STATE OF MICHIGAN

COURT OF APPEALS

AMERISURE INSURANCE COMPANY,
Subrogee of LOEKS STAR PARTNERS,

Plaintiff-Appellant,

v

MBM FABRICATORS COMPANY, INC. and PONTIAC CEILING & PARTITION COMPANY, LLC,

Defendants-Appellees,

and

TEAM INDUSTRIES, INC.,

Defendant.

UNPUBLISHED
November 19, 2002

No. 231753
Wayne Circuit Court
LC No. 99-903133-NZ

AMERISURE INSURANCE COMPANY,
Subrogee of LOEKS STAR PARTNERS,

Plaintiff-Appellant,

v

MBM FABRICATORS COMPANY, INC. and PONTIAC CEILING & PARTITION COMPANY, LLC,

Defendants-Appellees,

and

TEAM INDUSTRIES, INC.,

Defendant.

No. 236242
Wayne Circuit Court
LC No. 99-903133-NZ

AMERISURE INSURANCE COMPANY,
Subrogee of LOEKS STAR PARTNERS,

Plaintiff-Appellant,

v

No. 237616
Wayne Circuit Court
LC No. 99-903133-NZ

MBM FABRICATORS COMPANY, INC. and
PONTIAC CEILING & PARTITION
COMPANY, LLC,

Defendants-Appellees,

and

TEAM INDUSTRIES, INC.,

Defendant.

Before: Murray, P.J., and Cavanagh and Bandstra, JJ.

PER CURIAM.

In this consolidated action, plaintiff appeals as of right the trial court's summary dismissal, in favor of defendants MBM Fabricators Company, Inc. (MBM) and Pontiac Ceiling & Partition Co, LLC (Pontiac), of its subrogation claim for recovery of fire loss benefits it paid under an insurance policy. Plaintiff also appeals the trial court's award of postjudgment sanctions in favor of defendants. We affirm.

This case arises as a consequence of a fire that occurred during the construction of seating in a movie theater. Loeks Star Partners (Loeks) owned the property, and plaintiff insured the property against fire loss. Loeks contracted with Fishbeck, Thompson, Carr & Huber (FTC&H) to manage the construction. Loeks entered into separate contracts with defendants MBM and Pontiac, who also performed labor on the construction project. In Loeks' contract with FTC&H, Loeks agreed to waive its insurers' right of subrogation against the trade contractors who worked on the construction project.[1] Plaintiff paid Loeks $622,682.57 in

[1] The Loeks-FTC&H contract provides, in pertinent part:

> Waiver of Subrogation. The Owner shall have its insurers waive all rights of subrogation they may have against the Construction Manager, Architect/Engineer, Trade Contractors, and their subcontractors and suppliers on all policies carried by the Owner on the Project and adjacent properties.

insurance benefits to cover the fire loss. Plaintiff, as Loeks' subrogee, brought this action in negligence against defendants, seeking reimbursement for the insurance benefits it paid to Loeks.

Plaintiff first contends that the trial court erred in granting defendants' motions for summary disposition. We disagree. We review a trial court's decision on a motion for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Although the trial court did not state under which subrule of MCR 2.116(C) it granted defendants' motions for summary disposition, the court considered evidence outside the pleadings. Accordingly, we consider the motions as granted pursuant to MCR 2.116(C)(10), which "tests whether there is factual support for a claim." *Pippin v Atallah*, 245 Mich App 136, 141; 626 NW2d 911 (2001), quoting *Kefgen v Davidson*, 241 Mich App 611, 616; 617 NW2d 351 (2000). In our review, therefore, we consider the entire record, including pleadings, affidavits, depositions, and other available evidence submitted by the parties in the light most favorable to the nonmoving party to determine whether a genuine issue of material fact exists to warrant a trial. *Spiek*, *supra*. Further, "the interpretation of contractual language is an issue of law that is reviewed de novo on appeal." *Singer v American States Ins*, 245 Mich App 370, 373-374; 631 NW2d 34 (2001).

Plaintiff contends that the contractual waiver contained in the Loeks-FTC&H contract (contract) does not apply to its claims of subrogation against defendants because they were not parties to the contract. We disagree. The scope of a waiver is governed by the intent of the parties as expressed in the contract. See *Collucci v Eklund*, 240 Mich App 654, 658; 613 NW2d 402 (2000) (discussing the scope of a contractual release). In this case, the contractual language "fairly admits of but one interpretation," and thus, we must ascertain the intent of the parties from its plain and unambiguous language. See *Meridian Mut Ins Co v Mason-Dixon Lines, Inc (On Remand)*, 242 Mich App 645, 650, n 2; 620 NW2d 310 (2000); *Collucci*, *supra*.

