STATE OF MICHIGAN

COURT OF APPEALS

WILLIAM WAHL,

Plaintiff-Appellee,

v

CITY OF DEARBORN,

Defendant-Appellant.

UNPUBLISHED
October 25, 1996

No. 183985
LC No. 93-306646-NO

Before: Jansen, P.J., and Reilly and M.E. Kobza,* JJ.

PER CURIAM.

Defendant appeals as of right from a February 23, 1995 order of the Wayne Circuit Court denying its motion for costs and attorney fees pursuant to MCR 2.405(D). We reverse and remand.

This is a premises liability case in which plaintiff filed suit against defendant, claiming that he was injured at the Mike Adray Ice Arena. On October 23, 1993, the case was unanimously mediated for $30,000. Plaintiff accepted the mediation amount and defendant rejected it. On June 17, 1994, defendant submitted an offer of judgment in the amount of $15,000. Plaintiff did not respond, therefore, he was deemed to have rejected the offer of judgment. See MCR 2.405(C)(2)(b). The case went to a jury trial and the jury entered a verdict of no cause of action in defendant's favor.

An order of judgment was entered on December 22, 1994. Subsequently, defendant moved for costs and attorney fees. The trial court denied the request finding that the parties had entered into a consent judgment that did not provide for costs or attorney fees and that the offer of judgment was not made in good faith.

Defendant first argues that the trial court erred in finding that the order of judgment constituted a consent judgment such that an award of costs and attorney fees was precluded. The order of judgment indicates that it was "[a]pproved as to form and substance." We agree with defendant's position that such language in the order did not change the order of judgment into a consent judgment on the basis of our Supreme Court's recent decision in *Ahrenberg Mechanical Contracting, Inc v Howlett,* 451

* Circuit judge, sitting on the Court of Appeals by assignment.

Mich 74; 545 NW2d 4 (1996). The Supreme Court held that the mere approval of an order as to form and substance does not transform it into a consent judgment. *Id.*, p 78. Here, the order of judgment reduced the jury's verdict of no cause of action in defendant's favor to writing, but there is no indication that it is a consent judgment. Accordingly, the order of judgment in this case does not constitute a consent judgment and defendant was not precluded from requesting costs and attorney fees after signing the order of judgment.

Next, defendant argues that the trial court erred in denying its motion for costs under MCR 2.405(D). This rule provides in pertinent part:

> (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 to the offeror the offeror's actual costs incurred in the prosecution or defense of the action.

Actual costs are defined as the costs and fees taxable in a civil action and a reasonable attorney fee. MCR 2.405(A)(6). Although the trial court may, in the interest of justice, refuse to award an attorney fee, MCR 2.405(D)(3), the award of actual costs is mandatory. The court rule does not give the trial court discretion to award costs other than attorney fees. See *Ecclestone, Moffett & Humphrey, PC v Ogne, Jinks, Alberts & Stuart, PC*, 177 Mich App 74, 77; 441 NW2d 7 (1989).

Accordingly, the trial court erred in denying defendant's request for costs and fees taxable in a civil action. Such an award is mandatory because defendant, as the offeror, is entitled to actual costs incurred in the defense of the action. We remand to the trial court for it to determine the actual costs incurred. MCR 2.405(D)(3).

The more difficult issue is whether defendant is entitled to attorney fees under MCR 2.405(D) as well. MCR 2.405(D)(3) specifically allows for the trial court to refuse to award attorney fees in the interest of justice. The trial court's decision whether to award attorney fees as costs under MCR 2.405(D) is reviewed for an abuse of discretion. *Cole v Eckstein*, 202 Mich App 275, 278; 507 NW2d 792 (1993); *Butzer v Camelot Hall (After Remand)*, 201 Mich App 275, 278; 505 NW2d 862 (1993). However, this Court has stated that a grant of attorney fees under MCR 2.405 should be the rule rather than the exception. *Lamson v Martin (After Remand)*, 216 Mich App 452, 462; 549 NW2d 878 (1996); *Butzer, supra*, p 278.

