STATE OF MICHIGAN

COURT OF APPEALS

SHORE FINANCIAL SERVICES, INC., d/b/a UNITED WHOLESALE MORTGAGE,

Plaintiff-Appellant,

v

LAKESIDE TITLE AND ESCROW AGENCY, INC. and TOP FLITE FINANCIAL, INC.,

Defendants-Appellees.

UNPUBLISHED
May 21, 2013

No. 301143
Oakland Circuit Court
LC No. 2009-100819-CK

SHORE FINANCIAL SERVICES, INC., d/b/a UNITED WHOLESALE MORTGAGE,

Plaintiff-Appellee,

v

LAKESIDE TITLE AND ESCROW AGENCY, INC.,

Defendant-Appellant,

and

TOP FLITE FINANCIAL, INC.,

Defendant.

No. 302707
Oakland Circuit Court
LC No. 2009-100819-CK

SHORE FINANCIAL SERVICES, INC., d/b/a UNITED WHOLESALE MORTGAGE,

Plaintiff-Appellee,

v

LAKESIDE TITLE AND ESCROW AGENCY,

No. 302723
Oakland Circuit Court
LC No. 2009-100819-CK

INC.,

Defendant,

and

TOP FLITE FINANCIAL, INC.,

Defendant-Appellant.

Before: BORRELLO, P.J., and K.F. KELLY and MURRAY, JJ.

PER CURIAM.

In Docket No. 301143, plaintiff Shores Financial Services, Inc. d/b/a United Wholesale Mortgage, appeals as of right the trial court's order granting defendants, Top Flite Financial, Inc.'s and Lakeside Title and Escrow Agency, Inc.'s, motions for summary disposition pursuant to MCR 2.116(C)(8) and (10) on plaintiff's first amended complaint. In Docket Nos. 302707 & 302723, Top Flite and Lakeside appeal as of right the trial court's order denying their motions for costs and case evaluation sanctions. In Docket No. 301143, we affirm the trial court's order. In Docket Nos. 302707 & 302723, we reverse the trial court's order and remand for further proceedings.

I. FACTS & PROCEEDINGS

In October 2003, plaintiff, a mortgage lender, and Top Flite, a mortgage broker, entered into a wholesale lending agreement. Under the terms of the wholesale lending agreement, Top Flite would submit the application of various borrowers to plaintiff for plaintiff's consideration regarding whether to fund a residential mortgage loan to the borrower.

Consistent with this agreement, in March 2009, Top Flite submitted the mortgage loan application of Clara Parker, the borrower. Parker was seeking a Federal Housing Administration (FHA) 30-year mortgage for about $183,964 to purchase a house. Plaintiff pre-approved the Parker mortgage loan contingent upon various conditions bet met, including the sale of Parker's condo (condition 11). Subsequently, it appears that there was miscommunication regarding whether condition 11 needed to be satisfied or if plaintiff had removed the condition. Ultimately, the Parker mortgage loan closed without condition 11 being satisfied.

Following these events, in May 2009, plaintiff filed its complaint against Top Flite and Lakeside, and in July 2009, plaintiff filed its first amended complaint against Top Flite and Lakeside alleging breach of contract, promissory and/or equitable estoppel, unjust enrichment, and specific performance (counts I, II, III, and IV) because the Parker mortgage loan had been closed without Top Flite or Lakeside ensuring that condition 11 had been satisfied. Plaintiff alleged that the Parker mortgage loan was uninsurable because condition 11 had not been satisfied, and thus, it was not marketable. In response, Lakeside and Top Flite each filed a motion for summary disposition pursuant to MCR 2.116(C)(10), arguing that summary

disposition was appropriate for each count. On September 30, 2010, the trial court issued an opinion and order granting Top Flite's and Lakeside's motions for summary disposition pursuant to MCR 2.116(C)(8) and (10):

