STATE OF MICHIGAN

COURT OF APPEALS

BRIAN T. DAILEY and DIANE J. DAILEY,

Plaintiffs-Appellees,

v

ALAN OSTERDALE and OSTERDALE INSURANCE AGENCY, INC.,

Defendants-Appellants

and

AETNA CASUALTY & SURETY COMPANY,

Defendant.

UNPUBLISHED
December 20, 1996

No. 182959
LC No. 91-420440

Before: Saad, P.J., and Corrigan and R. A. Benson,* JJ.

PER CURIAM.

Defendants appeal as of right from the trial court's order denying their motion for mediation sanctions pursuant to MCR 2.403, offer of judgment sanctions pursuant to MCR 2.405, sanctions for bringing a frivolous claim pursuant to MCL 600.2591; MSA 27A.2591, sanctions for violation of MCR 2.114, and taxation of costs pursuant to MCR 2.625. We affirm.

Plaintiffs brought an action against defendants[1] claiming negligence and misrepresentation with regard to the issuance of an insurance policy and demanded that defendants pay the costs incurred by plaintiff[2] as a result of an automobile accident that were not covered by his insurance policy. During the jury trial, plaintiff voluntarily dismissed his claims against Aetna with the agreement that he would not be assessed costs. He similarly dismissed his claims against defendants, but defendants requested that they be awarded costs. The trial court granted the dismissal against defendants but denied the motion for costs.

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

I

Defendants first argue that the trial court abused its discretion in denying their request for mediation sanctions and offer of judgment sanctions. Although we may very well have decided these sanction issues in favor of defendants, our review of the trial court's decision is very limited given the latitude afforded to trial judges in these cases. That is, a trial court's decision to award attorney fees under MCR 2.403 or MCR 2.405 is reviewed for an abuse of discretion. See *Nostrant v Chez Ami, Inc*, 207 Mich App 334, 337; 525 NW2d 470 (1994); *Michigan Basic Property Ins Ass'n v Hackert Furniture Distributing Co*, 194 Mich App 230, 234; 486 NW2d 68 (1992). The decision is an abuse of discretion, and subject to reversal, only if grossly violative of fact and logic. *Michigan Basic Property Ins Ass'n*, 207 Mich App at 234.

MCR 2.405 governs *offers of judgment* and provides:

> 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. [MCR 2.405(D)(1) and (2).]

The rule defines "verdict" as "the award rendered by a jury or by the court sitting without a jury, excluding all costs and interest." MCR 2.405(A)(4).

MCR 2.403 governs *mediation* and provides in pertinent part:

> (O) Rejecting Party's Liability for Costs.
>
> (1) If a party has rejected an evaluation and the action proceeds to trial, 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.
>
> (2) For purposes of this rule, "verdict" includes,
>
> (a) a jury verdict,
>
> (b) a judgment by the court after a nonjury trial,

(c) a judgment entered as a result of a ruling on a motion filed after mediation.

When a case involves both a mediation award and an offer of judgment, MCR 2.405(E) provides for the following method of accessing sanctions:

> **(E) Relationship to Mediation.** In an action in which there has been both the rejection of a mediation award pursuant to MCR 2.403 and a rejection of an offer under this rule, the cost provisions of the rule under which the later rejection occurred control, except that if the same party would be entitled to costs under both rules costs may be recovered from the date of the earlier rejection.

Thus, if an offer of judgment is rejected after a mediation evaluation was previously rejected, then the cost provisions of the offer of judgment rule control. MCR 2.405(E); *Haberkorn v Chrysler Corp*, 210 Mich App 354, 378; 533 NW2d 373 (1995). The only exception applies where the same party is entitled to costs under both rules. *Id.* The offer of judgment rule can still apply even if the provisions of the rule actually deny costs. *Zantop Int'l Airlines, Inc v Eastern Airlines*, 200 Mich App 344, 366; 503 NW2d 915 (1993). "In other words, the fact that the rule grants no costs in particular circumstances does not mean that the rule is to be ignored. When both the offer of judgment rule and the mediation rule are invoked, the later rejection controls which one will provide a remedy--*if any*." *Id.*

