

STATE OF MICHIGAN
COURT OF APPEALS

MATTHEW EDINGTON,

Plaintiff-Appellant/Cross-Appellee,

v

UNION SQUARE DEVELOPMENT, INC.,
PIONEER GENERAL CONTRACTORS, INC.,
JASON CATER, SERGIO VARGAS
GUTIERREZ, PARKLAND INVESTMENT,
INC., and PARKLAND PROPERTY
MANAGEMENT, INC.,

Defendants,

and

SOBIE COMPANY, INC.,

Defendant-Appellee/Cross-
Appellant.

UNPUBLISHED

April 9, 2013

No. 303876

Kent Circuit Court

LC No. 08-001429-NO

Before: WILDER, P.J., and METER and RIORDAN, JJ.

PER CURIAM.

Plaintiff, Matthew Edington, appeals as of right the trial court's order granting summary disposition to defendant, Sobie Company, Inc. On cross-appeal, defendant Sobie argues that the trial court erred in denying its requests for attorney fees pursuant to MCR 2.405. We affirm in part, reverse in part.

I. FACTUAL BACKGROUND

Plaintiff, an employee of Kusters & DeVries, was injured while working at the construction site of a residential community in Grand Rapids. The accident occurred in unit #228, when plaintiff and his partner were instructed to paint the unit after Sobie's employees had installed drywall. While painting the ceiling, plaintiff was walking along the floor and fell through a hole. He did not know the hole existed and there was no guardrail near the hole at the time of his fall.

At some point before the accident, however, there had been a guardrail near the hole. Trevor Hall, an employee of Sobie, testified that he remembered a guardrail present when Sobie's employees were installing the drywall. When asked whether the guardrail had to be removed in order to install the drywall in unit #228, Hall replied "[n]ot necessarily." Plaintiff, however, produced other consultants who opined that it was more than likely that Sobie's employees removed the guardrail because it would have been in the way of installing the drywall.

After sustaining serious injuries in the fall, plaintiff filed a complaint against Union Square Development, Inc., Parkland Property Management, Inc., and Pioneer General Contractors, Inc. Plaintiff alleged negligence and violations of the Construction Safety Standards. Union Square gave notice pursuant to MCR 2.112, MCL 600.2957, and MCL 600.6304, that Sobie was a nonparty at fault because it provided construction services in unit #228 and may have removed the guardrail that was surrounding the hole. Thus, plaintiff filed a second complaint under MCR 2.112(K)(4), alleging that Sobie's employees entered the unit to complete the drywalling and removed the guardrail without replacing it.

Sobie submitted an offer of judgment, stating that pursuant to MCR 2.405, it was willing to stipulate to entry of judgment against it in the amount of \$1,000. Plaintiff filed a counter-offer of judgment, rejecting Sobie's offer of \$1,000, and offering to settle for \$400,000 instead. Sobie then filed a motion for summary disposition pursuant to MCR 2.116(C)(10), arguing that there was no genuine issue of material fact because plaintiff failed to produce any evidence that Sobie's employees removed the guardrail. While plaintiff posited that there was sufficient circumstantial evidence that Sobie's employees moved the guardrail, the trial court agreed with Sobie, noting that plaintiff failed to produce any direct evidence that Sobie's employees moved the guardrail. Alternatively, the trial court found that summary disposition was appropriate based on *Fultz v Union-Commerce Assoc.*, 470 Mich 460, 461; 683 NW2d 587 (2004), because plaintiff only was performing contractual duties, which could not give rise to a duty in tort.

