

STATE OF MICHIGAN
COURT OF APPEALS

RODERICK L. DUNBAR,

Plaintiff-Appellant,

v

PROGRESSIVE MECHANICAL, INC.,

Defendant-Appellee.

UNPUBLISHED

June 19, 2007

No. 268076

Oakland Circuit Court

LC No. 2004-063061-CD

Before: Servitto, P.J., and Jansen and Schuette, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order awarding \$4,802.63 in case evaluation sanctions to defendant pursuant to MCR 2.403(O). Because the trial court did not abuse its discretion in awarding case evaluation sanctions and the sanctions were reasonable, we affirm.

On December 16, 2004, plaintiff Roderick Dunbar initiated an action against defendant Progressive Mechanical, Inc., charging unlawful race discrimination and retaliation under the Elliott-Larsen Civil Rights Act, MCL 37.2101 *et seq.* Defendant moved for summary disposition of plaintiff's claims. While defendant's motion was pending, the parties attended case evaluation. The unanimous case evaluation was in favor of plaintiff. Defendant accepted the case evaluation, but plaintiff did not respond to the case evaluation within 28 days and thereby rejected the case evaluation award. MCR 2.403(L)(1); *Richardson v Ryder Truck Rental, Inc.*, 213 Mich App 447, 457; 540 NW2d 696 (1995). When plaintiff learned that defendant had accepted the case evaluation, he advised defendant that he, too, wished to accept the case evaluation award. On October 18, 2005, plaintiff presented defendant with an offer of judgment for \$6,500. Defendant did not respond, thereby rejecting the offer of judgment. MCR 2.405(C). On December 2, 2005, the trial court granted defendant's motion for summary disposition. Thereafter, defendant moved for \$6,766.13 in case evaluation sanctions under MCR 2.403(O). Following a hearing on defendant's motion, the trial court awarded \$4,802.63 in attorney fees and costs to defendant.

Plaintiff first contends that, although he rejected the case evaluation award, he did not demand a trial. Rather, he immediately attempted to amend his rejection to reflect an acceptance of the case evaluation award, in an effort to avoid case evaluation sanctions under MCR 2.403. Thus, the trial court should have declined to award attorney fees and costs to defendant in the interest of justice. We disagree.

We review de novo the interpretation and application of a court rule. *Allard v State Farm Ins Co*, 271 Mich App 394, 397; 722 NW2d 268 (2006). We also review de novo a trial court's decision to grant or deny case evaluation sanctions under MCR 2.403. *Id.* "The amount of sanctions imposed by the trial court is reviewed for an abuse of discretion." *Campbell v Sullins*, 257 Mich App 179, 197; 667 NW2d 887 (2003). Moreover, "because a trial court's decision whether to award costs pursuant to the 'interest of justice' provision set forth in MCR 2.403(O)(11) is discretionary, this Court reviews that decision for an abuse of discretion." *Harbour v Correctional Medical Services, Inc*, 266 Mich App 452, 465; 702 NW2d 671 (2005). An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

"[A] party who rejects a case-evaluation award is generally subject to sanctions if he fails to improve his position at trial." *Campbell, supra* at 198. MCR 2.403(O)(1) provides:

If a party has rejected an evaluation and the action proceeds to verdict, that party *must* pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the case evaluation. However, if the opposing party has also rejected the evaluation, a party is entitled to costs only if the verdict is more favorable to that party than the case evaluation. [Emphasis added.]

"The purpose of this rule 'is to encourage settlement, deter protracted litigation, and expedite and simplify the final settlement of cases' by placing the burden of litigation costs on the party who demands a trial by rejecting the case evaluation award." *Rohl v Leone*, 258 Mich App 72, 74; 669 NW2d 579 (2003) (citation omitted).

When the language of a court rule is clear and unambiguous, the plainly expressed meaning must be enforced. *Webb v Holzheuer*, 259 Mich App 389, 391; 674 NW2d 395 (2003). "Our Supreme Court's use of the word 'must' indicates that the award of costs is mandatory, not discretionary." *Great Lakes Gas Transmission Ltd Partnership v Markel*, 226 Mich App 127, 130; 573 NW2d 61 (1997). However, where, as here, a verdict is entered "as a result of a ruling on a motion after rejection of the case evaluation," the trial court "may, in the interest of justice," refuse to award costs" under MCR 2.403(O). MCR 2.403(O)(11); *Allard, supra* at 398-399.

