

STATE OF MICHIGAN
COURT OF APPEALS

SHAFER REDI-MIX, INC.,

Plaintiff/Counter-Defendant-
Appellant,

v

J. SLAGTER & SON CONSTRUCTION
COMPANY,

Defendant/Counter-Plaintiff-
Appellee,

and

HANOVER INSURANCE GROUP, INC.,

Defendant-Appellee.

UNPUBLISHED
June 14, 2012

No. 297765
Jackson Circuit Court
LC No. 08-003369-CK

SHAFER REDI-MIX, INC.,

Plaintiff/Counter-Defendant-
Appellee,

v

J. SLAGTER & SON CONSTRUCTION
COMPANY,

Defendant/Counter-Plaintiff-
Appellant,

and

HANOVER INSURANCE GROUP, INC.,

Defendant-Appellant.

No. 298935
Jackson Circuit Court
LC No. 08-003369-CK

Before: BORRELLO, P.J., and O'CONNELL and TALBOT, JJ.

PER CURIAM.

In Docket No. 297665, Shafer Redi-Mix, Inc. (“Shafer”) appeals as of right from the trial court’s judgment awarding it \$104,791.88, plus statutory interest of \$5,274.95, and costs of \$673.18, after a bench trial. In Docket No. 298935, J. Slagter & Son Construction Company (“Slagter”) and Hanover Insurance Group, Inc. (“Hanover”) appeal as of right from the trial court’s order awarding them case evaluation sanctions of \$100,000. We affirm in both appeals.

Shafer’s business is to provide concrete and concrete materials to businesses and consumers throughout the state of Michigan. Slagter is a construction company that constructs large-scale bridges and overpasses for interstate highway projects. Shafer filed this action against Slagter and Hanover alleging that Slagter failed to pay amounts due for concrete that Shafer supplied for various highway projects, which were bonded and secured by payment bonds issued by Hanover. Slagter and Hanover filed a counterclaim against Shafer, alleging that the concrete materials supplied by Shafer for one highway project did not meet the specifications required by the Michigan Department of Transportation (MDOT).

The case proceeded to case evaluation and the case evaluators awarded \$100,000 to Shafer on its claim and \$1 to Slagter and Hanover on their counterclaim. Shafer rejected the case evaluation and the case proceeded to trial. In order to avoid liability for case evaluation sanctions, Shafer was required to obtain an adjusted verdict that was more than 10 percent above the net case evaluation amount, i.e., more than \$109,998.90.¹ After a bench trial, the trial court awarded Shafer a judgment of \$104,791.88. MCR 2.403(O)(3) instructs that for purposes of MCR 2.403(O)(1), a verdict must be adjusted by adding to it assessable costs and interest on the amount of the verdict from the filing of the complaint to the date of the case evaluation. Here, the trial court determined that the assessable costs from the filing of the complaint to the date of the case evaluation amounted to \$231.22, and that the interest on the amount of the verdict from the filing of the complaint to the date of the case evaluation amounted to \$2,758.41. Thus, Shafer’s adjusted verdict for purposes of determining liability for case evaluation sanctions was \$107,781.51. Because that amount did not exceed the case evaluation award by more than 10 percent, Shafer was liable for case evaluation sanctions. The trial court later conducted an evidentiary hearing to determine an appropriate award of sanctions. Although Slagter and Hanover had requested sanctions in excess of \$199,000, the trial court awarded them \$100,000, consisting of taxable costs of \$550 and a reasonable attorney fee.

On appeal, Shafer argues that the trial court erred in determining that it was liable for case evaluation sanctions. We disagree. “We review de novo a trial court’s decision regarding a

¹ MCR 2.403(O)(1) and (3).

motion for case evaluation sanctions under MCR 2.403(O).”² “The proper interpretation of a court rule is a question of law and is [also] subject to review de novo.”³

Shafer asserts that the trial court erred by failing to include a previously imposed discovery sanction of \$1,500 in its adjusted verdict calculation. Shafer contends that the discovery sanction qualifies as an “assessable cost” under MCR 2.403(O)(3). The discovery sanction was not an assessable cost, but rather a previously imposed sanction for failure to timely comply with discovery. Indeed, the purpose of awarding MCR 2.403(O) sanctions is “not to act as a punitive measure but rather is intended to foster settlement.”⁴ A discovery sanction is a punitive measure intended to punish noncompliance with discovery orders.⁵ Thus, including discovery sanctions as “assessable costs” under MCR 2.403(O)(3) would not further the purpose of the court rule. Therefore, the trial court did not err by not including the \$1,500 discovery sanction in its determination of assessable costs for purposes of increasing Shafer’s adjusted verdict under MCR 2.403(O)(3).