Even though defendants were not parties to the Loeks-FTC&H contract, the contract operates to waive plaintiff's right of subrogation against them. Loeks clearly and unambiguously waived its insurers' right of subrogation against the trade contractors by the language, "[t]he Owner shall have its insurers waive all rights of subrogation they may have against the . . . Trade Contractors. . . . " It is uncontested that defendants are trade contractors, as contractually defined; therefore, there is no need to "look beyond the plain, explicit, and unambiguous language" of the contract to conclude that Loeks intended to waive its insurers' right of subrogation against them. See *id*. Accordingly, plaintiff, as Loeks's insurer, does not have a right of subrogation against defendants because Loeks clearly and unambiguously waived that right on behalf of plaintiff and summary dismissal was proper. See *UAW-GM Human Resource Center v KSL Recreation Corp*, 228 Mich App 486, 491; 579 NW2d 411 (1998), quoting *Port Huron Ed Ass'n, MEA/NEA v Port Huron Area School Dist*, 452 Mich 309, 323; 550 NW2d 228 (1996).

Next, plaintiff contends that the trial court improperly allowed defendants to raise the contractual waiver issue outside of the pleadings. We disagree. We review decisions regarding the meaning and scope of pleadings for an abuse of discretion. *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997).

A party generally must raise an affirmative defense in his first responsive pleading or the defense is waived. MCR 2.111(F)(3) and MCR 2.116(D)(2). A defense not asserted in the

responsive pleading or by motion, as provided by the court rules, is waived except for the defenses of lack of subject-matter jurisdiction and failure to state a claim on which relief can be granted. MCR 2.111(F)(2). However, this Court has held that a defendant's delayed assertion of the defense does not prevent it from subsequently raising the issue where: (1) the defendant moved for summary disposition based on an affirmative defense within a reasonable time of discovering the defense, and (2) there is no indication that the plaintiff suffered any unfair prejudice by the defendant's failure to assert the defense in its first responsive pleading. *Meridian, supra* at 647-648.

In *Meridian, supra*, the defendant failed to assert the existence of a release, an affirmative defense, within its pleadings and did not move to amend its pleading to include it. The defendant discovered the release during discovery and moved for summary disposition based on the release. *Id*. Similarly, defendants in this case moved for summary disposition upon discovering the waiver of subrogation clause. Applying the principles of *Meridian*, we conclude that defendants were not prevented from asserting the waiver of subrogation defense in their motion for summary disposition. Although the record indicates that plaintiff previously provided defendants with a copy of the Loeks-FTC&H contract,[2] plaintiff did not provide them with the identifying pages of the contract. Thus, we conclude that defendants raised the waiver of subrogation issue within a reasonable time of discovering the existence of the waiver of subrogation clause in the contract. See *Meridian, supra* at 648.

Furthermore, contrary to plaintiff's contention, the failure to raise the defense in its pleadings did not unfairly prejudice plaintiff. "'Prejudice' exists if the amendment would prevent the opposing party from receiving a fair trial where, for example, the opposing party would not be able to properly contest the matter raised in the amendment because important witnesses have died or necessary evidence has been destroyed or lost." *Romska v Opper*, 234 Mich App 512, 522; 594 NW2d 853 (1999), citing *Weymers, supra* at 659. Plaintiff contends that it was unfairly surprised due to the "late" notice of the waiver of subrogation defense. We disagree.

"[T]he primary function of a pleading in Michigan is to give notice of the nature of the claim or defense sufficient to permit the opposite party to take a responsive position." *Stanke v*

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[2] The record indicates that defendants discovered the existence of the waiver of subrogation clause and thereafter moved for summary disposition based on the clause. Approximately nine months before defendants raised the waiver of subrogation defense in its motion for summary disposition, defendants received a copy of the Loeks-FTC&H contract from plaintiff. However, plaintiff did not provide a complete copy of the contract; the signature and cover pages identifying the parties were missing. Defendants moved for summary disposition raising the waiver of subrogation issue based on the incomplete contract and assumed that the document represented a contract between Loeks and FTC&H. A complete contract, identifying the parties to the contract, was not provided until after the hearing on the motion for summary disposition in accordance with the trial court's order. Defendants explained at the hearing on the motion for summary disposition that they did not raise the issue earlier because the partial contract they received from plaintiff did not contain the title page or signature page that identified the parties and was buried in a stack of documents "a foot and-a-half thick." It is apparent from the record that defendants were unclear as to what document they originally had.