> The action arises from a loan for the purchase of a house in Pataskala, OH. Plaintiff served as the lender, Defendant Top Flight [sic] served as the mortgage broker and Defendant Lakeside served as the title company for the closing. Plaintiff alleges that because its closing conditions were not followed the mortgage is not commercially viable and cannot be sold. Although there has been no default on the mortgage obligations, Plaintiff filed the instant lawsuit for breach of contract, promissory estoppel, unjust enrichment and specific performance.
>
> The Court finds that summary disposition is appropriate as to both Defendants on all counts. Plaintiff's equitable claims fail as a matter of law because there is no evidence that Defendants made any promises that induced Plaintiff to act or that Defendants were unjustly enriched. The Court finds that Plaintiff has failed to submit sufficient evidence in support of its breach of contract claim and is not entitled to specific performance. In addition, the Court finds that Plaintiff has failed to submit any admissible evidence in support of its alleged damages.

Following this order, plaintiff appealed as of right. Meanwhile, following the trial court's granting of the motions for summary disposition, Top Flite filed a motion for costs and case evaluation sanctions and Lakeside filed a motion for case evaluation sanctions. On January 11, 2011, the trial court issued an order denying Top Flite's and Lakeside's motions for costs and case evaluation sanctions without prejudice pending the outcome of plaintiff's appeal:

> This matter was before the Court on Defendants' Motions for Costs and Case Evaluation Sanctions. The Court heard oral arguments and took the matter under advisement pending the submission of supplemental briefs. Because a Claim of Appeal has been filed in this case, the Court is denying these motions without prejudice. Once the appellate process has been completed Defendants may re-file the motions if still applicable.

Subsequently, in February 2011, Top Flite and Lakeside each appealed as of right the trial court's order. Thereafter, on March 2, 2011, this Court consolidated Docket Nos. 301143, 302707, and 302723 to advance the efficient administration of the appellate process. *Shore Fin Servs, Inc v Lakeside Title & Escrow Agency*, unpublished order of the Court of Appeals, entered March 2, 2011 (Docket Nos. 301143, 302707 & 302723).

II. ANALYSIS

A. DOCKET NO. 301143:

MOTIONS FOR SUMMARY DISPOSITION

Plaintiff argues that the trial court erred in granting Top Flite's and Lakeside's motions for summary disposition on its first amended complaint because genuine issues of material fact exist regarding each count. This Court reviews the trial court's ruling on a motion for summary disposition de novo. *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). Summary disposition is appropriate under MCR 2.116(C)(8) when "[t]he opposing party has failed to state a claim on which relief can be granted." MCR 2.116(C)(8). "A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone." *Detroit Int'l Bridge Co v Commodities Export Co*, 279 Mich App 662, 669; 760 NW2d 565 (2008) (quotation marks and citation omitted). "The pertinent question is whether the claim is so clearly unenforceable as a matter of law that no factual development could establish the claim and justify recovery." *Id*. at 669-670 (quotation marks and citation omitted). In reviewing the motion, this Court accepts as true all factual allegations supporting the claim, as well as any reasonable inferences that can be drawn from the facts. *Id*. at 670.

When deciding a motion for summary disposition under MCR 2.116(C)(10), this Court considers the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted in a light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). Summary disposition should be granted when "there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "There is a genuine issue of material fact when 'reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party.'" *Lakeview Commons Ltd Partnership v Empower Yourself, LLC*, 290 Mich App 503, 506; 802 NW2d 712 (2010), quoting *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008). "This Court considers only the evidence that was properly presented to the trial court in deciding the motion." *Id*.

"The existence and interpretation of a contract are questions of law reviewed de novo[,]" *Kloian v Domino's Pizza, LLC*, 273 Mich App 449, 452; 733 NW2d 766 (2006), as is "whether a liquidated damages provision is valid and enforceable[,]" *St Clair Med, PC v Borgiel*, 270 Mich App 260, 270; 715 NW2d 914 (2006). Equitable actions are reviewed de novo, but the ultimate decision regarding whether to grant equitable relief rests in the sound discretion of the trial court and is based on the facts and circumstances of the particular case. *Tkachik v Mandeville*, 487 Mich 38, 44-45; 790 NW2d 260 (2010).