Shafer next argues that the trial court erred by failing to award prejudgment contract interest on the amount Slagter owed from the date it was due until the date of case evaluation. Shafer did not raise this theory below, so it cannot raise it on appeal.⁶ That notwithstanding, the trial court found that no contract existed allowing interest or attorney fees, and Shafer does not challenge that ruling on appeal. Accordingly, the trial court did not err by failing to award prejudgment contract interest to determine the amount of Shafer’s adjusted verdict for purposes of MCR 2.403(O)(3).

Shafer also argues that the trial court erred by granting Slagter and Hanover’s request to dismiss their counterclaim without prejudice and without awarding costs that, when added to the adjusted verdict, will surpass the threshold amount necessary to negate its liability for case evaluation sanctions. We review a motion to grant a voluntary dismissal for an abuse of discretion.⁷ An action may be voluntarily dismissed “by order of the court on terms and conditions the court deems proper.”⁸ This same rule applies to the voluntary dismissal of a counterclaim.⁹ In this case, the trial court found that at the time the counterclaim was brought,

² *Ivezaj v Auto Club Ins Ass’n*, 275 Mich App 349, 356; 737 NW2d 807 (2007).

³ *Dessart v Burak*, 470 Mich 37, 39; 678 NW2d 615 (2004).

⁴ *Dessart v Burak*, 252 Mich App 490, 498; 652 NW2d 669 (2002), *aff’d* 470 Mich 37 (2004).

⁵ See MCR 2.313.

⁶ See *Ficano v Lucas*, 133 Mich App 268, 275; 351 NW2d 198 (1983) (parties “may not shift ground on appeal and come up with new theories here after being unsuccessful on the [theories] presented in the trial court[.]”)

⁷ *Mleczo v Stan’s Trucking, Inc*, 193 Mich App 154, 155; 484 NW2d 5 (1992).

⁸ MCR 2.504(A)(2).

⁹ MCR 2.504(C).

MDOT had not yet “closed out” the Verona Road project and was investigating whether a section of overlay would need to be repaired or replaced. Thus, the counterclaim was appropriate at the time it was brought. Since then, however, MDOT had “closed out” the project without requiring that the questionable section be repaired or replaced. Because the trial court found that there was a proper basis for the counterclaim at the time it was brought, and that dismissal was appropriate based on events that arose afterward, dismissal without prejudice and without an assessment of costs was not an abuse of discretion.¹⁰

Shafer also argues that the trial court erred by failing to award sanctions against Slagter or defense counsel on the basis that the counterclaim was frivolous.¹¹ We review a trial court’s finding that an action is frivolous for clear error.¹² “A decision is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake was made.”¹³ “Whether a claim is frivolous within the meaning of MCR 2.114(F) . . . depends on the facts of the case.”¹⁴ “The determination whether a claim or defense is frivolous must be based on the circumstances at the time it was asserted.”¹⁵ A claim premised on a reasonable belief that there is an arguable case is not frivolous.¹⁶

In this case, Slagter and Hanover presented factual support for their belief that, at the time the counterclaim was brought, MDOT was considering ordering additional repair work for which Shafer was potentially responsible for completing. This evidence supports that Slagter and Hanover’s primary purpose in bringing the counterclaim was not to “harass, embarrass, or injure” Shafer,¹⁷ that Slagter and Hanover had a reasonable basis to believe that the facts underlying their legal position were true,¹⁸ and that their “legal position was [not] devoid of arguable legal merit.”¹⁹ As such, the trial court did not clearly err in concluding that the counterclaim was not frivolous.

Shafer next argues that the trial court erred by failing to award it additional contract damages, or equitable relief, based on the value of loads of cement that were rejected on May 1, 2008, and July 2, 2008. We disagree. The trial court determined that Shafer was responsible for

¹⁰ *Mleczo*, 193 Mich App at 155.

