

STATE OF MICHIGAN
COURT OF APPEALS

SHEABRA SIMPSON,

Plaintiff-Appellant,

V

DEPARTMENT OF CORRECTIONS,

Defendant-Appellee.

UNPUBLISHED
September 30, 2003

No. 240445
Wayne Circuit Court
LC No. 97-702866-NO

Before: Smolenski, P.J., and Murphy and Wilder, JJ.

PER CURIAM.

Plaintiff appeals as of right from a circuit court order granting defendant's motion for costs and attorney fees pursuant to MCR 2.405. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff first contends that defendant's motion was untimely because it was filed more than two months after this Court disposed of plaintiff's prior appeal. We disagree. A motion for costs and fees under the offer of judgment rule "must be filed and served within 28 days after the entry of the judgment or entry of an order denying a timely motion for a new trial or to set aside the judgment." MCR 2.405(D). Defendant originally filed its motion before entry of a final order and the issue was preserved in the final order pending appeal. The motion was thus timely filed.

Plaintiff next contends that the trial court erred in granting defendant's request for attorney fees. The award of attorney fees under MCR 2.405 is reviewed for an abuse of discretion. *Hovanesian v Nam*, 213 Mich App 231, 238; 539 NW2d 557 (1995).

Defendant made a timely offer of judgment. MCR 2.405(B). Plaintiff rejected the offer by failing to expressly accept or reject it. MCR 2.405(C)(1), (2). The verdict, i.e., the court's ruling on the dispositive motions, was more favorable to defendant than the offer and plaintiff was therefore liable for defendant's actual costs incurred in the defense of the action. MCR 2.405(A)(3), (A)(4), (D)(1). The trial court must determine the actual costs incurred. It may, "in the interest of justice, refuse to award an attorney fee under this rule." MCR 2.405(D)(3). Whether attorney fees should be denied "in the interest of justice" is to "be decided on a case-by-case basis," *Stamp v Hagerman*, 181 Mich App 332, 339; 448 NW2d 849 (1989), giving weight to the general purpose of the rule, which is "to encourage settlement and to deter protracted litigation." *Hamilton v Becker Orthopedic Appliance Co*, 214 Mich App 593, 596-597; 543

NW2d 60 (1995); *Sanders v Monical Machinery Co*, 163 Mich App 689, 692; 415 NW2d 276 (1987).

Plaintiff contends that by making a \$5,000 offer of judgment after a \$160,000 case evaluation, defendant was engaging in gamesmanship, and attorney fees should have been denied. Although some cases have applied the interest of justice exception where a party makes a minimal offer of judgment after an unfavorable case evaluation to avoid sanctions under MCR 2.403, others have not. Compare *Butzer v Camelot Hall Convalescent Centre, Inc (After Remand)*, 201 Mich App 275; 505 NW2d 862 (1993) (attorney fees improperly denied) with *Stamp, supra* (attorney fees properly denied). In this case, however, we do not view defendant's offer as mere gamesmanship because defendant did not gain a tactical advantage by making the offer after mediation. Sanctions were only available under MCR 2.405; neither party would have been entitled to sanctions under MCR 2.403 in the absence of an offer of judgment because the mediation evaluation was not unanimous. MCR 2.403(O)(7); MCR 2.405(E). For these reasons, and because there are no unusual circumstances favoring denial of attorney fees, we find that the trial court did not abuse its discretion in granting defendant's motion.

Affirmed.

/s/ Michael R. Smolenski
/s/ William B. Murphy
/s/ Kurtis T. Wilder