STATE OF MICHIGAN

COURT OF APPEALS

JEREMY SHELTON and ALLISON SHELTON, Plaintiffs-Appellees,	UNPUBLISHED September 08, 2026 11:30 AM
v	No. 375744 Oakland Circuit Court LC No. 2023-202904-CK
BRANDON MCEWEN and PAM MCEWEN, Defendants-Appellants,	
and	
KAMRAN NALLAMOTHU, JESICA R. SPENCER, and SPENCER REAL ESTATE, LLC, Defendants.	

Before: M. J. KELLY, P.J., and O'BRIEN and LIEVENSE, JJ.

PER CURIAM.

Following a dispute related to a residential real estate transaction, the trial court granted summary disposition in favor of defendant-appellants, Brandon and Pam McEwen (the McEwens). But the court subsequently denied the McEwens' motion for actual costs and attorney fees. That subsequent order is the subject of this appeal. We reverse in part, affirm in part, and remand for further proceedings consistent with this opinion.

I. FACTUAL BACKGROUND

This case arises out of a dispute involving the sale of residential real property involving plaintiffs, Jeremy and Allison Shelton (the Sheltons), as buyers and the McEwens as sellers.

On July 29, 2023, the Sheltons entered into a purchase agreement with the McEwens for the sale of a home located in Oakland County. Before the agreement was signed, the McEwens executed a "Sellers' Disclosure" form in May 2023. One item in this disclosure form asked if there had been any "[m]ajor damage to the property from fire, wind, floods, or landslides," and the

McEwens had marked off a box indicating there was "no" such damage. The Sheltons purchased the home for $445,000.

Later, after the closing date in mid August 2023, the Sheltons discovered that the property had been subject to a "major fire" in 2007, which was not disclosed to them before their purchase. Specifically, the Sheltons alleged that it was the McEwens' real-estate agent who first disclosed information about the fire after the closing and stated that the house had "been subject to a major fire and was reportedly rebuilt in 2007."

On September 27, 2023, the Sheltons filed a complaint alleging several counts related to fraud and sought a rescission of the contract. The Sheltons alleged that the McEwens made material misrepresentations or failed to disclose material facts about the condition of the property and that they had actual knowledge of the fire. They requested an order requiring the McEwens to return the entire purchase price of the home or, alternatively, a judgment in their favor awarding damages for the losses they allegedly suffered from the nondisclosure. The McEwens filed an answer denying the Sheltons's allegations, and they specifically alleged that they did not live at or own the property in 2007. Moreover, the McEwens argued, as an affirmative defense, that they "did not have any personal knowledge of the alleged fire that occurred at the property in 2007."

Relevant to this appeal, the McEwens sent the Sheltons an offer of judgment, offering to stipulate to an entry of judgment of $5,000 to resolve all claims. The Sheltons did not respond to this offer within 21 days as required under MCR 2.405(C)(1).

Following discovery, on December 16, 2024, the McEwens moved for summary disposition under MCR 2.116(C)(8) and (10). They argued that the property did not have any signs of fire damage as confirmed by multiple inspections. The McEwens also argued that they had no duty to disclose or any liability related to the fire under the Seller Disclosure Act (SDA), MCL 565.951 *et seq*., because they lacked personal knowledge of its occurrence. Finally, they argued that any claim of fraud failed as a matter of law because the Sheltons could not prove intent to defraud, any claim of negligent misrepresentation was defeated by the inclusion of "AS IS" language in the purchase agreement, and the Sheltons had constructive knowledge of the fire before the sale was completed.

Following a hearing on the motion, the trial court granted summary disposition in the McEwens' favor. The court held that, under MCL 565.955(1), none of the named defendants were liable for any statement, or lack thereof, in the seller's disclosure related to the 2007 fire unless the facts concealed were within the defendants' personal knowledge. The court concluded that the Sheltons had not presented any evidence that any defendant had personal knowledge of the fire or any fire-related damage to the house in May 2023 when they sold it to the Sheltons. As such, there was no evidence that "any Defendant could testify in court about the fire having happened." At most, the trial court held, the Sheltons had only established that if any of the defendants had knowledge of the fire, such "knowledge" was predicated on statements made by others such as the Shelton' neighbors or the person who owned the home before the McEwens.