Here, plaintiff's case did not present any "unusual circumstances" that would justify the denial of attorney fees and costs under MCR 2.403. This case did not involve an issue of first impression. The governing law was not unsettled, and there were no substantial damages at issue. There was no indication that plaintiff's failure to accept the award within the time frame proscribed by MCR 2.403 was inadvertent or the result of clerical error. Further, nothing in the lower court record indicates that there was a significant financial disparity between the parties, or that the effect of the decision on third persons would be significant. See *Stitt v Holland Abundant Life Fellowship (On Remand)*, 243 Mich App 461, 473; 624 NW2d 427 (2000); *Luidens v 63rd Dist Court*, 219 Mich App 24, 35; 555 NW2d 709 (1996).

Furthermore, nothing in the record indicates that defendant engaged in gamesmanship or other misconduct in this case. After plaintiff rejected the case evaluation award and learned that defendant had accepted the award, plaintiff made an offer of judgment to defendant, which

defendant rejected. However, defendant's actions did not constitute gamesmanship that was unnecessarily costly to plaintiff. In other words, nothing in the record supports the conclusion that defendant made a tactical decision to incur additional costs that may not have been necessary. *Luidens, supra*, at 35. In fact, defendant decided to pursue its summary disposition motion and was successful in doing so. Nothing in MCR 2.403 authorized, or required, the trial court to accept plaintiff's untimely acceptance of the case evaluation award. Furthermore, defendant was not obligated to accept plaintiff's offer of judgment. Defendant was entitled to continue to defend against the lawsuit, and pursue its motion for summary disposition, in the hopes of obtaining a more favorable verdict. Nothing in the record supports the conclusion that defendant's actions caused plaintiff and the trial court to expend time and resources on litigation that might have been unnecessary from the outset. Under the circumstances of this case, it was not unjust for the trial court to award costs and fees to defendant under MCR 2.403(O). Accordingly, the trial court did not abuse its discretion in failing to invoke the "interest of justice" exception set forth in MCR 2.403(O)(11).

Because the trial court declined to invoke the interest of justice exception, and because this case did not fall within the other two exceptions to an award of costs under MCR 2.403, plaintiff was required to pay defendant's actual costs. See *Allard, supra* at 399. For purposes of MCR 2.403, "actual costs" include

- (a) those costs taxable in any civil action, and
- (b) a reasonable attorney fee based on a reasonable hourly rate as determined by the trial judge for services necessitated by the rejection of the case evaluation. [MCR 2.403(O)(6).]

“‘[T]hose costs taxable in any civil action’ are enumerated in MCL 600.2405.” *Allard, supra* at 401. In this case, the trial court awarded \$842.63 in costs to defendant. On appeal, plaintiff does not challenge the trial court's award of costs to defendant.

Plaintiff contends, however, that the trial court abused its discretion in awarding \$3,960 in attorney fees to defendant. Defendant first argues that defendant failed to establish that the fees were “necessitated by” plaintiff's rejection of the case evaluation. “[U]nder MCR 2.403(O), there must be ‘a causal nexus between rejection and incurred expenses’ to justify the award of case evaluation sanctions.” *Id.* at 402, quoting *Haliw v Sterling Heights*, 471 Mich 700, 711 n 8; 691 NW2d 753 (2005).

Defendant sought \$5,923.50 in attorney fees, which it claimed it incurred after plaintiff rejected the case evaluation. In support of its claim, defendant submitted, to the trial court, a summary of the professional services rendered to defendant after plaintiff's rejection of the case evaluation award. The summary provided the dates of the representation, the number of hours expended for each task defense counsel undertook, the nature of the services provided, and the respective billing rates paid by defendant. The evidence indicated that defense counsel spent 19.8 hours defending this case from August 30, 2005, the date that plaintiff rejected the case evaluation award, to December 6, 2005, when the trial court granted defendant's motion for summary disposition. We find, on the record, that there was a sufficient causal nexus between plaintiff's rejection of the case evaluation and the fees and costs associated with continuing to defend against plaintiff's case. *Id.* Plaintiff's rejection of the case evaluation necessitated

further action on defendant's motion for summary disposition, and necessitated further preparation by defense counsel in the event that this case proceeded to trial. "[A] causal nexus plainly exists between rejection and trial fees and costs . . ." *Haliw, supra* at 711 n 8.