¹¹ MCR 2.114(F).

¹² *John J Fannon Co v Fannon Prod, LLC*, 269 Mich App 162, 168; 712 NW2d 731 (2005).

¹³ *Jerico Constr, Inc v Quadrants, Inc*, 257 Mich App 22, 35; 666 NW2d 310 (2003).

¹⁴ *John J Fannon Co*, 269 Mich App at 168 (quotation marks omitted).

¹⁵ *Jerico*, 257 Mich App at 36.

¹⁶ *Robert A Hansen Family Trust v FGH Indus, LLC*, 279 Mich App 468, 486-487; 760 NW2d 526 (2008).

¹⁷ MCL 600.2591(3)(a)(i).

¹⁸ MCL 600.2591(3)(a)(ii).

¹⁹ MCL 600.2591(3)(a)(iii).

the rejection of those loads and, therefore, was not entitled to damages for the lost value of those loads. “We review a trial court’s findings of fact in a bench trial for clear error and its conclusions of law de novo.”²⁰ “The trial court’s findings are given great deference because it is in a better position to examine the facts.”²¹

Regarding the May 1, 2008, concrete deliveries, the trial court’s finding that four loads were rejected because of too much air, and thus the loads did not meet required specifications, is supported by the testimony at trial. The testimony does not support Shafer’s argument that it was only obligated to deliver a load within specifications and that any air changes that occurred by the time the concrete left the pump should be attributable to Slagter. The testimony indicated that the concrete must meet MDOT specifications when it leaves the pump, and that it is the supplier’s responsibility to make adjustments to the air to bring it within specification. It is clear that MDOT accepts or rejects loads, and that the contractor may pour the cement for the project only after a load is accepted.

Regarding the July 2, 2008, concrete deliveries, the trial court found that the first load was Slagter’s responsibility because its delays prevented the concrete from being timely poured, but that Shafer was responsible for the next three truck loads. Shafer’s argument that all four loads were delivered within specification but were not poured due to Slagter’s delay is not supported by the record. According to the testimony, Shafer sent four trucks spaced too close together. The first truck was not used due to Slagter’s delay, but Slagter was ready to pour at 7:30 a.m. The second, third, and fourth trucks did not meet specifications due to high air content at that time, which could not have been corrected even if Slagter would have been ready to pour at the scheduled time. Thus, the trial court did not clearly err in finding that Shafer was responsible for the rejected loads.²²

We also reject Shafer’s argument that it was entitled to damages for the lost loads under the equitable doctrines of quantum meruit or unjust enrichment. “[A] contract will be implied only if there is no express contract covering the same subject matter.”²³ Here, the trial court found that Shafer and Slagter’s relationship was governed by various purchase agreement contracts. Because a contract existed, equitable relief was not warranted.²⁴

In Docket No. 298935, Slagter and Hanover argue that the trial court abused its discretion by awarding case evaluation sanctions of only \$100,000. We disagree. This Court reviews a trial court’s determination of the amount of case evaluation sanctions for an abuse of

²⁰ *Chelsea Investment Group, LLC v City of Chelsea*, 288 Mich App 239, 250; 792 NW2d 781 (2010); MCR 2.613(C).

²¹ *Chelsea Investment Group*, 288 Mich App at 251.

²² *Id.* at 250.

²³ *Belle Isle Grill Corp v Detroit*, 256 Mich App 463, 478; 666 NW2d 271 (2003).

²⁴ *Id.*

discretion.²⁵ “A trial court abuses its discretion when it reaches a decision that falls outside the range of principled outcomes.”²⁶

A party liable for case evaluation sanctions is responsible for “the opposing party’s actual costs.”²⁷ “Actual costs” include (1) “those costs taxable in any civil action” and (2) “a reasonable attorney fee based on a reasonable hourly or daily rate determined by the trial judge for services necessitated by the rejection of the case evaluation.”²⁸ “[T]he burden of proving the reasonableness of the requested [attorney] fees rests with the party requesting them.”²⁹ To determine the reasonableness of requested fees, a trial court is “required to consider the totality of special circumstances applicable to the case at hand.”³⁰ The court should consider the factors set out in *Wood v DAIIE*³¹ and MRPC 1.5(a).³²

Slagter and Hanover requested case evaluation sanctions in excess of \$199,000. The trial court awarded sanctions of \$100,000, consisting of taxable costs of \$550 and a reasonable attorney fee. The record indicates that the trial court’s award was based on its careful consideration of the relevant factors in *Wood* and MRPC 1.5(a).

