

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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GREG DOLL,

Plaintiff-Appellant,

v

CITY OF FLINT,

Defendant-Appellee.

UNPUBLISHED

October 6, 2005

No. 253253

Genesee Circuit Court

LC No. 00-067045-CL

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GREG DOLL,

Plaintiff-Appellee,

v

CITY OF FLINT,

Defendant-Appellant,

and

KELLER, THOMA, SCHWARZE, SCHWARZE,  
DUBAY & KATZ, P.C.,

Respondent-Appellant.

No. 253292

Genesee Circuit Court

LC No. 00-067045-CL

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Before: Sawyer, P.J., and Talbot and Borrello, JJ.

PER CURIAM.

In Docket No. 253253, plaintiff appeals as of right from the trial court's order awarding defendant, the City of Flint, sanctions under the offer of judgment rule, MCR 2.405, in the amount of \$70,732.20. In Docket No. 253292, defendant and the law firm representing defendant, Keller, Thoma, Schwarze, Schwarze, DuBay & Katz, P.C. (respondent), appeal as of right from the same order, which denied other requested costs and attorney fees and further required that respondent refund \$7,791.25 in attorney fees to defendant. The appeals have been consolidated for this Court's consideration. We affirm in part and vacate in part.

Plaintiff's sole claim on appeal is that the trial court abused its discretion by declining to invoke the interest of justice exception in the offer of judgment rule, MCR 2.405(D)(3), to deny defendant's request for sanctions. We disagree.

We review the trial court's decision for an abuse of discretion. *Luidens v 63rd Dist Court*, 219 Mich App 24, 32; 555 NW2d 709 (1999). An abuse of discretion occurs only if the result is so palpably and grossly violative of fact and logic that it evidences a perversion of will, defiance of judgment, or an exercise of passion or bias. *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 227; 600 NW2d 638 (1999). The interest of justice exception in MCR 2.405(D)(3) should be invoked only in unusual circumstances. *Luidens, supra* at 32. Although gamesmanship may constitute an unusual circumstance, *id.*, the 1997 amendment of MCR 2.405(E) represents our Supreme Court's attempt to eliminate gamesmanship through the use of this rule to avoid "case evaluation" sanctions, MCR 2.403, while at the same time opening up the possibility of offer of judgment sanctions without a good-faith intent to settle. *Reitmeyer v Schultz Equipment & Parts Co, Inc*, 237 Mich App 332, 342; 602 NW2d 596 (1999). According to the Report of Supreme Court Mediation Rule Committee, 451 Mich 1205, 1233 (1995):

The Committee did not think that the offer of judgment rule should be completely eliminated. Concerns about it center around its impact on the effectiveness of mediation. Since some courts do not use mediation at all, or use it for only certain categories of cases, the offer of judgment rule retains some utility. In addition, the Committee discussed the situation in which a mediation award is not unanimous, which means that mediation sanctions are not available. MCR 2.403(O)(7). It recommends that in that case the offer of judgment rule, with its costs provision, could be used. With mediation sanctions unavailable, the undesirable gamesmanship permitted by the offer of judgment rule was not felt to be a problem.

We disagree with plaintiff that the case evaluation in this case provides a reliable benchmark for evaluating defendant's later offer of judgment. This case did not involve the typical situation where case evaluation occurred shortly before trial, after discovery is completed. *Stitt v Holland Abundant Life Fellowship (On Remand)*, 243 Mich App 461, 474 n 5; 624 NW2d 427 (2000). Rather, the record reflects that plaintiff amended his complaint after the January 25, 2001 case evaluation to include new allegations about his employment that occurred after the case evaluation, such as his discharge from employment in June 2001. Also, the case evaluation was not unanimous, thus permitting defendant to seek offer of judgment sanctions. MCR 2.405(E). Under these circumstances, the fact that defendant made only a \$5,000 offer of judgment does not demonstrate that the trial court abused its discretion by refusing to invoke the interest of justice exception to preclude an award of attorney fees. We affirm the trial court's decision to award attorney fees under the offer of judgment rule. *Derderian v Genesys Health Care Systems*, 263 Mich App 364, 390-391; 689 NW2d 145 (2004).

Defendant and respondent have filed a joint brief in their appeal in Docket No. 253292. They assert that the trial court abused its discretion by striking certain requested attorney fees and costs from the award under MCR 2.405.

The offer of judgment rule allows recovery of "actual costs," which are defined as "costs and fees taxable in a civil action and a reasonable attorney fee for services necessitated by the

failure to stipulate to the entry of judgment.” MCR 2.405(A)(6). The power to tax costs is wholly statutory. *Luidens, supra* at 30. We review de novo questions of law involved in the construction of court rules and statutes, *Derderian, supra* at 374, but we review a trial court’s decision with respect to the reasonableness and appropriateness of attorney fees for an abuse of discretion, *J C Building Corp II v Parkhurst Homes, Inc*, 217 Mich App 421, 428; 552 NW2d 466 (1996).

