it is a condition precedent.”

The cardinal principle of statutory construction is that courts must give effect to legislative intent. When reviewing a statute, courts necessarily must first examine the text of the statute. If the Legislature’s intent is clearly expressed by the language of the statute, no further construction is permitted. [*Burton*, 471 Mich at 751 (citations omitted).]

Clear and unambiguous statutory language must be enforced as written. *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002).

The statute at issue contains no requirement that, in order for costs associated with a deposition to be granted, the depositions must be filed before trial or before they are used as part of the proceedings. It simply indicates that if the depositions have been filed and if the depositions were read into evidence for purposes other than impeachment, costs are allowable. The trial court read a requirement into the statute that is not apparent from the clear and unambiguous statutory language. Accordingly, costs for the depositions of Antisdell, Williamson, and Hull (which were read at trial) are taxable.

The depositions of plaintiff and Chestang, however, were not read into evidence for purposes other than impeachment but were instead attached to defendant's unsuccessful motions for summary disposition. Defendant contends that costs should be allowed for these depositions because they were "necessarily used." Defendant cites *Portelli v IR Constr Products Co, Inc*, 218 Mich App 591; 554 NW2d 591 (1996), for this proposition. It is true that in *Portelli, id.* at 605, the Court stated that "[t]he plain language of the statute states that such costs are recoverable where the deposition is 'read in evidence' at trial or where it is 'necessarily used.'" However, this statement involved a misreading of the statutory language. Again, the statute states:

Reasonable and actual fees paid for depositions of witnesses filed in any clerk's office and for the certified copies of documents or papers recorded or filed in any public office shall be allowed in the taxation of costs only if, at the trial or when damages were assessed, the depositions were read in evidence, except for impeachment purposes, or the documents or papers were necessarily used. [MCL 600.2549.]

The statute clearly and unambiguously makes a distinction between "depositions" and "documents and papers." It is only in reference to "documents and papers" that the phrase "necessarily used" is employed. Because the depositions of plaintiff and Chestang were not read into evidence for purposes other than impeachment, costs associated with them were not allowable and the trial court should be affirmed with respect to those depositions. *Miller-Davis v Ahrens Constr, Inc (On Remand)*, 296 Mich App 56, 70; 817 NW2d 609 (2012), lv granted on other grounds 494 Mich 861 (2013) (trial court will be affirmed if it reached the correct result for the wrong reason).

It is true that, ordinarily, this Court would be bound to follow the interpretation of MCL 600.2549 provided by *Portelli*. However, the statement at issue by the *Portelli* Court was obiter dictum because it was not necessary for the resolution of the issue at hand; as such, this Court need not adhere to the interpretation. *Whirlpool Corp v Civil Rights Comm'n*, 425 Mich 527, 539; 390 NW2d 625 (1986) (discussing obiter dictum). Indeed, the *Portelli* Court concluded that no costs were allowable in that case because the depositions *had not been filed*, *Portelli*, 218 Mich App at 606-607, meaning that the Court's statement about the phrase "necessarily used" was not essential to its resolution of the issue it faced.

INTEREST

Defendant argues that the trial court erred in denying interest for defendant's taxable costs. This issue, too, involves statutory interpretation, which we review de novo. *Burton*, 471 Mich at 751.

MCL 600.6013 states, in part:

(1) Interest is allowed on a money judgment recovered in a civil action, as provided in this section.

* * *

(8) Except as otherwise provided in subsections (5) and (7) and subject to subsection (13), for complaints filed on or after January 1, 1987, interest on a money judgment recovered in a civil action is calculated at 6-month intervals from the date of filing the complaint at a rate of interest equal to 1% plus the average interest rate paid at auctions of 5-year United States treasury notes during the 6 months immediately preceding July 1 and January 1, as certified by the state treasurer, and compounded annually, according to this section. Interest under this subsection is calculated on the entire amount of the money judgment, including attorney fees and other costs. In an action for medical malpractice, interest under this subsection on costs or attorney fees awarded under a statute or court rule is not calculated for any period before the entry of the judgment. The amount of interest attributable to that part of the money judgment from which attorney fees are paid is retained by the plaintiff, and not paid to the plaintiff's attorney.

The trial court, in ruling on the interest issue, stated, "a money judgment is a condition precedent to obtaining attorney fees and other costs. So, denied."

As noted in *In re Forfeiture of \$176*, 465 Mich 382, 386; 633 NW2d 367 (2001), "[f]or the purpose of the judgment interest statute, a money judgment is one that orders the payment of a sum of money, as distinguished from an order directing an act to be done or property to be restored or transferred." Defendant argues that the award of costs fits within this description.

In *In re Forfeiture, id.* at 387-388, the Court stated that the wording of the statute as a whole indicates that, for interest to be allowable, a complaint must have been filed and the person seeking interest must have recovered a *judgment on that complaint*. Defendant argues that this analysis is dicta, but this is not actually the case; the Court used this analysis to *support its conclusion* that "[t]he trial court's order was not an adjudication of an action for money damages, but rather one for the delivery of property that had been the subject of a forfeiture action." *Id.* at 388.

Here, defendant did not file a complaint and recover a money judgment on that complaint. Accordingly, the trial court correctly denied interest on the taxable costs.

In Docket No. 303171, we affirm. In Docket No. 304643, we affirm in part, reverse in part, and remand for further proceedings. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ Stephen L. Borrello
/s/ Cynthia Diane Stephens