It was appropriate for the trial court to consider the number of hours spent working on the case and preparing for trial in light of the nature and complexity of the case. Because sanctions are limited to a reasonable attorney fee, it was appropriate for the trial court to examine whether the extent of defense counsel’s preparation was reasonable in light of the nature of the case, particularly considering defense counsel’s expertise in the subject matter. Further, contrary to Slagter and Hanover’s assertion, the trial court recognized that the amount in dispute did not remain stagnant throughout the case. The court acknowledged that the amount at issue “was somewhat of a moving target” due to Shafer’s claim for interest and attorney fees, “which obviously kept growing as the case went on,” but found that there was only approximately \$110,000 “in play,” yet Slagter and Hanover were requesting approximately \$200,000 in attorney fees. Further, while acknowledging that the amount involved increased during the case, the court noted that Slagter was not disputing a substantial portion of its liability, observing that Slagter conceded that it owed approximately \$90,000, such that “there was really only about \$50,000 in dispute.” Therefore, it was appropriate for the trial court to consider that Slagter and

²⁵ *Ivezaj*, 275 Mich App at 356.

²⁶ *Huntington Nat’l Bank v Ristich*, 292 Mich App 376, 383; 808 NW2d 511 (2011).

²⁷ MCR 2.403(O)(1).

²⁸ MCR 2.403(O)(6)(a) and (b).

²⁹ *Smith v Khouri*, 481 Mich 519, 528-529; 751 NW2d 472 (2008).

³⁰ *Id.* at 529.

³¹ *Wood v DAIIE*, 413 Mich 573, 588; 321 NW2d 653 (1982).

³² See *Smith*, 481 Mich at 529-530.

Hanover had conceded liability for a substantial portion of the amount involved in determining a reasonable attorney fee.

Slagter and Hanover also argue that the factor regarding the amount at issue and results achieved should not weigh against it based on the circumstances of this case. The lead opinion in *Smith* concluded that the amount in question and the results achieved³³ “is not a relevant consideration in determining a reasonable attorney fee for case-evaluation sanctions.”³⁴ Although the trial court mentioned the amount in question in this case, the overarching theme of its decision was that defense counsel simply spent too much time litigating a case that was not very complicated. The trial court repeatedly stated that there was too much lawyering for a case of this nature, that the preparation was overly thorough, and that the number of hours was too great. Because case evaluation sanctions are limited to a reasonable attorney fee,³⁵ the trial court appropriately focused on the amount of preparation and thoroughness that was reasonably required in light of the nature and complexity of the case, as opposed to the actual efforts and preparation by defense counsel, in determining a reasonable attorney fee. Further, the trial court did not suggest that the use of two attorneys could never be considered reasonable, it merely concluded that two attorneys were not reasonably required in this case.

Lastly, while Slagter and Hanover suggest other ways in which the trial court could have analyzed the case differently to arrive at a reasonable attorney fee, this Court’s inquiry on appeal is limited to whether the trial court’s outcome is within the range of reasonable and principled outcomes.³⁶ If so, it is not an abuse of discretion, even if other outcomes are possible.

The record indicates that the trial court carefully considered the relevant factors to arrive at an award of attorney fees that it believed was reasonable in light of the nature and complexity of the case, and where a substantial portion of liability had been conceded. Although other outcomes were possible, the trial court’s award was based on appropriate considerations that are supported by the record and it is within the range of reasonable and principled outcomes.³⁷ Therefore, it does not constitute an abuse of discretion.

Affirmed.

/s/ Stephen L. Borrello
/s/ Peter D. O’Connell
/s/ Michael J. Talbot

³³ *Wood* factor #3 and MRPC 1.5(a) factor #4.

³⁴ *Smith*, 481 Mich at 534 n 20.

³⁵ MCR 2.403(O)(6)(b).

³⁶ *Huntington Nat’l Bank*, 292 Mich App at 383.

³⁷ *Id.*