1. BREACH OF CONTRACT

The elements for a breach of contract claim are: "(1) that there was a contract, (2) that the other party breached the contract and, (3) that the party asserting breach of contract suffered damages as a result of the breach." *Miller-Davis Co v Ahrens Const, Inc (On Remand)*, 296 Mich App 56, 71; 817 NW2d 609 (2012). To prove a breach of contract, the plaintiff must first prove the existence of a contract between the parties. *Pawlak v Redox Corp*, 182 Mich App 758, 765; 453 NW2d 304 (1990). A valid contract has five elements: "(1) parties competent to contract, (2) a proper subject matter, (3) a legal consideration, (4) mutuality of agreement, and (5) mutuality of obligation." *Calhoun Co v Blue Cross & Blue Shield of Mich*, 297 Mich App 1, 13; 824 NW2d 202 (2012).

"Damages are an element of a breach of contract action." *Miller-Davis*, 296 Mich App at 72 (quotation marks and citation omitted). "The proper measure of damages for a breach of contract is the pecuniary value of the benefits the aggrieved party would have received if the contract had not been breached." *Ferguson v Pioneer State Mut Ins Co*, 273 Mich App 47, 54; 731 NW2d 94 (2006) (quotation marks and citation omitted). Therefore, "[l]ike other civil actions, the plaintiff in a breach of contract case must establish a causal link between the alleged improper conduct of the defendant and the plaintiff's damages." *Miller-Davis*, 296 Mich App at 72. A causal link is one based on reasonable inferences, as opposed to impermissible conjecture. *Id*. In other words, "[t]he party asserting a breach of contract has the burden of proving its damages with reasonable certainty, and may recover only those damages that are the direct, natural, and proximate result of the breach." *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003). While the amount of damages need not be determined with mathematical precision, *Severn v Sperry Corp*, 212 Mich App 406, 415; 538 NW2d 50 (1995), damages are not recoverable if they are based on mere speculation or conjecture, *Berrios v Miles, Inc*, 226 Mich App 470, 478; 574 NW2d 677 (1997).

Assuming that the evidence established a contract between plaintiff and Top Flite (the wholesale lending agreement) and plaintiff and Lakeside (the closing instructions), and that the evidence supports a finding that Top Flite's and Lakeside's actions respectively constituted a breach of the wholesale lending agreement and the closing instructions, plaintiff's claim fails because there is no evidence that plaintiff suffered damages as a result of Top Flite's and/or Lakeside's actions. Plaintiff alleged damages in the form of a defective and unmarketable mortgage loan. Yet, plaintiff acknowledges that, at the time the motions for summary disposition were filed, it had not attempted to sell the Parker mortgage loan. And, although plaintiff provided affidavits that alleged a loss of just over $7,000, plaintiff failed to submit any *evidence* regarding how it had determined the alleged loss. Specifically, one of the affiants, plaintiff's CEO Kathy Welty, admitted during her deposition that she could not produce a numerical figure that represented plaintiff's alleged monetary damages. Additionally, as noted by Top Flite and Lakeside, when plaintiff funded the Parker mortgage loan it received a first priority mortgage and note from Parker on the property, and Parker was current on her monthly mortgage payments at the time the motions were heard. Even considering that plaintiff's usual business model would have been to sell the Parker mortgage loan for a profit, plaintiff's alleged damages—in the form of an unmarketable mortgage loan—amounts to pure speculation based on potential loss. In other words, plaintiff's alleged damages were based on mere conjuncture because it failed to submit any documentary evidence to show the alleged loss incurred for having a defective mortgage loan, and thus, it was not reasonably certain that plaintiff suffered any damages.

However, plaintiff also relies upon the liquidated damages provision within the addendum to the closing instructions to support its damages claim against Lakeside. "A liquidated damages provision is simply an agreement by the parties fixing the amount of damages in the event of a breach and is enforceable if the amount is reasonable with relation to the possible injury suffered and not unconscionable or excessive." *St Clair Med*, 270 Mich App at 270-271. Liquidated damages provisions are appropriate where actual damages are uncertain and difficult to ascertain. *Id*. at 271. Whether a liquidated damages clause is valid depends on conditions at the time the contract was signed, and not at the time of the breach. *Solomon v Dep't of State Hwys & Transp*, 131 Mich App 479, 484; 345 NW2d 717 (1984). Moreover, a