Following the hearing, the McEwens moved for actual costs and attorney fees. Specifically, they alleged that they had offered to stipulate to an entry of judgment for $5,000 to resolve all claims, that the Sheltons did not respond to this offer, and so, under MCR 2.405(D), since the $5,000 "average offer" was more favorable to the McEwens than the verdict, the Sheltons were required to pay the McEwen's "actual costs incurred in the . . . defense of the action." The McEwens argued that their "actual costs" included $30,550.15 in attorney fees and costs, which was measured from January 8, 2024, the date of rejection to the settlement offer, to April 2, 2025, the date in which the instant motion was filed.

The Sheltons filed a brief in opposition to the McEwens's motion arguing that it was not in the interest of justice to grant the motion under MCR 2.405(D)(3). They argued that they rejected the offer of judgment because the $5,000 offer "did not even attempt to address the real issues that were present in the case." As such, the Sheltons argued that the offer was an attempt at gamesmanship and not a sincere effort toward settlement. Finally, they argued that the McEwens had failed to provide any evidence of their attorney fees and costs.

The trial court held a hearing on the motion in April 2025. Proceeding without oral argument, the trial court denied the McEwens' motion. The trial court found that the Sheltons did not timely accept the McEwens's offer of judgment, but it also found that the offer was "de minimis in the context of the case," as the McEwens sought $30,550 in attorney fees and the Sheltons had sought "recissions of a contract in the amount of $445,000." Therefore, it held that granting defendant's motion was not "in the interest of justice" under MCR 2.405(D)(3). The trial court also stated that it was denying the motion because it lacked evidence supporting the request. As the court acknowledged, the McEwens's attorney had completed an affidavit stating that he had represented the McEwens at an hourly rate of $385 and that the McEwens had incurred "attorney fees of $28,485.00, plus costs of $1,315.15 and expert fees of $750.00 for a total of $30,550.15 in this matter." The trial court found that was not enough information, however, because the affidavit had not provided a "breakdown of the actual work done or how many hours he worked on this case, nor was there a request for an evidentiary hearing for the Court to decide the same."

This appeal followed.

II. STANDARD OF REVIEW

At issue in this case is the trial court's interpretation and application of MCR 2.405, otherwise known as the "offer of judgment rule." *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 297; 769 NW2d 234 (2009) (citation omitted). This Court reviews de novo the interpretation and application of the offer of judgment rule. *Id.* But we review for an abuse of discretion "the trial court's decision regarding whether to refuse to award attorney fees under the interest of justice exception." *Simcor Constr, Inc v Trupp*, 322 Mich App 508, 514; 912 NW2d 216 (2018) (quotation marks and citation omitted). "An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes." *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008). "A trial court necessarily abuses its discretion when it makes an error of law." *Powers v Brown*, 328 Mich App 617, 620; 939 NW2d 733 (2019).

III. ANALYSIS

The McEwens argue that the trial court erred by not awarding actual costs and attorney fees based on its finding that the interest of justice exception applied. They also argue that the trial court erred by denying their motion without holding an evidentiary hearing because the reasonableness of their requested attorney fees was in dispute. We agree with the McEwens that the trial court abused its discretion by not awarding actual costs, but we disagree that it abused its discretion by not awarding attorney fees, and therefore an evidentiary hearing is not necessary.

The McEwens sought to recover their actual costs from the litigation after the trial court granted them summary disposition. "Actual costs" are defined as "the costs and fees taxable in a civil action and a reasonable attorney fee, dating to the rejection of the prevailing party's last offer or counteroffer, for services necessitated by the failure to stipulate to the entry of judgment." MCR 2.405(A)(6). However, while "actual costs" include attorney fees, attorneys fees are subject to the "interest of justice" exception. In relevant part, MCR 2.405(D) provides as follows:

> (D) Imposition of Costs Following Rejection of Offer. If an offer is rejected, costs are payable as follows:
>
> (1) If the adjusted verdict is more favorable to the offeror than the average offer, the offeree must pay the offeror the offeror's actual costs incurred in the prosecution or defense of the action.
>
> * * *
>
> (3) 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. Interest of justice exceptions may apply, but are not limited to:
>
> (*i*) cases involving offers that are token or de minimis in the context of the case; or
>
> (*ii*) cases involving an issue of first impression or an issue of public interest. [MCR 2.405(D)(1) and (3).]

