STATE OF MICHIGAN

COURT OF APPEALS

TIMOTHY E. BAXTER and NOAH T. BAXTER, Plaintiffs-Appellants, v DENNIS GEURINK, a/k/a DENNY GEURINK, d/b/a OUTDOOR ADVENTURES, Defendant-Appellee.	UNPUBLISHED April 24, 2012 No. 301748 Kent Circuit Court LC No. 10-007132-AV

Before: BECKERING, P.J., and OWENS and RONAYNE KRAUSE, JJ.

PER CURIAM.

Plaintiffs appeal by leave granted the Kent Circuit Court's order affirming the 61st District Court's order awarding attorney fees to defendant pursuant to MCR 2.405(D) but increasing the amount of fees awarded by the District Court to the full amount defendant had requested. We affirm in part, vacate in part, and remand for further proceedings.

This matter arises out of a bear hunting trip to Russia that plaintiffs arranged through defendant. Plaintiffs were disappointed by the experience and filed suit in District Court against defendant, seeking $22,703 in damages. Defendant gave plaintiffs a settlement offer of $1,000; plaintiffs did not accept that offer and, pursuant to MCR 2.405(C)(2), their failure to accept constituted a rejection. Almost two years later, plaintiffs gave defendant a settlement offer of $10,000; defendant did not accept that offer, and his failure to accept also constituted a rejection. After a bench trial, the court directed a verdict in defendant's favor as to one of plaintiffs' claims and found no cause of action as to the remaining claims. The trial court awarded defendant an unexplained $1,500 in attorney fees. Defendant moved for offer of judgment costs in the amount of $46,016.30; the trial court found it appropriate to award costs but pursuant to "a kind of fairness doctrine" only awarded $18,500. On appeal, the Circuit Court concluded that the District Court had committed an error of law in declining to award the full amount of defendant's requested costs. This appeal followed.

A trial court's decision to award sanctions under MCR 2.405 is reviewed de novo. *Castillo v Exclusive Builders, Inc*, 273 Mich App 489, 492; 733 NW2d 62 (2007). Underlying questions of law, such as the trial court's interpretation of the offer of judgment rule, are also reviewed de novo. *Id.* Facts underlying an award of attorney fees are reviewed for clear error.

Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club, 283 Mich App 264, 296; 769 NW2d 234 (2009).

Plaintiffs first argue that defendants are not entitled to any award of attorney fees and costs under MCR 2.405 because defendant failed to make a counteroffer to plaintiffs' settlement offer. Pursuant to MCR 2.405(D)(2), "an offeree who has not made a counteroffer may not recover actual costs unless the offer was made less than 42 days before trial." Defendant was an offeree to plaintiffs' offer and did not make a counteroffer. However, binding precedent establishes that MCR 2.405(D)(2) "does not apply where, as here, each party is an offeror." *Beveridge v Shorecrest Lane & Lounge, Inc*, 204 Mich App 466, 470; 516 NW2d 117 (1994); *Lamson v Martin (After Remand)*, 216 Mich App 452, 462; 549 NW2d 878 (1996). Plaintiffs and defendant *both* made independent offers, to which the other party did not respond. Accordingly, both were offerors and MCR 2.405(D)(2) did not preclude defendant's recovery. *Beveridge*, 204 Mich App at 470. Rather, under MCR 2.405(D)(1),[1] defendant could recover if the adjusted verdict was less than $1,000, and plaintiffs could have recovered if the adjusted verdict had been greater than $10,000. *Id.* The District Court ultimately awarded $0 to plaintiffs after trial, an outcome more favorable to defendant than his $1,000 offer. For this reason, the District Court correctly found MCR 2.405(D)(1) applicable and awarded attorney fees and costs to defendant.

We note, however, that we are inclined to view plaintiffs' concerns about the correctness of *Beveridge* with some sympathy. Nothing in the plain language of the Court Rule, which this Court has found "unambiguous," *Coy v Richard's Industries, Inc*, 170 Mich App 665, 674; 428 NW2d 734 (1988), provides any explicit support for the exception seemingly created out of whole cloth by *Beveridge*. The *Beveridge* Court did not state why it held as it did, and we note that certain commentators are also uncomfortable with the *Beveridge* exception. See 2 Longhofer, Michigan Court Rules Practice, p 596. Michigan generally follows the "American rule" that attorney fees and costs are not recoverable from a losing party. *Haliw v Sterling Heights*, 471 Mich 700, 706-707; 691 NW2d 753 (2005). Exceptions to that doctrine, such as MCR 2.405, are generally supposed to be construed narrowly. See *Spectrum Health v Grahl*, 270 Mich App 248, 253; 715 NW2d 357 (2006). The *Beveridge* rule appears to expand this exception without any articulated or, to us, readily apparent reason for doing so.

On the other hand, we are unwilling to conclude that the *Beveridge* rule is entirely without logic. The Court may have chosen to apply MCR 2.405(D)(1) independently of the language of MCR 2.405(D)(2) in cases where the party seeking attorney fees is both an offeree and an offeror. The offers by each party are evaluated under MCR 2.405(D)(1), and MCR 2.405(D)(2) functions to stop an offeree from collecting costs based on an evaluation of the offeror's offer. For example, defendant could not have received sanctions merely because the verdict was more favorable than plaintiffs' offer because he did not counter offer. But, if the

[1] If an offer is rejected, MCR 2.405(D)(1) provides that, "[i]f the adjusted verdict is more favorable to the offeror than the average offer, the offeree must pay to the offeror the offeror's actual costs incurred in the prosecution or defense of the action."

verdict was more favorable than his offer, he could receive costs under MCR 2.405(D)(1). While the *Beveridge* rule may serve to foster some gamesmanship, the absence thereof may also foster some gamesmanship.

