STATE OF MICHIGAN

COURT OF APPEALS

ELYSE TUGENDER, Personal Representative of the Estate of ADRIAN ZACK, and KAREN SOLOWAY,

Plaintiffs,

and

MAUREEN HARTE and SHARON WILKINSON,

Plaintiffs-Appellants,

v

HENRY FORD HEALTH SYSTEM, HENRY FORD ACCOUNTING DEPARTMENT, HENRY FORD MAPLEGROVE BUSINESS OFFICE, PATRICK IRWIN, MARY JEAN KOKOSKA and LYNETTE TOTH,

Defendants-Appellees.

UNPUBLISHED
March 25, 2004

No. 243790
Oakland Circuit Court
LC No. 98-004703-CZ

Before: Borrello, P.J., and White and Smolenski, JJ.

PER CURIAM.

Plaintiffs Maureen Harte and Sharon Wilkinson appeal as of right from the July 17, 2002 order awarding defendants case evaluation sanctions. We affirm.

On May 11, 1998, Harte and Wilkinson filed their second amended complaint. On March 26, 1999, these claims were submitted to mediation (now case evaluation) under MCR 2.403. The mediators rendered an award of $7,500 for each of them, jointly and severally against Toth, Kokoska and HFHS. All affected parties rejected the award. Before the claims were submitted to case evaluation, defendants filed motions for summary disposition of plaintiffs' second amended complaint.

On June 24, 1999, Harte and Wilkinson filed their third amended complaint, which alleged the same two counts contained in their second amended complaint, adding a new theory of liability as to count I, and also adding new claims, as a result of Wilkinson being fired and Harte resigning (alleged to be a constructive discharge). Defendants moved for summary

disposition of plaintiffs' third amended complaint on October 20, 1999. One month later, on November 16, 1999, the court granted defendants' previous motions for summary disposition of plaintiffs' *second* amended complaint pursuant to MCR 2.116(C)(10). Subsequently, on February 5, 2000, the court entered its opinion and order granting defendants' October 20, 1999 motion and dismissed plaintiffs' third amended complaint. On March 1, 2000, defendants filed their motion requesting case evaluation sanctions of $40,097 against Harte and $53,860 against Wilkinson, based on their prior rejection of the $7,500 mediation awards. After many interim proceedings, which are not applicable to the issues on appeal, the court granted defendants' request for case evaluation sanctions.

Plaintiffs first argue that the trial court erred in awarding defendants' case evaluation sanctions because their request was untimely. This Court reviews de novo a trial court's decision whether to award case evaluation sanctions. *Brown v Gainey Transportation Services, Inc*, 256 Mich App 380, 383; 663 NW2d 519 (2003). Similarly, the interpretation of a court rule is a question of law that this Court reviews de novo. *Id*.

On April 26, 1999, the date plaintiffs rejected the mediation award, MCR 2.403 provided:[1]

> (O) Rejecting Party's Liability for Costs.
>
> (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 mediation evaluation.
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> (2) For the purpose of this rule "verdict" includes,
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> (a) a jury verdict,
>
> (b) a judgment by the court after a nonjury trial,
>
> (c) a judgment entered as a result of a ruling on a motion after rejection of the mediation evaluation.

This court rule further provided that a request for costs "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 2.403(O)(8).

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[1] MCR 2.403 has been frequently amended and this Court must apply the version of the rule existing at the time case evaluation was rejected. *Haliw v Sterling Heights*, 257 Mich App 689, 695; 669 NW2d 563 (2003).

Plaintiffs assert that the "judgment" from which defendants were required to file their request for costs within 28 days was the court's November 16, 1999 order granting defendants' summary disposition as to plaintiffs' second amended complaint. Plaintiffs contend that this is the proper order from which to calculate timeliness because this was the order that adjudicated the rights and liabilities of the parties with respect to all claims submitted to case evaluation.