State Farm Mut Auto Ins Co, 200 Mich App 307, 317; 503 NW2d 758 (1993). In this case, the Loeks-FTC&H contract was a document provided by plaintiff. Accordingly, plaintiff had reasonable notice from its own possession of the contract that defendants might rely on the waiver of subrogation theory at trial. See *Weymers*, *supra*. Thus, plaintiff could not be unfairly surprised by the waiver of subrogation defense. Furthermore, any surprise caused by defendants' untimely assertion of the waiver of subrogation defense was cured by the court's allowance of additional time for plaintiff to respond to the waiver of subrogation defense before it decided the summary disposition motions.[3] Moreover, the litigation had not proceeded to a point where plaintiff could not reasonably be expected to defend against the waiver of subrogation defense. See *Weymers*, *supra*. In this case, additional discovery was not necessary to defend plaintiff's position. The waiver of subrogation clause was contained within the Loeks-FTC&H contract, which was in plaintiff's possession during discovery. Therefore, we cannot agree that permitting defendants to raise the waiver of subrogation issue prevented plaintiff from receiving a fair trial. See *Romska*, *supra*. In sum, then, the trial court did not abuse its discretion in permitting defendants to raise the waiver of subrogation issue in their motions for summary disposition.

Next plaintiff contends that the trial court erred in awarding postjudgment sanctions in favor of defendants.[4] We disagree. Generally, we review de novo a trial court's decision whether to grant mediation sanctions under MCR 2.403(O).[5] *Meyer v Center Line*, 242 Mich App 560, 577; 619 NW2d 182 (2000). However, plaintiff's sole issue with respect to the award of postjudgment sanctions involves the interest of justice exception under MCR 2.403(O)(11), which gives the court limited discretion in denying such an award. Accordingly, we review this issue for an abuse of discretion. *Stitt v Holland Abundant Life Fellowship (On Remand)*, 243 Mich App 461, 472, 476; 624 NW2d 427 (2000); *Luidens v State of Michigan 63rd Dist Court*, 219 Mich App 24, 37; 555 NW2d 709 (1996). Further, the construction of court rules is a question of law that we review de novo. *Barclay v Crown Bldg & Dev, Inc*, 241 Mich App 639, 642; 617 NW2d 373 (2000).

Defendant Pontiac made an offer of judgment to plaintiff on February 9, 2000, in the amount of $20,000. This offer was apparently refused by plaintiff. Thereafter, this case was

[3] Plaintiff filed a brief with the court in which plaintiff stated its objections, and the court, at a later date, heard additional argument on the matter.

[4] Plaintiff's argument on appeal analyzes defendant Pontiac's award as offer of judgment sanctions under MCR 2.405. Defendant Pontiac analyzes the court's award as mediation sanctions under MCR 2.403. Defendant Pontiac moved for mediation sanctions solely under MCR 2.403. The trial court did not specify whether it awarded costs pursuant to MCR 2.405 or MCR 2.403, but awarded costs "representing fees necessitated by [plaintiff's] rejection of defendant Pontiac's Offer to Stipulate to Entry of Judgment." However, because defendant Pontiac moved for mediation sanctions under MCR 2.403 and costs may not be awarded under MCR 2.405 where a case was submitted to mediation (unless the case evaluation award was not unanimous, which is not applicable here) (MCR 2.405(E)), we analyze this issue as involving mediation sanctions under MCR 2.403. Regardless, the issue involves the "interest of justice" exception, which also exists under MCR 2.405(D)(3).

[5] MCR 2.403, as amended, effective August 1, 2000, changed the terminology of the rule. "Mediation" is now referred to as "case evaluation." *Stitt*, *supra* at 474, n 6. We use the terminology applicable at the time of the mediation proceeding.

mediated in favor of plaintiff in an amount of $20,000 against defendant MBM and $10,000 against defendant Pontiac. Plaintiff rejected the mediation awards, while defendants accepted their respective awards. Following the court's grant of summary disposition in favor of defendants, they moved for mediation sanctions. Pursuant to MCR 2.403, the trial court awarded sanctions equal to $16,556.60 comprised of costs and attorney fees in favor of defendant MBM. The court awarded defendant Pontiac $47,232.50 in attorney fees and costs of $207.