After prevailing at the summary disposition hearing, Sobie filed a motion for costs as the prevailing party pursuant to MCR 2.625 and for costs and fees pursuant to MCR 2.405(D). Plaintiff objected to an award of costs under MCR 2.405(D)(3), arguing that Sobie only made a *de minimus* offer of judgment to frustrate the purpose of the court rule. While the trial court agreed that Sobie was entitled to costs under MCR 2.625 and costs under MCR 2.405(D)(1), it denied Sobie's request for attorney fees under MCR 2.405(D)(3). The court found that, in the interest of justice, attorney fees were not warranted because plaintiff did not originally name Sobie as a party and because Sobie only offered a *de minimus* offer of \$1,000. Plaintiff and Sobie now appeal.¹

¹ The jury found that Pioneer was 30 percent at fault and plaintiff was 70 percent at fault. Past economic damages were calculated to be \$186,073 and future medical care was calculated to be \$96,355. On August 26, 2011, plaintiff filed a satisfaction of judgment.

II. MOTION FOR SUMMARY DISPOSITION

A. Standard of Review

A grant or denial of a motion for summary disposition under MCR 2.116(C)(10) is reviewed de novo. *MEEMIC Ins Co v DTE Energy Co*, 292 Mich App 278, 280; 807 NW2d 407 (2011). The motion for summary disposition “tests the factual support for a claim and should be granted if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.” *Id.* “A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ.” *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). In reviewing a motion for summary disposition under MCR 2.116(C)(10), a court considers “affidavits, pleadings, depositions, admissions, and other documentary evidence submitted by the parties in the light most favorable to the party opposing the motion.” *Greene v A P Prods, Ltd*, 475 Mich 502, 507; 717 NW2d 855 (2006) (internal quotations and citations omitted). This Court considers only “what was properly presented to the trial court before its decision on the motion.” *Pena v Ingham Co Rd Comm*, 255 Mich App 299, 310; 660 NW2d 351 (2003).

B. Analysis

Plaintiff argues that there was at least circumstantial evidence that Sobie’s employees moved the guardrail. He is correct that “[c]ircumstantial evidence may be sufficient to establish a case.” *Karbel v Comerica Bank*, 247 Mich App 90, 97; 635 NW2d 69 (2001) (quotation marks and citation omitted). However, the opposing party to a motion for summary disposition must present more the mere speculation and conjecture in order to establish a genuine issue of material fact. *Id.* As this Court recognized:

A conjecture is simply an explanation consistent with known facts or conditions, but not deducible from them as a reasonable inference. There may be 2 or more plausible explanations as to how an event happened or what produced it; yet, if the evidence is without selective application to any 1 of them, they remain conjectures only. On the other hand, if there is evidence which points to any 1 theory of causation, indicating a logical sequence of cause and effect, then there is a juridical basis for such a determination, notwithstanding the existence of other plausible theories with or without support in the evidence. [*Karbel*, 247 Mich App at 98 (quotation marks, citation, brackets, and emphasis omitted.)]

In the instant case, plaintiff’s experts opined that some drywallers moved guardrails and that Sobie’s employees probably moved the guardrail in this case in order to complete their task. While this is “an explanation consistent with known facts or conditions,” it is “not deducible from them as a reasonable inference.” *Karbel*, 247 Mich App at 98. As both parties acknowledge, there is no direct evidence that Sobie’s employees moved the guardrail. In fact, the only direct evidence came from Hall, who testified that when he was in unit #228, Sobie’s employees were installing the drywall with the guardrail in place, although he failed to specify which part of the drywall was being installed at that time.

Furthermore, the evidence established that numerous people had access to unit #228. Because plaintiff failed to establish when exactly the guardrail was moved, he could not demonstrate that the timing necessarily implied that Sobie's employees moved the guardrail. Moreover, even if this Court agreed that Sobie's employees had to move the guardrail in order to complete their work, there is simply no evidence that Sobie's employees failed to replace it in the proper location. Thus, all plaintiff produced was conjecture and speculation, which is "insufficient to create an issue of fact." *MEEMIC Ins Co*, 292 Mich App at 282. The trial court properly found that plaintiff's evidence was merely speculative and insufficient to demonstrate a genuine issue of material fact.²