liquidated damages provision is invalid if it is, in fact, a penalty. *Moore v St Clair Co*, 120 Mich App 335, 339-341; 328 NW2d 47 (1982). "'Where, by the terms of a contract, a sum is mentioned as "liquidated damages" for a nonperformance of several distinct stipulations of very different degrees of importance, and this sum is to be payable equally on a failure to perform the least, as to that to perform the most, important or whole of them together, it is in legal effect a penalty . . . .'" *Randall v Douglass*, 321 Mich 492, 496; 32 NW2d 721 (1948), quoting *Decker v Pierce*, 191 Mich 64, 70; 157 NW 384 (1916). Whether the parties use the term "penalty" or "liquidated" or some other similar term is not material; rather, the proper inquiry is based on the parties' intent as understood from the contractual language. *Moore*, 120 Mich App at 340-341.

The liquidated damages in the addendum to the closing instructions specifically states that the failure to close the loan, or the failure to comply with all of plaintiff's closing conditions, will result in a $1,000 per day penalty until the failure(s) are rectified. This provision is not enforceable. It requires the payment of the same sum regardless of the degree in the breaching party's failure to perform and would apply against the closing agent even if a closing failed for a reason unrelated to the closing agent's failure to perform. Additionally, the instruction itself calls the damages provision a "penalty" and the penalty amount is unreasonable and excessive considering that the contract was for a residential mortgage of about $180,000. Hence, plaintiff cannot make use of the liquidated damages clause. Because plaintiff failed to prove it suffered damages, the trial court properly granted Top Flite's and Lakeside's motions for summary disposition pursuant to MCR 2.116(C)(10) on the breach of contract claim.

2. PROMISSORY/EQUITABLE ESTOPPEL

"Promissory estoppel is a judicially created doctrine that was developed as an equitable remedy applicable in common-law contract actions." *Crown Tech Park v D & N Bank, FSB*, 242 Mich App 538, 548 n 4; 619 NW2d 66 (2000). To show promissory estoppel, a plaintiff must establish:

> (1) a promise, (2) that the promisor should reasonably have expected to induce action of a definite and substantial character on the part of the promisee, and (3) that in fact produced reliance or forbearance of that nature in circumstances such that the promise must be enforced if injustice is to be avoided. [*Novak v Nationwide Mut Ins Co*, 235 Mich App 675, 686-687; 599 NW2d 546 (1999).]

"In determining whether a requisite promise existed, we are to objectively examine the words and actions surrounding the transaction in question as well as the nature of the relationship between the parties and the circumstances surrounding their actions." *Novak*, 235 Mich App at 687. Caution must be exercised when "evaluating an estoppel claim and [this Court] should apply the doctrine only where the facts are unquestionable and the wrong to be prevented undoubted." *Id*. Additionally, equitable estoppel "arises where a party, by representations, admissions, or silence intentionally or negligently induces another party to believe facts, the other party justifiably relies and acts on that belief, and the other party will be prejudiced if the first party is allowed to deny the existence of those facts." *Soltis v First of America Bank-Muskegon*, 203 Mich App 435, 444; 513 NW2d 148 (1994).

The trial court properly granted Top Flite's and Lakeside's motions for summary disposition on this claim because plaintiff did not allege that it relied upon a promise outside of the alleged express contracts, i.e., the wholesale lending agreement and the closing instructions. Thus, there was no promise made outside of the alleged contracts that induced plaintiff to fund the Parker mortgage loan. See *UAW-GM Human Resource Center v KSL Recreation Corp*, 228 Mich App 486, 504; 579 NW2d 411 (1998).

