

STATE OF MICHIGAN  
COURT OF APPEALS

MAYSELLE POWERS, as guardian and  
conservator for GLENN SHAVERS,

Plaintiff-Appellant,

v

CITIZENS INSURANCE COMPANY,

Defendant-Appellant.

NOV 9 1990

No. 119149

Before: McDonald, P.J., and MacKenzie and Weaver, JJ.

PER CURIAM.

Plaintiff's nephew, Glenn Shavers, suffered closed head injuries in a 1984 pedestrian-automobile accident. At the time of the accident, he was covered under a no-fault automobile insurance policy issued by defendant to plaintiff. Defendant paid for private duty aides to attend Shavers until July 1987, when it asserted that the services were no longer reasonably necessary. In September 1987, plaintiff filed a breach of contract action for nonpayment of benefits. She subsequently filed an amended complaint stating that she was seeking declaratory relief in addition to monetary damages.

In March 1989, a mediation panel returned an evaluation in the amount of \$15,000 in favor of plaintiff to cover disputed benefits and costs incurred through the date of mediation. Both parties accepted the award. Plaintiff then moved for entry of judgment on mediation and dismissal of that portion of her claim for past benefits. The trial court entered a judgment in the amount of \$15,000, and dismissed the action in its entirety. Plaintiff now appeals as of right the dismissal of the portion of her suit requesting declaratory relief. We affirm.

Under MCR 2.403(A)(1), the scope of mediation is defined to include civil actions in which the relief sought is primarily money damages. A mediation panel lacks the authority to award equitable relief, such as declaratory relief. See MCR 2.403(K)(3); R N West Construction Co v Barra Corp of America,

Inc., 148 Mich App 115; 384 NW2d 96 (1986). Thus, when, as here, an action requests both monetary relief and equitable relief, mediation may not be appropriate. See 2 Martin, Dean & Webster, Michigan Court Rules Practice (3d ed), p 437.

Experience has shown that the concept behind the mediation rule is sound, but only in those cases in which the primary relief sought is money. . . . If the primary relief sought in an action is a declaration or determination by the court of the relative rights and responsibilities of the parties, particularly if such is sought as a guide for further action, the monetary value of the action is not readily discernible. This is true whether or not one or both of parties also seek damages for past injuries. Regardless of any monetary value placed on the action by the mediation panel, the action is destined for trial as it is the court's judgment and decision, and not a monetary award, that is of primary concern. For this type of action mediation itself is an unnecessary expense and objections to it should be sustained by the court. [Id., pp 437-348.]

In this case, the trial court expressed some doubt whether plaintiff's request for declaratory relief would be proper, since it would essentially require a decision as to Shavers' future need for an aide. In Manley v DAIE, 425 Mich 140; 388 NW2d 216 (1986), the Supreme Court held that a declaratory judgment may determine that the expense of nursing services is necessary and allowable and may also establish the amount for the services that will be allowed, so long as the judgment does not oblige a no-fault insurer to pay for an expense until it is actually incurred by the insured. See 425 Mich 157. With such a judgment, both the insured and the insurer are entitled to a redetermination from time to time of the amounts properly allowable for nursing services, and the insurer may in the future seek a redetermination of the need for nursing services. 425 Mich 158-159.

Based on Manley, it is apparent that declaratory relief was appropriate for this case. It is likewise apparent from the above-quoted procedural commentary that, in light of the equitable aspects of plaintiff's action, this case was not well-suited for mediation since the declaratory aspect would have to proceed to trial for resolution. Nevertheless, plaintiff did not object to mediation, accepted the mediation award, and apparently

declined the trial court's suggestion that she move to set aside the award. Thus, the question becomes whether plaintiff's acceptance of the mediation award for past incurred expenses necessitated dismissal of her claim for declaratory relief regarding rights to future expenses. We must conclude that the dismissal was proper.

At the time the trial court entered its order in this case, MCR 2.403(M)(1) provided:

If all the parties accept the panel's evaluation, judgment will be entered in that amount, which includes all fees, costs, and interest to the date of judgment.

It is unclear whether or not this language serves to bar claims undecided by a mediation panel from proceeding to trial. However, the Supreme Court recently proposed a court rule to "clarify that the entry of a judgment following acceptance of an award disposes of the entire case, even if the case includes equitable claims on which the mediation panel is not permitted to make an award." See 432 Mich 1231, 1234 (1989). That court rule was adopted at 434 Mich XVII. MCR 2.403(M)(1) now reads:

If all the parties accept the panel's evaluation, judgment will be entered in that amount. The judgment shall be deemed to dispose of all claims in the action and includes all fees, costs, and interest to the date of judgment.

In light of this clarification, we must conclude that the trial court properly dismissed the declaratory portion of plaintiff's action.

Whether plaintiff is entitled to expenses incurred in providing an aide for Shavers has been resolved through the date of mediation. We do not read MCR 2.403(M)(1) as precluding a future claim for damages and declaratory relief pursuant to Manley, supra, should a dispute arise as to payment for expenses incurred in caring for Shavers since that date. We emphasize, however, that such an action would in all likelihood not be an appropriate case for mediation.

Plaintiff asks for the assessment of actual and punitive damages against defendant. This Court has held that the assessment of appellate costs under MCR 7.216(C) is proper when

there is no "reasonable basis for belief that there was a meritorious issue to be determined on appeal." Fisher v Detroit Free Press, 158 Mich App 409, 418; 404 NW2d 765 (1987), lv den 429 Mich 864 (1988); Briarwood v Faber's Fabric, 163 Mich App 784, 795; 415 NW2d 310 (1987), lv den 430 Mich 889 (1988).

In the instant case, defendant's position at the hearing on the motion and in its brief on appeal sufficiently demonstrated a reasonable basis for the merit of defendant's position. The necessity of plaintiff of the complexity and the uncertain vexatiousness on the part of defendant. Plaintiff's request for sanctions against defendant under MCR 7.216 is therefore denied.

Affirmed.

/s/ Gary R. McDonald  
/s/ Barbara B. MacKenzie  
/s/ Elizabeth A. Weaver