"The purpose of MCR 2.405 is to encourage settlement and to deter protracted litigation." *Luidens v 63rd Dist Court*, 219 Mich App 24, 31; 555 NW2d 709 (1996). MCR 2.405 was amended in 2022. See Administrative Order No. 2020-06, 508 Mich lxxix (2021). Most relevant here, the amendments added the nonexhaustive list of circumstances when the interest of justice exception "may apply" in MCR 2.405(D)(3)(*i*) and (*ii*). None of the amendments changed the underlying purpose of the rule described in *Luidens*, but they did potentially impact the scope of the interest of justice exception and, accordingly, we review whether the trial court abused its discretion by applying the exception in this case.

In general, the interest of justice exception to this rule is a remedy of "exceptional nature," *id*. at 33, and it should only be applied in "unusual circumstances." *Harbour v Correctional Med Servs*, *Inc*, 266 Mich App 452, 466; 702 NW2d 671 (2005) (quotation marks and citation omitted). "The unusual circumstances necessary to invoke the 'interest of justice' exception may occur where a legal issue of first impression is presented, or where the law is unsettled and substantial damages are at issue, where a party is indigent and an issue merits decision by a trier of fact, or where the effect on third persons may be significant." *Simcor*, 322 Mich App at 521 (quotation marks, citation, and alterations omitted). "Factors such as the reasonableness of the offeree's refusal of the offer, the party's ability to pay, and the fact that the claim was not frivolous are too common to constitute the unusual circumstances encompassed by the 'interest of justice exception.' " *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 391; 689 NW2d 145 (2004) (quotation marks and citation omitted).

We have previously noted that situations in which an interest of justice exception would apply include when parties "make offers of judgment for gamesmanship purposes, rather than as a sincere effort at negotiations." *Luidens*, 219 Mich App at 35. This may include a "de minimis offer of judgment early in a case in the hopes of tacking attorney fees to costs if successful at trial." *Id.*, citing *Sanders v Monical Machinery Co*, 163 Mich App 689, 692; 415 NW2d 276 (1987). However, when a trial court decides not to grant fees pursuant to the "interest of justice exception," it "must articulate why the 'interest of justice' will be served in light of the role that MCR 2.405 was designed to serve in the administration of our judicial process under the Michigan Court Rules." *Hamilton v Becker Orthopedic Appliance Co*, 214 Mich App 593, 597; 543 NW2d 60 (1995).

A. ACTUAL COSTS NOT INCLUDING ATTORNEYS FEES

In this context, we first consider the issue of actual costs, but not attorney fees, specifically, $1,315.15 in costs and $750.00 for expert fees. There is no dispute that the adjusted verdict the McEwens obtained against the Sheltons was more favorable than the offer of judgment the Sheltons rejected when they did not respond to the offer within 21 days. MCR 2.405(C); *AFP Specialties, Inc v Vereyken*, 303 Mich App 497, 517; 844 NW2d 470 (2014). As a consequence, the Sheltons were required to pay the McEwens's "actual costs in the prosecution or defense of the action" because the adjusted verdict was more favorable to the McEwens as the offeror than the offer itself. MCR 2.405(D)(3). The imposition of costs, other than attorney fees, is required and is not subject to an interest of justice exception under the rule. See *Derderian*, 263 Mich App at 390 ("By its plain language, MCR 2.405(D)(3) limits application of the interest of justice exception to the attorney fee portion of 'actual costs.' "). The trial court, therefore, abused its discretion by denying the McEwens's motion for costs under the interest of justice exception. *Powers*, 328 Mich App at 620. On remand, the trial court should award the McEwens the actual costs and fees of $2,065.15 ($1,315.15 in costs and $750.00 for expert fees) that they requested under MCR 2.405(D).

B. ATTORNEY FEES

Turning next to the McEwens's request for attorney fees, we hold that, on the current record and under the circumstances of this case, the trial court did not abuse its discretion by denying the request based on the interest of justice exception.