Further, we agree that plaintiff's arguments are no longer timely, as a jury already has apportioned 100 percent of fault in this matter. Plaintiff does correctly note that "[t]he tort-reform statutes have abolished joint and several liability in cases in which there is more than one tortfeasor actively at fault." *Kaiser v Allen*, 480 Mich 31, 37; 746 NW2d 92 (2008). Also, MCL 600.6304(1)(b), in relevant part, states that the jury must determine "[t]he percentage of the total fault of all persons that contributed to the death or injury . . . regardless of whether the person was or could have been named as a party to the action." See also *Barnett v Hidalgo*, 478 Mich 151, 170; 732 NW2d 472 (2007) (emphasis added) (stating that pursuant to MCL 600.6304 and MCL 600.2957, "the jury is required to allocate fault of all persons, parties as well as nonparties[.]").

Despite asking that a jury not assess Sobie's liability in the trial court, plaintiff now attempts to navigate his way around the issue. Prior to trial, plaintiff filed a motion seeking to prevent the jury from assessing Sobie's alleged fault. He moved the trial court to bar the introduction of evidence relating to Sobie.³ The trial court ruled that Sobie would not be listed on the jury's verdict sheet as a potential nonparty at fault. Thus, the jury was prevented from assessing whether Sobie had any role in the accident and whether any damages should be apportioned to the company. Now, on appeal, plaintiff relies on the fact that a jury has yet to consider Sobie's potential liability to argue, indeed, a jury could have found that Sobie was at least partially at fault.

In a nutshell, plaintiff is attempting to relitigate and undermine the jury's decision regarding the allocation of damages. We find that plaintiff's belated challenge to the

² Because the trial court properly granted summary disposition based on plaintiff's failure to establish a genuine issue of material fact, we decline to address plaintiff's arguments concerning the alternate basis for summary disposition based on *Fultz*, *supra*. Regardless of the trial court's interpretation of *Fultz*, "[i]t is axiomatic that we will not reverse when the lower courts have reached the correct result, even when they have done so for the wrong reason." *Dybata v Wayne Co*, 287 Mich App 635, 647; 791 NW2d 499 (2010).

³ Plaintiff relied on *Romain v Frankenmuth Mut Ins Co*, 483 Mich 18, 21; 762 NW2d 911 (2009), where the Michigan Supreme Court held that "proof of a duty is required before fault can be apportioned and liability allocated under the comparative fault statutes, MCL 600.2957 and MCL 600.6304." (Quotation marks, emphasis, and footnotes omitted).

apportionment of fault, after he proceeded to trial and after he requested that the jury not consider Sobie's role in the accident, is meritless. Especially so, since the trial court properly granted summary disposition to Sobie.

III. MOTION FOR COSTS

A. Standard of Review

"We review the trial court's decision that the 'interest of justice' exception to MCR 2.405(D)(3) applies to the facts of a specific case for an abuse of discretion." *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 374; 689 NW2d 145 (2004). "An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes." *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008). This Court reviews a trial court's interpretation of a court rule de novo. *McManus v Toler*, 289 Mich App 283, 286; 810 NW2d 38 (2010).

B. Analysis

On cross-appeal, Sobie contends that the trial court erred in invoking the "interest of justice" exception to MCR 2.405(D)(3) and declining to award attorney fees. MCR 2.405(D), in relevant part, states:

(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.

(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.

(3) The court shall determine the actual costs incurred. *The court may, in the interest of justice, refuse to award an attorney fee under this rule.* [(Emphasis added).]

"The purpose of MCR 2.405 is to encourage settlement and to deter protracted litigation." *Hanley v Mazda Motor Corp*, 239 Mich App 596, 603; 609 NW2d 203 (2000) (quotation marks and citation omitted). The "interest of justice" exception only applies in unusual circumstances. *Derderian*, 263 Mich App at 390. This Court is particularly concerned with limiting the "interest of justice" exception "because of its susceptibility to broad interpretations that could potentially consume the general rule and thus nullify MCR 2.405's purpose of encouraging settlement." *Reitmeyer v Schultz Equip & Parts Co, Inc*, 237 Mich App 332, 338-339; 602 NW2d 596, 600 (1999). Thus, the "grant of fees under MCR 2.405 should be the rule rather than the exception. To conclude otherwise would be to expand the 'interest of justice' exception to the point where it

