

STATE OF MICHIGAN
COURT OF APPEALS

KANELLA HANTZIS,

Plaintiff-Appellee/Cross-Appellant,

v

PERRY DRUG STORES, INC.,

Defendant-Appellant/Cross-Appellee.

UNPUBLISHED

December 21, 1999

No. 210294

Macomb Circuit Court

LC No. 92-005229 NO

Before: Gribbs, P.J., and O'Connell and R.B. Burns*, JJ.

O'CONNELL, J. (dissenting).

I respectfully dissent. The majority concludes that the trial court properly applied the amended version of MCR 2.405(E) to this case. I conclude that it is unjust to apply the revised court rule.¹

If the amended version of that rule is applied, then plaintiff is entitled to mediation sanctions under MCR 2.403(O)(1). However, if the version existing at the time of defendant's relevant conduct is applied, then plaintiff is not entitled to mediation sanctions. Here, defendant rejected the mediation evaluation and made an offer of judgment before the amended version took effect. In reliance on the existing rules, defendant took actions that, under those rules, would not have subjected it to sanctions. After those actions were taken, the rules changed, leaving defendant subject to sanctions if the amended version is applied. Under these circumstances, I would hold that the application of the amended version of MCR 2.405(E) works an injustice in this case, and the trial court abused its discretion in refusing to apply the version existing at the time of defendant's relevant conduct.

Generally, new court rules are applied to pending actions; however, MCR 1.102 allows a trial court to decline to apply a new rule and instead apply the former rule, where application of the new rule would not be feasible or would work an injustice. *Reitmeyer v Schultz Equipment & Parts Co, Inc*, ___ Mich App ___, ___ NW2d ___ (Docket No. 212063, issued 08/24/1999), slip op at 2. The trial court's determination whether application of a new court rule would work an injustice is reviewed for an abuse of discretion. *Id.* Under the facts of this case, I would conclude that the trial court abused its

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

discretion in applying the new rule. Application of the amended version of MCR 2.405(E) works an injustice in this case.

In *Reitmeyer*, we examined a case where the trial court, as in the instant case, applied the amended version of MCR 2.405(E) to a pending case. We reversed and remanded to the trial court for a determination whether application of the amended version of the rule would work an injustice and, if so, to apply the former version of the rule. *Id.*, slip op at 6. Although we held that the injustice exception should not be read so broadly as to nullify the general rule that new court rules are applicable to pending cases, we also expressed concern over the fairness of applying the amended version of MCR 2.405(E) where the parties had completed all mediation proceedings before the rule's amendment.

In *Reitmeyer*, the trial court had not determined whether application of the new rule would work an injustice, so we remanded to allow the trial court to “determine whether application of the amended version of MCR 2.405(E) to this case in which the pertinent offer of judgment and mediation proceedings all occurred *prior* to the adoption of the current version would reasonably further the goal of the amendment.” *Id.*, slip op at 6 (emphasis in original). In the instant case, however, the trial court did determine that applying the amended version of MCR 2.405(E) was not unjust. Bearing in mind the principles set forth in *Reitmeyer*, I would conclude that the trial court abused its discretion in applying the amended version of the rule. Defendant relied on the existing rules in rejecting the mediation evaluation and making an offer of judgment. It is procedurally unjust to apply a different rule *after* all mediation proceedings have been concluded, thereby sanctioning defendant for conduct that would not have resulted in sanctions absent the application of the amended rule.

Accordingly, I would reverse the trial court's imposition of mediation sanctions and remand for application of the former MCR 2.405(E).

/s/ Peter D. O'Connell

¹ In my opinion, it is unfair (unjust) to sanction a party when they properly follow the then-existing court rule. The defendant may have acted differently under the revised court rule.