

STATE OF MICHIGAN  
COURT OF APPEALS

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MERIDIAN MUTUAL INSURANCE  
COMPANY and ESTATE DESIGN & FORMS,  
INC.,

UNPUBLISHED  
January 27, 2004

Plaintiffs-Appellees,

v

No. 243067  
Macomb Circuit Court  
LC No. 2001-005402-AV

MASON-DIXON LINES, INC.,

Defendant-Appellant,

and

CENTRAL TRANSPORT, INC., and CENTRA,  
INC.,

Defendants.

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Before: Owens, P.J., and Schuette and Borrello, JJ.

PER CURIAM.

Defendant appeals by leave granted from a circuit court order affirming the district court's denial of its motion for mediation sanctions pursuant to the 1994 version of MCR 2.405. We affirm.

Defendant first argues that the trial court abused its discretion when it determined defendant's entitlement to mediation sanctions using the former version of MCR 2.405 that was in existence before and during the trial. While the interpretation of court rules is a legal question that is reviewed de novo, we review the trial court's decision whether application of amended court rules would "work injustice" under MCR 1.102 for an abuse of discretion. *Reitmeyer v Schultz Equipment*, 237 Mich App 332, 336; 602 NW2d 596 (1999).

MCR 1.102, the court rule that provides for retroactive application of amended court rules in pending proceedings, states:

These rules take effect on March 1, 1985. They govern all proceedings in actions brought on or after that date, and all further proceedings in actions then pending. A court may permit a pending action to proceed under the former rules

if it finds that the application of these rules to that action would not be feasible or would work injustice.<sup>[1]</sup>

The version of MCR 2.405, the rule governing an offer of judgment, that was in effect at the time this case was in the pretrial, trial, and post-trial judgment phases governed cost provisions where both a mediation award and an offer of judgment have been rejected. MCR 2.405(E) specifically provided:

Relationship to Mediation. In an action in which there has been both the rejection of a mediation award pursuant to MCR 2.403 and a rejection of an offer under this rule, the cost provisions of the rule under which the later rejection occurred control, except that if the same party would be entitled to costs under both rules costs may be recovered from the date of the earlier rejection.

Effective October 1, 1997, MCR 2.405(E) was amended to provide:

Relationship to Mediation. Costs may not be awarded under this rule in a case that has been submitted to mediation under MCR 2.403 unless the mediation award was not unanimous.

Defendant agrees that under the former MCR 2.405(E), because both the mediation award and the offer of judgment were rejected, the offer of judgment provisions would control the award of sanctions. Defendant further agrees that under the former MCR 2.405(A)(4), a “verdict” was defined as “the award rendered by a jury or by the court sitting without a jury.” However, defendant claims that the request for sanctions should have been decided under the amended MCR 2.405(E), according to which the offer of judgment provisions do not control. Defendant further argues that, even if the former rules control resolution of this issue, the judgment obtained pursuant to summary disposition qualified as an “award rendered . . . by the court sitting without a jury.”

In *Reitmeyer*, this Court established guidelines for determining whether application of the 1997 amendment of MCR 2.405 or the previous version of the rule governed a party’s motion for sanctions. *Reitmeyer, supra* at 334-335. There, the plaintiff rejected a unanimous mediation award and the defendant’s offer of judgment, after having made an offer of judgment that the defendant rejected. When the plaintiff prevailed at trial, receiving a verdict more favorable than his offer of judgment, he moved for offer of judgment sanctions after October 1, 1997. This Court concluded, pursuant to MCR 1.102, that application of the amended MCR 2.405(E) might

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<sup>1</sup> Although the language of MCR 1.102 appears directed more at the application of the court rules during the period of transition when our Supreme Court first promulgated those rules, the principle provided in MCR 1.102 also applies to application of subsequently amended rules. See *Reitmeyer v Schultz Equipment & Parts Co*, 237 Mich App 332, 337; 602 NW2d 596 (1999); 1 Dean & Longhofer, Michigan Court Rules Practice (4<sup>th</sup> Ed), pp 4-5; *People v Jackson*, 465 Mich 390, 396; 633 NW2d 825 (2001), amended 465 Mich 1209 (2001).

work an injustice by denying the plaintiff sanctions he was entitled to under the former version of MCR 2.405(E).