A party who rejects a mediation evaluation is subject to sanctions if he fails to improve his position at trial. *Elia v Hazen*, 242 Mich App 374, 378; 619 NW2d 1 (2000). MCR 2.403(O)(1) provided:

> 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 mediation 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 mediation evaluation.

The use of the word "must" in the court rule 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, pursuant to MCR 2.403(O)(11), the court may refuse to award actual costs in the "interest of justice" if the verdict is the result of a judgment entered as a result of a ruling on a motion after rejection of the case evaluation.

This Court has commented on the "exceptional nature" of the "interest of justice" exception under MCR 2.405(D)(3) and concluded that the exception is only implicated in "unusual circumstances." *Stitt*, *supra* at 472. Unusual circumstances implicating the "interest of justice" exception exist where the case involves an issue of public interest, the law is unsettled and involves substantial damages or where "gamesmanship" by the parties is present, such as making a de minimis offer after a mediation award is rejected in order to avoid mediation sanctions. *Luidens*, *supra* at 35-36. "Other circumstances, including misconduct on the part of the prevailing party, may also trigger [the interest of justice] exception." *Id*. at 36. Absent such unusual circumstances, the general rule mandating an award of costs applies. *Stitt*, *supra*.

We find that the general rule mandating mediation sanctions, MCR 2.403(O)(1), is applicable to this case. The unusual circumstances required to implicate the "interest of justice" exception to the otherwise non-discretionary award of mediation sanctions do not exist in this case. Plaintiff contends that the inability to adequately assess its position following the mediation evaluation due to defendants' failure to timely raise the waiver of subrogation defense warrants application of the interest of justice exception. We disagree. As discussed above, the record indicates that plaintiff was aware of the contract clause waiving plaintiff's right of subrogation. Moreover, although this case involves substantial damages, the issues do not present issues of first impression or public interest, nor is there any evidence of gamesmanship or misconduct on the part of defendants to implicate the "interest of justice" exception. See *Luidens*, *supra* at 35-36.

Plaintiff's argument amounts to a claim that its rejection of the mediation evaluation was reasonable given the information available at the time. However, this Court has rejected similar arguments. A reasonable refusal of an offer, alone, is not sufficient to justify not awarding

attorney fees under the 'interest of justice' exception. *Id*. at 33. Moreover, because plaintiff had possession of the contract, it had notice that defendants could raise a defense based on a clause contained in the contract. Accordingly, the trial court did not abuse its discretion in awarding defendants mediation sanctions. Although, pursuant to MCR 2.403(O)(11), the trial court may refuse to award actual costs in the interest of justice if, as here, the "verdict" is the result of a judgment entered from a ruling on a motion, we find that this case does not present the unusual circumstances warranting a court's refusal to award sanctions. See *Stitt*, *supra* at 471-477. Accordingly, we find the trial court did not abuse its discretion in awarding postjudgment sanctions to defendants.

Plaintiff finally argues on appeal that defendant Pontiac's fee award was excessive and unreasonable. Plaintiff's sole contention on appeal is that the fees were excessive in relation to defendant MBM's fee award. Plaintiff did not cite any legal support for its assertion. We need not address an issue where a party gives cursory treatment to the issue with little or no citation to supporting authority. *Silver Creek Twp v Corso*, 246 Mich App 94, 99; 631 NW2d 346 (2001). Accordingly, we decline to review this issue.[6]

We also decline to address plaintiff's argument regarding whether defendants were third-party beneficiaries of the Loeks-FTC&H contract and defendant Pontiac's alternative arguments for summary disposition. Resolution of these issues is not necessary for a proper determination of this case because summary disposition was proper on the basis of the unambiguous contract language. Furthermore, the trial court did not address these issues. Accordingly, we decline to decide these issues.

Affirmed.

/s/ Christopher M. Murray
/s/ Mark J. Cavanagh
/s/ Richard A. Bandstra

[6] However, we note that the fee award was not excessive or unreasonable and that the trial court considered the proper factors in determining the amount of the fee award.