

STATE OF MICHIGAN
COURT OF APPEALS

VALERIA HALIW and ILKO HALIW,

Plaintiffs-Appellees/Cross-
Appellants,

v

CITY OF STERLING HEIGHTS,

Defendant-Appellant/Cross-
Appellee.

FOR PUBLICATION

August 5, 2003
9:10 a.m.

No. 237269

Macomb Circuit Court
LC No. 97-000036-NO

Updated Copy

September 12, 2003

Before: Markey, P.J., and White and Zahra, JJ.

WHITE, J. (*dissenting*).

I respectfully dissent. MCR 2.403 consistently has been interpreted as providing for attorney fees incurred at the trial level only, and as not providing for attorney fees incurred on appeal. *Leavitt v Monaco Coach Corp*, 241 Mich App 288, 312 n 4; 616 NW2d 175 (2000); *Giannetti Bros Constr Co, Inc v City of Pontiac*, 175 Mich App 442, 447; 438 NW2d 313 (1989); *American Cas Co v Costello*, 174 Mich App 1, 13; 435 NW2d 760 (1989). See also Dean & Longhofer, Michigan Court Rules Practice, § 2403.22, p 533. None of these cases relied on MCR 2.403's then-requirement that the case proceed to trial in order for mediation sanctions to be invoked.¹

¹ I observe that *Keiser v Allstate Ins Co*, 195 Mich App 369; 491 NW2d 581 (1992), which the majority notes held that the ultimate "verdict" after appellate review controls whether sanctions are appropriate under MCR 2.403(O), recognized a distinction between the inquiry before it and two issues previously decided in the negative in other cases—whether sanctions could be based on a pretrial motion, rather than a trial verdict, and whether costs and expenses on appeal are recoverable under MCR 2.403(O). While the instant issue was not before the *Keiser* Court, the Court, having acknowledged the changes in the mediation rule that permitted an award of sanctions following a pretrial grant of summary disposition, then distinguished the cases that held that appellate costs and fees are not recoverable, explaining that "sanctions for appellate expenses are expressly set forth in MCR 7.216(C), which does not provide for mediation sanctions." *Keiser, supra* at 374.

The changes in the court rule relied upon by the majority were not intended to address the issue whether appellate fees and costs are assessable as mediation sanctions. Rather, the changes were addressed at making mediation sanctions available where a party prevails on motion, rather than at trial. I would not read the changes as evidencing an intent by the Supreme Court to modify the construction previously given the rule with respect to whether appellate attorney fees are appropriately included as an element of mediation sanctions.

/s/ Helene N. White