We find that plaintiffs' argument must fail. The term "judgment," as used in MCR 2.403(O)(8), has been defined broadly as "the judgment adjudicating the rights and liabilities of particular parties, regardless of whether that judgment is the final judgment from which the parties may appeal." *Braun v York Properties, Inc*, 230 Mich App 138, 150; 583 NW2d 503 (1998), citing MCR 2.604(A). In this case, it was the February 5, 2000 order that adjudicated the rights and liabilities of the parties. Although the November 16, 1999 order adjudicated all of the claims that were subject to case evaluation, defendants could not know before the February 5, 2000 order was entered whether they received a "more favorable" verdict, the threshold for incurring liability under MCR 2.403(O)(1). This is because, at the time the November 16, 1999 order was entered, other claims were still pending against defendants as embodied in plaintiffs' third amended complaint which included the same two claims that had been submitted to case evaluation under plaintiffs' second amended complaint. Therefore, there was still a possibility that plaintiffs could ultimately prevail in the action. Because the February 5, 2000 order was the first judgment from which defendants could determine whether plaintiffs were liable for sanctions under subrule (O)(1), it was the applicable judgment for purposes of filing a request for sanctions under subrule (O)(8). Accordingly, the trial court did not err in determining that defendants' motion for case evaluation sanctions, which was filed within 28 days of the court's February 5, 2000 order, was timely.

Plaintiffs also argue that the trial court erred in failing to apply the "interest of justice" exception. MCR 2.403(O)(11) provides that if the verdict is the result of a judgment entered as the result of a motion after rejection of the case evaluation, the court may, in the interests of justice, refuse to award actual costs. Plaintiff contends that application of the exception was appropriate in this case because of the gamesmanship by defendants regarding discovery.

The "term 'interest of justice' in MCR 2.403(O)(11) must not be too broadly applied so as to swallow the general rule of subsection 1 and must not be too narrowly construed so as to abrogate the exception." *Haliw v Sterling Hts*, 257 Mich App 689, 706-707; 669 NW2d 563 (2003). There must be unusual circumstances to invoke the interest of justice exception. *Id.* at 707.

In interpreting the meaning of the phrase "interests of justice" in MCR 2.403(O)(11), the *Haliw* Court looked to the phrase's interpretation in a similar court rule, MCR 2.405,[2] by this Court in *Luidens v 63rd Dist Court*, 219 Mich App 24; 555 NW2d 709 (1996). In *Luidens*, this Court noted that it would be appropriate to invoke exception where "there is a public interest in

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[2] This court rule applies to offers of judgments and provides, "The court shall determine the actual costs incurred. The court may, in the interest of justice, refuse to award an attorney fee under this rule." MCR 2.405(D)(3).

having an issue judicially decided rather than merely settled by the parties." *Id*. at 36. In regards to invoking the exception in cases where the party requesting the case evaluation sanctions was involved in misconduct, the Court stated, "The 'interest of justice' exception appears to be directed at remedying the possibility that parties might make offers of judgment for gamesmanship purposes, rather than as a sincere effort at negotiation." *Id*. at 35. Thus, following *Luidens*, the Court in *Stitt v Holland Abundant Life Fellowship (On Remand)*, 243 Mich App 461; 624 NW2d 427 (2000), held that the trial court abused its discretion in not invoking the exception because "the combination of two 'unusual circumstances,' the unsettled nature of the law and the 'gamesmanship' evidenced by the large disparity between the rejected mediated evaluation and the defendant's offer of judgment" warranted its application. *Haliw, supra* at 708.

The *Haliw* Court concluded that "if the trial 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)." *Id*. at 709. The Court further held that if the exception applied, it was within the trial court's discretion to award or refuse to award costs. *Id*. Therefore, we review for clear error the trial court's finding that unusual circumstances did not exist in this case. MCR 2.613(C).

Considering the facts of this case, we find that the trial court did not clearly err in determining that "unusual circumstances" did not exist to warrant application of the "interest of justice" exception. *Haliw, supra* at 709.

Affirmed.

/s/ Stephen L. Borrello
/s/ Helene N. White
/s/ Michael R. Smolenski