This Court established guidelines for determining when amended court rules such as MCR 2.405 should be applied retroactively and when the “injustice” exception provided in MCR 1.102 warrants prospective application of an amended rule. Noting that similar exceptions such as “the interest of justice” in MCR 2.405(D)(3) are only applied in “unusual circumstances,” the *Reitmeyer* court concluded that the MCR 1.102 exception for “injustice” must not be read too broadly to apply to every case where new and old court rules would affect a case differently. *Reitmeyer, supra* at 339. However, contrasting the “works injustice” language of MCR 1.102 with the “interest of justice” language of MCR 2.405(D)(3), this Court observed that the MCR 1.102 language addressed the concern for the fundamental rule of law that “parties should be able to rely on the rules as they exist at the time they undertake conduct,” and concluded that “the MCR 1.102 exception may well apply in a higher proportion of cases . . . because a change in the rules when a party has already made decisions relying on the former rules will more clearly and logically result in ‘injustice’ than when both parties have relied on the same rules throughout a case.” *Reitmeyer, supra* at 340.

This Court also considered the purpose of MCR 2.405, which is “to encourage settlement and to deter litigation.” *Id.* at 338, 341. This Court noted that the reason that MCR 2.405 was amended was because it was undermining the mediation process under MCR 2.403 by allowing a party to escape or substitute mediation sanctions with offer of judgment sanctions. *Id.* at 341. Thus, to reduce gamesmanship, the drafters of the amended MCR 2.405 decided that the offer of judgment costs provision should only be used in conjunction with the mediation provisions where the mediation award was not unanimous and mediation sanctions were not available. *Id.* at 341-342. This Court stated that to determine whether application of the amended court rule accomplishes the goal of the amendment a court must look closely at the particular circumstances of the case and the purpose of the amendment. *Id.* at 342.

In particular, the Court in *Reitmeyer* instructed trial courts to consider “the substance of the rule involved and the timing of plaintiff’s actions, plaintiff’s obvious gamesmanship or lack thereof, and thus plaintiff’s reliance or lack of reliance on the rules as they existed at the time he made the pertinent decisions in this case, and any other pertinent factors in the individual case.” *Id.* at 345. In addition, the trial court was directed to determine “the ‘injustice’ in a particular case and whether a party ‘relied’ on a court rule to the extent that it would be ‘unjust’ to alter the rule in midstream.” *Id.*

There is no evidence that plaintiffs acted out of gamesmanship in rejecting the mediation award. The mediation award was \$5,000, defendant’s offer of judgment was \$4,100, and the jury’s verdict, before this Court granted defendant summary disposition, was \$85,835.88 (including \$16,208.40 in offer of judgment sanctions). Thus, there is no evidence that plaintiffs’ rejection of the mediation award and rejection of defendant’s offer of judgment were the result of gamesmanship aimed at avoiding mediation sanctions. See *Reitmeyer, supra* at 342-343. Rather, the rejection appears to have resulted from plaintiffs’ good-faith determination that the mediation award was unrealistic. Given that plaintiffs made an offer of judgment of \$51,474 and that the jury ultimately awarded plaintiff almost \$70,000 (exclusive of sanctions), this case appears to be one such as the *Reitmeyer* court observed might exist in which “a mediation award is unrealistic and thus will not contribute to the settlement of the case.” *Reitmeyer, supra* at 343,

quoting Report of the Supreme Court Mediation Rule Committee, 451 Mich 1233 (1995). We further observe that, as we will address shortly, had this case terminated as it ultimately did, by grant of summary disposition to defendant, under the version of MCR 2.405(A)(4) then existing defendant would not have been entitled to sanctions because the litigation would not have ended with a verdict “rendered by a jury or by the court sitting without a jury.”

