STATE OF MICHIGAN

COURT OF APPEALS

WAINO PIHL and SUSAN TAYLOR,

Plaintiff-Appellants,

v

DAVID J. CRUMBAUGH,

Defendant-Appellee.

UNPUBLISHED

No. 194030
Gratiot Circuit Court
LC No. 94-3257-CK

Before: McDonald, P.J., and Griffin and Bandstra, JJ.

McDONALD, P.J. (dissenting).

I respectfully dissent.

Plaintiffs moved to voluntarily dismiss the suit on the condition no attorney fees or costs be awarded. Defendant responded by joining in the request to dismiss the action with prejudice and petitioned for the award of attorney fees and costs pursuant to MCL 600.2591; MSA 27A.2591, MCR 2.114(f) and 2.625 (A)(2). The trial court granted plaintiffs' motion and awarded defendant attorney fees and costs pursuant to § 2591 finding the suit frivolous.

On appeal plaintiffs claim the court erred in awarding attorney fees and costs in conjunction with a voluntary dismissal that was conditioned upon the absence of an award of fees and costs. I agree. In *McKelvie v City of Mount Clemens*, 193 Mich App 81; 483 NW2d 442 (1992), this Court found that although MCR 2.504 permits the imposition of costs and attorney fees as a condition of voluntary dismissal, before imposing such conditions the party seeking the voluntary dismissal must be given a choice to either proceed to trial or accept a dismissal on the terms and conditions established by the trial court. Here, plaintiffs moved for voluntary dismissal with the condition fees and costs would not be awarded. Before entering a dismissal other than the one requested, or one with terms or conditions established by the court, plaintiffs should have been afforded the option to either proceed to trial or accept a dismissal without the bar on the award of fees and costs. Thus, because the dismissal was improperly entered, the award of fees and costs under either the court rules or the statute was premature.

If defendant wished to seek dismissal and attorney fees and costs pursuant to § 2591 he could have filed a motion for summary disposition under MCR 2.116 and if successful he could seek additional sanctions under § 2591.

Moreover, I am not certain whether the parole evidence rule would bar admission of plaintiffs' oral evidence regarding an additional term agreed to by the parties as long as it did not contradict the written agreement but offered only to explain the intent of the parties to the contract. However, any ruling on the admissibility of such evidence should be made in a motion for summary disposition or motion in limine rather than a motion for voluntary dismissal.

I would not find plaintiffs' suit frivolous. Although plaintiffs did not have a strong cause of action it was legitimate at the time of filing. It was only after discovery depositions of plaintiffs' most important witness that the viability of their position was seriously damaged. In response to such an unexpected turn of events plaintiffs made the proper decision to abandon their suit by seeking a voluntary dismissal. I would agree with the trial court's decision to grant statutory costs to defendant, but I would hold the additional grant of sanctions under § 2591 was an abuse of discretion.

Finally, I do not find requiring a court to follow the court rules and controlling case law a waste of judicial resources.

I would reverse and remand for proceedings consistent with my dissent.

/s/ Gary R. McDonald