3. UNJUST ENRICHMENT

"Unjust enrichment of a person occurs when he has and retains money or benefits which in justice and equity belong to another." *McCreary v Shields*, 333 Mich 290, 294; 52 NW2d 853 (1952) (quotation marks and citation omitted). "In order to sustain the claim of unjust enrichment, plaintiff must establish (1) the receipt of a benefit by defendant from plaintiff, and (2) an inequity resulting to plaintiff because of the retention of the benefit by defendant." *Belle Isle Grill Corp v Detroit*, 256 Mich App 463, 478; 666 NW2d 271 (2003) (citations omitted). "If this is established, the law will imply a contract in order to prevent unjust enrichment. However, a contract will be implied only if there is no express contract covering the same subject matter." *Id*. (citations omitted). "In other words, the law will imply a contract to prevent unjust enrichment only if the defendant has been unjustly or inequitably enriched at the plaintiff's expense." *Morris Pumps v Centerline Piping, Inc*, 273 Mich App 187, 195; 729 NW2d 898 (2006).

In this case, plaintiff cannot seek recovery through an unjust enrichment claim because there is no evidence that Top Flite or Lakeside were unjustly or inequitably enriched by the Parker mortgage loan. The record reflects that Top Flite did not receive any benefit from the Parker mortgage loan and Lakeside was paid nothing more than its usual fees for the services it provided involving the mortgage loan transaction. And, as already noted, in return for funding the Parker mortgage loan, plaintiff received a first priority mortgage and note and Parker was current on her monthly mortgage payments to plaintiff. Consequently, Top Flite and Lakeside were not unjustly or inequitably enriched at plaintiff's expense and the trial court properly granted summary disposition on this claim. *Morris Pumps*, 273 Mich App at 195; *Belle Isle Grill*, 256 Mich App at 478.

4. SPECIFIC PERFORMANCE

Specific performance is a type of equitable relief and it "is a remedy of grace and not a matter of right[.]" *MacGlashan v Harper*, 299 Mich 662, 667; 1 NW2d 30 (1941). "The granting of specific performance lies within the discretion of the court and whether or not it should be granted depends upon the particular circumstances of each case." *Derosia v Austin*, 115 Mich App 647, 652; 321 NW2d 760 (1982). "The adequacy of a remedy at law is not a bar to specific performance where the contract involves realty." *Wilhelm v Denton*, 82 Mich App 453, 454; 266 NW2d 845 (1978). Here, however, the contracts at issue do not involve realty; instead, they involve the funding of a mortgage loan pursuant to the wholesale lending agreement and the closing instructions. Thus, because there is an adequate remedy at law, the trial court properly granted Top Flite's and Lakeside's motions for summary disposition on this claim.

B. DOCKET NOS. 302707 & 302723:

MOTIONS FOR COSTS & CASE EVALUATION SANCTIONS

Top Flite and Lakeside argue that the trial court abused its discretion in denying their motions for costs and case evaluation sanctions. A trial court's award of attorney fees and costs is reviewed for an abuse of discretion. *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008). "An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes." *Id*. "A trial court's decision whether the grant case-evaluation sanctions under MCR 2.403(O) presents a question of law, which this Court reviews de novo." *Id*. However, a trial court's decision regarding whether to award costs pursuant to the "interest of justice" provision set forth in MCR 2.403(O)(11) is reviewed for an abuse of discretion. *Stitt v Holland Abundant Life Fellowship (On Remand)*, 243 Mich App 461, 476-477; 624 NW2d 427 (2000). Also, the interpretation and application of a court rule is a question of law that is reviewed de novo. *Snyder v Advantage Health Physicians*, 281 Mich App 493, 500; 760 NW2d 834 (2008).

A trial court may award costs pursuant to MCR 2.625(A), which provides:

> (1) *In General*. Costs will be allowed to the prevailing party in an action, unless prohibited by statute or by these rules or unless the court directs otherwise, for reasons stated in writing and filed in the action.
>
> (2) *Frivolous Claims and Defenses*. In an action filed on or after October 1, 1986, if the court finds on motion of a party that an action or defense was frivolous, costs shall be awarded as provided by MCL 600.2591.