Ultimately, while we recognize that plaintiffs' argument has some merit, and while we are somewhat uncomfortable with the *Beveridge* rule, we do not find it to be so obviously wrong that we must declare a conflict, and because it is such a long-standing rule, we would at this point be uncomfortable doing so in any event. Instead, we are of the view that if the *Beveridge* rule should be excised from the operation of the Court Rules, our Supreme Court is the appropriate entity to effectuate that. Until our Supreme Court does so, *Beveridge* remains binding precedent and we continue to follow it.

Plaintiffs next argue that defendant is precluded from recovering attorney fees pursuant to the "interest of justice" exception, MCR 2.405(D)(3), which precludes gamesmanship along with a few other narrow exceptional circumstances. *Luidens v 63rd Dist Court*, 219 Mich App 24, 31-32, 35; 555 NW2d 709 (1996). We disagree. The applicability of MCR 2.405(D)(3) is reviewed for an abuse of discretion. *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 374; 689 NW2d 145 (2004). Gamesmanship refers to a "a token offer of judgment after an unfavorable mediation evaluation to avoid mediation sanctions under MCR 2.403 or . . . a de minimus offer of judgment early in a case in the hopes of tacking attorney fees to costs if successful at trial." *Luidens*, 219 Mich App at 35. Plaintiffs argue that defendant's $1,000 offer was gamesmanship, but considering the ultimate finding of no cause of action, we disagree. The trial court properly relied on the verdict to evaluate whether defendant's offer was made in good faith. *Id.* Accordingly, the district court did not abuse its discretion in determining that defendant did not engage in gamesmanship, and the interest of justice exception does not apply. Furthermore, the trial court's award was based on the legal requirements of MCR 2.405(D)(1), not on the irrelevant fact that plaintiff Timothy Baxter is an attorney.

Plaintiffs finally argue that the Circuit Court erred when it increased the amount of the award under MCR 2.405 from $18,500 to the full $46,000 requested by defendant. We agree in part. The District Court's award of only part of defendant's requested fees appears to have been a departure from the requirements of MCR 2.405 and an attempt instead to apply the "American rule" to which MCR 2.405 is an exception. Therefore, the Circuit Court correctly determined that the District Court abused its discretion in awarding $18,500. However, the Circuit Court erred in then simply concluding that "it was an error of law to not award the entire attorney's fees once we make the MCR 2.405 determination that attorney's fees are appropriate."

The fact that defendant was entitled to actual costs pursuant to MCR 2.405(D)(1) does not mean he was entitled to all of the fees he requested. Rather, having determined actual costs should be awarded, the District Court must determine what "actual costs" were incurred. MCR 2.405(A)(6) defines actual costs as the "costs and fees taxable in a civil action and a reasonable attorney fee for services necessitated by the failure to stipulate to the entry of judgment." Therefore, defendant could only collect attorney fees that were both (1) reasonable, and (2) necessitated by plaintiffs' failure to stipulate to an entry of judgment. MCR 2.405(A)(6).

The District Court did not, insofar as we can determine without the District Court record having been provided to us, determine the reasonableness or necessity of defendant's claimed

fees. When the reasonableness and appropriateness of attorney fees are at issue, the trial court should conduct an evidentiary hearing regarding the reasonableness of the requested fees. *Miller v Meijer, Inc*, 219 Mich App 476, 479; 556 NW2d 890 (1996). During such an evidentiary hearing, the court must consider the following factors, although it may consider others:

> (1) the professional standing and experience of the attorney; (2) the skill, time and labor involved; (3) the amount in question and the results achieved; (4) the difficulty of the case; (5) the expenses incurred; and (6) the nature and length of the professional relationship with the client. [*JC Bldg Corp II v Parkhurst Homes, Inc*, 217 Mich App 421, 430; 552 NW2d 466 (1996) (quotation omitted).]

On the record, no court considered any of these factors relevant to a determination of the reasonableness of fees. Furthermore, neither we, nor the Circuit Court when acting in its appellate role, conduct a de novo review of factual issues. *Beason v Beason*, 435 Mich 791, 802 n 5; 460 NW2d 207 (1990); *In re FG*, 264 Mich App 413, 417 n 6; 691 NW2d 465 (2004). The appropriate remedy was to remand for a determination of the reasonableness and appropriateness of attorney fees. *JC Bldg Corp II*, 217 Mich App at 430-431.

Accordingly, we remand to the District Court for a factual determination of the reasonableness of the sum requested, as well as a determination of whether the contested motions (e.g. motions to change venue, and motion to disqualify Timothy) were necessitated by plaintiffs' refusal of defendant's offer of judgment.

The award of costs under MCR 2.405 is affirmed, but the case is remanded for a determination of whether the amount of costs was reasonable and necessitated by plaintiffs' refusal of defendant's offer of judgment. We do not retain jurisdiction.

/s/ Jane M. Beckering
/s/ Donald S. Owens
/s/ Amy Ronayne Krause