We reject defendant’s general challenge to the trial court’s decision reducing its requested attorney fees and costs from \$126,455.95 to \$70,732.20 on the ground that it was prejudiced against non-local attorneys. The trial court’s remarks in its original written opinion, its amended written opinion, and at the various hearings relative to defendant’s motion for sanctions, viewed in context, do not support defendant’s claim that the court was biased.

Although the trial court used strong language critical of respondent, it did so in the context of expressing its opinion that respondent had engaged in unnecessary litigation during the lawsuit. A “judge’s mode of articulating a basis for decision may exhibit such a degree of antagonism or other offensive conduct that a single incident would indicate that impartial judgment is not reasonably possible,” *In re Hocking*, 451 Mich 1, 13; 546 NW2d 234 (1996), but judicial rulings alone almost never constitute an adequate basis for finding judicial bias. See *Cain v Dep’t of Corrections*, 451 Mich 470, 496; 548 NW2d 210 (1996).

Further, it was not improper for the trial court to consider local practices because community legal practice is a relevant consideration when determining a reasonable attorney fee. *Campbell v Sullins*, 257 Mich App 179, 201; 667 NW2d 887 (2003). See also MRPC 1.5(a)(3) (a relevant factor in determining a reasonable attorney fee is “the fee customarily charged in the locality for similar legal services”). A trial court has discretion in determining the weight to be accorded to the various factors in MRPC 1.5(a) when determining a reasonable attorney fee. *Dep’t of Transportation v Randolph*, 461 Mich 757, 766 n 11; 610 NW2d 893 (2000). The material question, therefore, is whether the trial court had a reasoned basis for its specific adjustments to defendant’s requested attorney fees, such that its decision was not violative of fact and logic. *Id.* at 768; see also *Alken-Ziegler, Inc, supra* at 227.

In sum, we find no merit to defendant’s claim that all excluded attorney fees and costs should be reinstated on the basis of judicial bias. We also decline to consider defendant’s request for a declaration regarding choice of counsel directed at the entire Genesee Circuit Court bench for failure to support its argument with citation to any authority, or to establish the relevancy of this claim to the particular sanctions ordered by the trial court in this case. “The appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims.” *Peterson Novelties, Inc v Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003).

Similarly, defendant has not established the relevancy of its claim regarding the right to counsel under Const 1963, art 1, § 13, to the offer of judgment sanctions ordered by the trial court here. An appellant must cite appropriate authority or policy. *Peterson Novelties, Inc, supra* at 14. Defendant’s reliance on *People v Fox*, 97 Mich App 324; 293 NW2d 814 (1980), rev’d 410 Mich 871 (1980), is misplaced because this case involves neither a criminal matter nor the removal of an attorney, but rather an award of sanctions under the offer of judgment rule. Further, we find no jurisdictional basis for disturbing the trial court’s award. To the extent the

trial court may have erred in deciding any aspect of defendant's request for sanctions, a mistake in the exercise of jurisdiction does not void a trial court's action, but may be subject to direct attack on appeal. *Buczowski v Buczowski*, 351 Mich 216, 222; 88 NW2d 416 (1958).

Turning to the merits of the three specific adjustments made by the trial court to defendant's requested attorney fees and costs, we deem defendant's challenge to the reduction of \$700 for a video deposition pursuant to *Stevens v Hogue*, 85 Mich App 185; 270 NW2d 735 (1978), to be abandoned because defendant does not brief this adjustment. "It is axiomatic that where a party fails to brief the merits of an allegation of error, the issue is deemed abandoned by this Court." *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999). Also, defendant has failed to adequately brief the trial court's downward adjustment of 113.25 hours for various legal matters. A party may not leave it to this Court to search for a factual basis to sustain a position. *Derderian*, *supra* at 388. We may decline to address an issue that is given cursory treatment in an appeal brief. *Peterson Novelties, Inc*, *supra* at 14.

Defendant has failed to meet its high burden of demonstrating that the trial court's decision to exclude \$42,000 led to a result that "is so palpably and grossly violative of fact and logic that it evidences a perversion of will, defiance of judgment, or an exercise of passion or bias" *Alken-Ziegler, Inc*, *supra*. Accordingly, we affirm the trial court's decision on the exclusion of \$42,000 from the requested amount.

Finally, we note that the portion of the trial court's order requiring respondent to reimburse defendant in the amount of \$7,791. Because defendant does not oppose respondent's claim of entitlement to this sum, we vacate the portion of the trial court's order requiring respondent to reimburse defendant attorney fees of \$7,791.25.

Affirmed in part, vacated in part. We do not retain jurisdiction. No costs pursuant to MCR 7.219(A), neither party having prevailed in full.

/s/ David H. Sawyer

/s/ Stephen L. Borrello