"What constitutes 'in the interest of justice' must be decided on a case-by-case basis." *Andreson v Progressive Marathon Ins Co*, 322 Mich App 76, 94; 910 NW2d 691 (2017) (quotation marks and citation omitted). The trial court first noted that "the case law on [the legal] issue [in the case] was very limited." In doing so, the court seemed to be referencing MCR 2.405(D)(3)(*ii*) ("cases involving an issue of first impression"). Next, and more important, it stated that, in the context of this case, the $5,000 offer of judgment was de minimis because the Sheltons were seeking rescission of the purchase agreement in the amount of $445,000 and the McEwens were seeking $30,550 in attorney fees and costs. As such, the Sheltons' monetary damages request provides an amount against which to compare the offer. See *Tennine Corp v Boardwalk Commercial, LLC*, 315 Mich App 1, 21; 888 NW2d 267 (2016) (finding an inability to adequately determine whether a defendant's offer was de minimis when "plaintiff did not request a specific amount of monetary damages"). The Sheltons argue that the McEwens's offer represented slightly more than 1% of the total amount of damages the Sheltons sought, which was why the Sheltons did not respond to it. Defendants argue that, even if it was reasonable for the Sheltons to refuse that offer, that fact does not establish the "unusual circumstances encompassed by the 'interest of justice exception.' " *AFP Specialties*, 303 Mich App at 520.

But the trial court's reasoning was based on the de minimis value of the offer in the context of the case, as specifically provided for in the amended MCR 2.405(D)(*i*). While not binding,[1] "unpublished opinions of this Court have emphasized that low offers, even offers of $0, are not necessarily de minimis, when the evidence is such that the offering parties know with relative certainty that they would prevail on the merits." *Capello v Walton (After Remand)*, unpublished per curiam opinion of the Court of Appeals, issued March 28, 2024 (Docket No. 364006), p 7 (citations omitted). At the same time, we have held that a trial court's invocation of the interest of justice exception did not constitute an abuse of discretion when the value of an offer of judgment was relatively low when compared to the damages sought by a plaintiff. See *Pandemonium, Inc v Northcrest Development, LLC*, unpublished per curiam opinion from the Court of Appeals, issued July 22, 2021 (Docket No. 350526), p 10 ("The trial court could have reasonably concluded that [defendants'] combined offer of $10,000, when the estimated cost to repair the damaged roof exceeded several hundred thousand dollars, was not a sincere effort to settle the case.").

Here, the trial court's conclusion that the $5,000 offer of judgment was de minimis was reasonably based on the disparity between the value of the offer ($5,000) and the amount the Sheltons sought to recover ($445,000). This is particularly true given *when* the McEwens made the offer of judgment, as the timing of a defendant's offer of judgment is a relevant consideration because early offers suggest gamesmanship. *Luidens*, 219 Mich App at 35. The Sheltons filed their complaint on September 27, 2023. Then, before "substantial discovery took place," the McEwens made their offer of judgment on December 18, 2023.

Because substantial discovery had not occurred before the offer was made, and the relative strength of the Sheltons' claims weighed against the McEwens' defense was unknown, it is unclear whether the offer was made in good faith or represented a strategic effort to "tack on" attorney fees if the McEwens succeeded in the litigation. *Sanders*, 163 Mich App at 692. The trial court's finding that the offer was de minimis in this context therefore was not an abuse of discretion. *Andreson*, 322 Mich App at 94 (application of the interest of justice exception is considered on a case by case basis). And the trial court is in a superior position to determine whether to exercise its discretion to award attorney fees under MCR 2.405. *Pandemonium, Inc*, unpub op at 10, citing *In re Loyd* 424 Mich 514, 535; 384 NW2d 9 (1986).

[1] Unpublished opinions from this Court have no binding authority but may be considered for their persuasive value. *Eddington v Torrez*, 311 Mich App 198, 203; 874 NW2d 394 (2015).

IV. CONCLUSION

We reverse the trial court's May 1, 2025 order denying the McEwens' request for actual costs not including attorney fees and direct the court to award the McEwens a sum of $2,065.15. We affirm the order denying the McEwens' request for attorney fees. Because we affirm on that issue, it is unnecessary to remand for an evidentiary hearing on the reasonableness of the attorney fees requested by the McEwens. We remand for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Kelly
/s/ Colleen A. O'Brien
/s/ Andrew J. Lievense