The term "interest of justice" is defined in the offer of judgment rule, and what constitutes "in the interest of justice" must be decided on a case-by-case basis. *Lamson, supra*, p 463. Some parameters have been set forth to determine what constitutes "in the interest of justice." See e.g., *Luidens v 63rd District Court*, ___ Mich App ___; ___ NW2d ___ (Docket nos. 165935, 167662; issued 9/17/96), slip op, pp 4-5. In *Sanders v Monical Machinery Co*, 163 Mich App 689, 693; 415 NW2d 276 (1987), this Court stated that if an offer to settle is made and the offer is not patently frivolous, MCR 2.405(D) puts an obligation on the offeree to accept the offer or make a counteroffer.

Rejecting or ignoring the offer puts the offeree to the judgment of the jury, and, if the offeree loses before the jury, at risk of costs as provided in MCR 2.405.

In *Stamp v Hagerman*, 181 Mich App 332, 339; 448 NW2d 849 (1989), this Court stated that a trial court may properly consider the good faith or reasonable conduct of the parties in resolving whether attorney fees are appropriate. This Court noted that the "interest of justice" standard is one which requires a balancing of competing interests. *Id.*, p 342. Other factors to consider are whether there was an unusually large verdict, whether there was a defense verdict in the face of catastrophic damages, and whether the offer was reasonable in light of the ultimate jury verdict. *Gudewicz v Matt's Catering, Inc*, 188 Mich App 639, 645; 470 NW2d 654 (1991).

This Court has also held that while the individual conduct of the parties and circumstances of each case may be relevant to a determination of what constitutes the interest of justice, the general purpose of the rule, to encourage settlement and to deter protracted litigation, must be given weight. *Hamilton v Becker Orthopedic Appliance Co*, 214 Mich App 593, 596-597; 543 NW2d 60 (1995). When a decision is made to not grant fees, the trial court must articulate why the "interest of justice" will be served in light of the role that MCR 2.405 was designed to serve. *Id.*, p 597.

In this case, the mediation evaluation was for $30,000, which plaintiff accepted and defendant rejected. Thereafter, defendant submitted an offer of judgment for $15,000, and plaintiff did not respond to the offer thereby rejecting it. The case went before a jury which returned a verdict of no cause of action in defendant's favor. The trial court, in denying defendant's request for attorney fees and costs, stated that the offer of judgment was not made in good faith and was not made to settle the case, but was made to escape mediation sanctions because plaintiff had accepted the mediation evaluation while defendant rejected it. The trial court, therefore, determined that the offer of judgment was not made in good faith.

We conclude that the trial court abused its discretion in denying defendant its request for attorney fees under MCR 2.405(D) given the facts of this case. First, the trial court stated that the request was denied "primarily on the fact that we have a judgment which was already entered which was – which does not address itself to costs or attorney fees." The trial court was concerned that there was no language in the order of judgment that preserved the right of defendant to costs or attorney fees. That concern was unwarranted because the successful offeror may make a request for costs under the offer of judgment rule within twenty-eight days after entry of judgment. MCR 2.405(D)(5).

Additionally, the trial court's conclusion that the offer of judgment in the amount of $15,000 was not in good faith is not supported by the record. The trial court concluded that because the offer was only fifty percent of the mediation award, it was made only to avoid mediation sanctions, and was not a good faith attempt to resolve the case. Considering the final outcome, that the jury decided that plaintiff was entitled to nothing, the trial court's conclusion that the $15,000 offer was not a valid gesture toward settlement was an abuse of discretion. We note that at the motion hearing, plaintiff's attorney indicated that the parties were only $5,000 apart in settlement negotiations before trial, suggesting that plaintiff was willing to accept $20,000 to settle. Accordingly, under the facts of this case, we conclude that the

trial court abused its discretion in denying defendant's request for attorney fees under the offer of judgment rule. See *Butzer*, *supra*, pp 278-279; *Gudewicz*, *supra*, pp 644-645.

Reversed and remanded for entry of an award of costs and attorney fees under the offer of judgment rule. MCR 2.405(D). Jurisdiction is not retained.

/s/ Kathleen Jansen
/s/ Maureen Pulte Reilly
/s/ Michael E. Kobza