We next consider “whether application of the amended version of MCR 2.405 would further the purpose behind the amendment because of the timing of the events in plaintiff[s] case.” *Reitmeyer, supra* at 343. The goal of the amendment, which is to “promote settlement and deter protracted litigation,” is not furthered by application of the 1997 version of MCR 2.405 in the circumstances of this case. Here, all proceedings relating to the preparation for, settlement discussions concerning, and trial of this case were completed well before the amended rule went into effect. Application of the amended rules would therefore have no effect on promoting settlement and deterring protracted litigation because the litigation had already ended well before the amendment occurred. Thus, the purpose of the amendment to promote settlement is not impaired by application of the former court rule to this case.

Further, it appears that plaintiffs relied on the former version of MCR 2.405 to such an extent that it would be unjust to alter the rule in midstream. Under the law in effect at the time of pre-trial negotiations and trial, plaintiffs could reasonably anticipate that they would prevail at trial. That this expectation was justified was demonstrated by the jury’s verdict. Indeed, the ultimate decision in this case, resulting in the granting of summary disposition to defendant, was occasioned by a change in the law that occurred after the trial, *Romska v Opper*, 234 Mich App 512; 594 NW2d 853 (1999) – not because the jury improperly determined that plaintiffs were entitled to prevail. Plaintiffs could not have been expected to realize that they would be liable for mediation or offer of judgment sanctions if defendant prevailed on a motion for summary disposition because, before the amendment to the court rules, defendant could not have obtained such sanctions. Compare former MCR 2.405(A)(4) with amended MCR 2.405(A)(4)(c).

Although this last consideration presents a close question, because we have found that the first two considerations support the trial court’s determination, and because the last consideration is a close question, we cannot conclude that the trial court abused its discretion in deciding that the amended version of MCR 2.405 should not be applied in this case. The trial court evaluated the relevant factors pursuant to this Court’s *Reitmeyer* decision and provided a reasoned basis for its decision.<sup>2</sup> *Dep’t of Transportation v Randolph*, 461 Mich 757, 768; 610 NW2d 893 (2000).

An abuse of discretion involves far more than a difference in judicial opinion. *Williams v Hofley Mfg Co*, 430 Mich 603, 619; 424 NW2d 278 (1988). It has been said that such abuse occurs only when the result is “so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of reason but

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<sup>2</sup> In *Reitmeyer*, this Court remanded the case to the trial court to conduct an analysis using the considerations we enumerated; a remand is unnecessary in this case because the trial court utilized the *Reitmeyer* considerations in making its decision.

rather of passion or bias.’” *Marrs v Bd of Medicine*, 422 Mich 688, 694; 375 NW2d 321 (1985), quoting *Spaulding v Spaulding*, 355 Mich 382, 384-385; 94 NW2d 810 (1959), and noting that, although the *Spaulding* standard has been often discussed and frequently paraphrased, it has remained essentially intact. [*Alken-Ziegler v Waterbury Headers Corp*, 461 Mich 219, 227-228; 600 NW2d 638 (1999).]

Accordingly, because plaintiffs have established that application of the amended version of MCR 2.405 would work an injustice, plaintiffs have overcome the presumption of MCR 1.102 that the 1997 amendment of MCR 2.405 should be applied. Accordingly, we conclude that the trial court did not abuse its discretion when it denied defendant’s request for mediation sanctions by applying the former version of MCR 2.405.

Defendant also argues that it is entitled to sanctions even under the former version of MCR 2.405. As we have observed, the version of MCR 2.405 that existed before 1997 provided for imposition of sanctions only in cases ending in a “verdict,” which was specifically defined as “the award rendered by a jury or by the court sitting without a jury.” MCR 2.405(A)(4). Defendant ultimately prevailed, and based its claim of sanctions on, a grant of summary disposition. The trial court correctly determined that summary disposition “cannot be deemed ‘an award by a court sitting without a jury’ within the intent of the old MCR 2.403.” If defendant’s position were correct, there would have been no need for our Supreme Court to re-write MCR 2.405(A)(4) to specifically provide in subrule (c) that a “verdict” includes “a judgment entered as a result of a ruling on a motion after rejection of the case evaluation.” Because defendant ultimately prevailed pursuant to a grant of summary disposition, his judgment award is not based on a verdict as defined by the pre-1997 court rules and he is therefore not entitled to sanctions.

Affirmed.

/s/ Donald S. Owens  
/s/ Bill Schuette  
/s/ Stephen L. Borrello