Plaintiff also argues that the attorney fee was not reasonable because the hourly rate of \$200 was excessive. "A reasonable attorney fee must be based on a reasonable hourly or daily rate for services necessitated by the rejection of the evaluation." *Zdrojewski v Murphy*, 254 Mich App 50, 71-72; 657 NW2d 721 (2002). The billing sheets submitted by defense counsel revealed that, on average, defendant paid defense counsel \$300 per hour. Recognizing that a lower hourly rate was more reasonable, the trial court reduced defense counsel's billing rate to \$200 per hour. The trial court was not required to accept defense counsel's billing on its face or to find that reasonable attorney fees are equivalent to actual attorney fees. *Cleary v Turning Point*, 203 Mich App 208, 212; 512 NW2d 9 (1993). It appears that the trial court determined the fee "based on the particular facts of the case and community legal practice." *Campbell v Sullins*, 257 Mich App 179, 201; 667 NW2d 887 (2003) (citation omitted). Given the trial court's familiarity with the case and the issues presented, the trial court did not abuse its discretion in determining the reasonableness of the attorney fees. *Id.* Plaintiff failed to present any evidence in support of his assertion the hourly rate of \$200 per hour was excessive, or that a rate of \$125 per hour was more reasonable, under the circumstances of this case. "A party may not merely announce a position and leave it to the Court of Appeals to discover and rationalize the basis for the claim." *Joerger v Gordon Food Service, Inc*, 224 Mich App 167, 178; 568 NW2d 365 (1997). Thus, the trial court did not err in awarding \$4,802.63 in costs and attorney fees, in favor of defendant, under MCR 2.403(O).

Plaintiff next contends that, because defendant did not make a counteroffer to plaintiff's offer of judgment, the offer of judgment rule, MCR 2.405, precluded the trial court from awarding costs and fees to defendant. Plaintiff's argument is without merit. MCR 2.405(D) provides, in pertinent part:

If an offer is rejected, costs are payable as follows:

* * *

(2) If the adjusted verdict is more favorable to the offeree than the average offer, the offeror must pay to the offeree the offeree's actual costs incurred in the prosecution or defense of the action. However, an offeree who has not made a counteroffer may not recover actual costs unless the offer was made less than 42 days before trial.

Defendant did not seek costs under MCR 2.405. Defendant's motion for costs and fees clearly provided that it was seeking attorney fees and costs under MCR 2.403. Cf. *Reitmeyer v Schultz Equip & Parts Co, Inc*, 237 Mich App 332; 602 NW2d 596 (1999). Thus, the rules governing the award of costs under the offer of judgment rule did not apply in this case, and did not preclude the trial court from awarding attorney fees and costs to defendant under MCR 2.403.

Lastly, plaintiff contends that the trial court had discretion to accept plaintiff's untimely acceptance of the case evaluation and deny defendant's motion for costs and fees, and that the trial court abused its discretion in failing to exercise such discretion. We disagree.

We review a claim alleging a failure to exercise discretion under the abuse of discretion standard. *Rieth v Keeler*, 230 Mich App 346, 348; 583 NW2d 552 (1998). “[F]ailure to exercise discretion when called on to do so constitutes an abdication and hence an abuse of discretion.” *Id.*, quoting *People v Stafford*, 434 Mich 125, 134 n 4; 450 NW2d 559 (1990).

Under the circumstances of this case, the trial court did not abuse its discretion when it failed to allow plaintiff to amend his rejection of the case evaluation award to reflect an acceptance of the award. Plaintiff did not initially accept the case evaluation award, and was not seeking relief from inadvertently missing a case evaluation deadline. Cf. *Rieth, supra* at 347-350. Moreover, plaintiff knowingly rejected the case evaluation. Nothing in the record indicates that plaintiff’s rejection was based upon a mistake of fact. Cf. *State Farm Mut Auto Ins Co v Galen*, 199 Mich App 274, 278-279; 500 NW2d 769 (1993). Furthermore, the record reflects that, after plaintiff rejected the case evaluation award, defendant did not reaffirm its continued acceptance of the award. In fact, defendant rejected plaintiff’s offer of judgment for \$6,500, which demonstrated that defendant no longer wished to accept the case evaluation award. Therefore, it would have been improper for the trial court allow plaintiff to amend his rejection of the award. *Rieth, supra*, at 350. Thus, plaintiff failed to establish that the trial court erred in failing to exercise its discretion under MCR 2.403(O).

Finally, defendant argues that there was no arguable legal merit to plaintiff’s appeal and, therefore, it is entitled to attorney fees under MCR 7.216(C)(1)(a). Defendant’s request for sanctions was procedurally improper. The issue was raised in defendant’s brief on appeal, rather than in a separate motion. See MCR 7.211(C)(8).

Moreover, the fact that a plaintiff is not successful on his claim on appeal does not entitle the opposing party to sanctions under MCR 7.216(C)(1)(a). Plaintiff’s claims on appeal were not “devoid of arguable legal merit.” *Siecinski v First State Bank of East Detroit*, 209 Mich App 459, 466; 531 NW2d 768 (1995). In other words, “[t]his is not, by any stretch of the imagination, an issue so one-sided that no reasonable lawyer could contest it in good faith.” *Cardinal Mooney High School v Michigan High School Athletic Ass’n*, 437 Mich 75, 79; 467 NW2d 21 (1991). Therefore, we deny defendant’s request for attorney fees under MCR 7.216(C).

Affirmed.

/s/ Deborah A. Servitto

/s/ Kathleen Jansen

/s/ Bill Schuette