Typically, "[c]osts shall be allowed as a matter of course to the prevailing party." *Guerrero v Smith*, 280 Mich App 647, 671; 761 NW2d 723 (2008) (quotation marks and citation omitted). However, "[w]hen costs are denied to the prevailing party for reasons written and filed by the court, the court's 'determination should not be reversed on appeal unless [its] written reasons are totally unsupported by the facts involved in the case.'" *Gentis v State Farm Mut Auto Ins Co*, 297 Mich App 354, 365; 824 NW2d 609 (2012) (citation omitted). This means that "[a] trial court is not required to justify awarding costs to a prevailing party; rather, the court must justify the failure to award costs." *Blue Cross & Blue Shield of Mich v Eaton Rapids Community Hosp*, 221 Mich App 301, 308; 561 NW2d 488 (1997). "[T]o be considered a prevailing party, that party must show, at the very least, that its position was improved by the litigation." *Forest City Enterprises, Inc v Leemon Oil Co*, 228 Mich App 57, 81; 577 NW2d 150 (1998).

In this case, the trial court stated in writing that it was denying Top Flite's motion for costs because plaintiff filed a claim of appeal. While MCR 7.208(I) permits a trial court to rule on a party's motion for costs under MCR 2.625 despite the filing of a claim of appeal, it does not require a trial to do so. *Edge v Edge*, 299 Mich App 121, 137; __ NW2d __ (2012). Thus, because the trial court has the discretion regarding whether to rule on costs during the pendency of an appeal, the trial court did not abuse its discretion in denying the first argument from Top Flite's motion for costs without prejudice pending this Court's decision in Docket No. 301143.

However, in addition, Top Flite and Lakeside argue that the trial court was required to decide their motions for case evaluation sanctions under MCR 2.403(O). MCR 2.403(O) provides:

> (1) If a party has rejected an evaluation and the action proceeds to verdict,[1] 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 case evaluation. [MCR 2.403(O)(1).] [Footnote added.]

MCR 2.403(O)(1) is a mandatory rule that requires the rejecting party to "pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the case evaluation." *Haliw v City of Sterling Hts (On Remand)*, 266 Mich App 444, 447; 702 NW2d 637 (2005) (quotation marks and citation omitted). "The purpose of case evaluation sanctions is to shift the financial burden of trial onto 'the party who demands a trial by rejecting a proposed award.'" *Allard v State Farm Ins Co*, 271 Mich App 394, 398; 722 NW2d 268 (2006) (citations omitted).

MCR 2.403(O)(11) "is an exception to the mandatory rule set forth in MCR 2.403(O)(1) . . . ." *Haliw*, 266 Mich App at 447. MCR 2.403(O)(11) provides, "[i]f the 'verdict' is the result of a motion as provided by subrule (O)(2)(c), the court may, in the interest of justice, refuse to award actual costs." Thus, despite the mandatory nature of MCR 2.403(O)(1), MCR 2.403(O)(11) "confers discretion" upon the trial court regarding whether to award actual costs when a judgment is entered under MCR 2.403(O)(2)(c) and the trial court determines that awarding costs would not be in the interests of justice. *Haliw*, 266 Mich App at 447. The *Haliw* Court further explained:

> In sum, we conclude 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). It follows that if the exception applies, the trial court may, in the exercise of its discretion, refuse to award any costs or attorney fees, or may award something less than "actual costs," i.e., something less than taxable costs and reasonable attorney fees. The trial court must, however, articulate the bases for its decision. [*Haliw*, 266 Mich App at 449 (citations omitted).]

The trial court did not state that it was relying upon the interest of justice exception in denying Top Flite's and Lakeside's motions for case evaluation sanctions. Rather, the trial court indicated that the pendency of an appeal was its reason for declining to award case evaluation sanctions. The pendency of an appeal is not an unusual circumstance that a trial court may use to

[1] A verdict includes "a judgment entered as a result of a ruling on a motion after rejection of the case evaluation." MCR 2.403(O)(2)(c).

invoke MCR 2.403(O)(11), and thus the trial court was required to decide the motions for case evaluation sanctions on the merits. Consequently, the trial court erred in denying without prejudice Top Flite's and Lakeside's motions for case evaluation sanctions.

III. CONCLUSION

In Docket No. 301143, we affirm the trial court's order. In Docket Nos. 302707 & 302723, we reverse the trial court's order and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

Defendants may tax costs, having prevailed in full. MCR 7.219(A).

/s/ Stephen L. Borrello
/s/ Kirsten Frank Kelly
/s/ Christopher M. Murray