would render the rule ineffective.” *Derderian*, 263 Mich App at 390-391 (block quote, quotation marks, and citation omitted). The exception may be applicable, however, if “an offer is made in the spirit of gamesmanship . . . rather than a sincere effort at negotiation, or when litigation of the case affects the public interest, such as a case resolving an issue of first impression.” *Id.* at 391 (quotation marks and citation omitted). When a trial court decides not to grant fees pursuant to the “interest of justice” exception, it “must articulate why the ‘interest of justice’ will be served in light of the role that MCR 2.405 was designed to serve in the administration of our judicial process under the Michigan Court Rules.” *Hamilton v Becker Orthopedic Appliance Co.*, 214 Mich App 593, 597; 543 NW2d 60 (1995).

This court determines what qualifies as “in the interest of justice” on a case-by-case basis. *Lamson v Martin*, 216 Mich App 452, 463; 549 NW2d 878 (1996). The trial court in the instant case cited two reasons for applying the interest of justice exception: (1) plaintiff did not originally name Sobie in the complaint; and (2) Sobie’s *de minimus* offer of \$1,000.

First, while it is true that plaintiff did not initially name Sobie in the complaint, that is of little significance. Plaintiff chose to add Sobie as a party and to zealously oppose Sobie’s dismissal from the action. Moreover, even if plaintiff did not initially add Sobie as a party, he could have attempted to settle with Sobie. Instead, he chose to prolong the litigation by refusing Sobie’s offer to settle. As stated above, “[t]he purpose of MCR 2.405 is to encourage settlement and to deter protracted litigation.” *Hanley*, 239 Mich App at 603. The failure to initially add Sobie as a party is irrelevant to whether plaintiff rejected Sobie’s offer to settle and protracted the litigation. While plaintiff contends that he was essentially forced to add Sobie as a party because otherwise the jury would refuse to find fault with the remaining defendants, the danger of this happening was unlikely. As discussed above, the evidence of any wrongdoing by Sobie was tenuous at best. The probability that the jury would become so convinced that Sobie was primarily responsible, and refuse to assign liability to the other defendants, was unlikely.

The trial court’s second reason, that Sobie only offered a *de minimus* amount of money in its settlement offer, is likewise insufficient to justify the application of the very narrow “interest of justice” exception. Whether an offer is *de minimus* is a relative inquiry, as it depends on the strength and merits of plaintiff’s claim. As discussed above, plaintiff failed to produce any direct evidence that Sobie’s employees moved the guardrail or failed to replace it. Plaintiff also failed to establish when the guardrail was moved or counter testimony from the only eyewitness, Hall, who testified that Sobie’s employees had not moved the guardrail. In light of the lack of evidence supporting plaintiff’s claim, it cannot be said that Sobie’s offer of \$1,000 was *de minimus*. While plaintiff argues that the law was unsettled regarding the proper interpretation of *Fultz*, the dispositive reason for granting summary disposition is that there is no genuine issue of material fact, which does not involve an unsettled area of the law.

Therefore, we find that the trial court erred in applying the very narrow “interest of justice” exception because it failed to articulate sufficient reasons for why the interest of justice would be served in light of the purpose MCR 2.405, namely, to encourage settlements. *Hanley*, 239 Mich App at 603.

IV. CONCLUSION

Because plaintiff failed to establish a genuine issue of material fact regarding its claims against Sobie, summary disposition was properly granted. However, the trial court erred in denying Sobie's motion for attorney fees under the "interest of justice" exception found in MCR 2.405(D)(3). Thus, we remand for a determination of the appropriate amount of attorney fees pursuant to MCR 2.405. In all other aspects we affirm the trial court's holding. We do not retain jurisdiction.

/s/ Michael J. Riordan

/s/ Patrick M. Meter

/s/ Kurtis T. Wilder