Here, the mediation panel did not award any money to plaintiff from defendants. Defendants accepted the mediation award of $0, and plaintiff rejected it. However, defendants subsequently made an offer of judgment in the amount of $2500.00. Because plaintiff did not expressly accept or reject defendants' offer of judgment in writing, the offer was deemed rejected. MCR 2.405(C)(2); *Magnuson v Zadrozny*, 195 Mich App 581, 584-585; 491 NW2d 258 (1992). Therefore, the offer of judgment rule controls whether defendants are entitled to costs because the offer of judgment was made after plaintiff rejected the mediation award. However, the term "verdict" in MCR 2.405 is limited to "the award rendered by a jury or by the court sitting without a jury," and the case was voluntarily dismissed, no "verdict" was ever reached. Thus, defendants were not entitled to costs and attorney fees under the offer of judgment rule. Therefore, defendants were also not entitled to recover mediation sanctions. Accordingly, the trial court did not abuse its discretion in denying defendants' motion for sanctions pursuant to MCR 2.403 and 2.405 because plaintiff's voluntary dismissal was not a verdict as required by the offer of judgment rule.

II

Defendants also argue that they should have been awarded costs because plaintiff brought a frivolous claim against them contrary to MCL 600.2591; MSA 27A.2591, plaintiff's attorneys signed the pleadings in violation of MCR 2.114, and defendants were entitled to taxation of costs pursuant to MCR 2.625, as the prevailing party. The court's finding that a claim was or was not frivolous will not be reversed unless clearly erroneous. *Richmond Twp v Erbes*, 195 Mich App 210, 224; 489 NW2d 504 (1992). A finding 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. *Id.* The trial court's decision whether to award attorney fees is reviewed for an abuse of discretion. See *Wojas v Rosati,* 182 Mich App 477, 480; 452 NW2d 864 (1990). The award of taxation of costs is also reviewed for an abuse of discretion. *Ullery v Sobie*, 196 Mich App 76, 82-83; 492 NW2d 739 (1992).

A

Sanctions may be imposed on a party who brings a frivolous claim under MCL 600.2591; MSA 27A.2591, which provides:

> (1) Upon motion of any party, if a court finds that a civil action or defense to a civil action was frivolous, the court that conducts the civil action shall award to the prevailing party the costs and fees incurred by that party in connection with the civil action by assessing the costs and fees against the nonprevailing party and their attorney.
>
> (2) The amount of costs and fees awarded under this section shall include all reasonable costs actually incurred by the prevailing party and any costs allowed by law or by court rule, including court costs and reasonable attorney fees.
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> (3) As used in this section:
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> (a) "Frivolous" means that at least 1 of the following conditions is met:
>
> (i) The party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party.
>
> (ii) The party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true.
>
> (iii) The party's legal position was devoid of arguable legal merit.
>
> (b) "Prevailing party" means a party who wins on the entire record.

Defendants argue that, because plaintiff knew that he had no significant injuries or loss of wages that could exceed the $300,000[3] insurance limit, his claim was frivolous. In support of this contention, defendants point to the fact that plaintiff represented a client who received a $900,000 mediation award in 1993. However, plaintiff sustained traumatic brain injury as a result of his December 3, 1989, accident. Dr. Mark Rottenberg testified that plaintiff would probably never completely recover from effects of that injury and would have a permanent reduced capacity for work. Plaintiff suffered from fatigue, concentration and memory problems, seizures and headaches, and problems controlling his emotions. Although he was an attorney, at the time plaintiff filed his complaint, he had not yet begun his law practice. He did not file the lawsuit, that eventually mediated for $900,000, until 1993. Defendants did not present any evidence that plaintiff knew at the time he brought suit against them, that he would earn a large contingency fee during the course of his trial or that he generally knew that he would not

suffer any wage loss due to the work restrictions placed upon him as a result of his accident. There was no evidence that plaintiff's primary purpose in initiating the action was to harass, embarrass, or injure defendant, or that he had no reasonable basis to believe that the facts underlying his legal position were in fact true, or that his legal position was devoid of arguable legal merit. Therefore, the trial court's finding that plaintiff did not bring a frivolous action was not clearly erroneous.

B

The trial court also denied defendants' motion for costs under MCR 2.114(D), which defendants now claim was in error. MCR 2.114(D) governs the signature of attorneys and parties on pleadings and motions and provides in relevant part:

> The signature of an attorney or party, whether or not the party is represented by an attorney, constitutes a certification by the signer that
>
> (1) he or she has read the document;
>
> (2) to the best of his or her knowledge, information, and belief formed after reasonable inquiry, the document is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law; and
>
> (3) the document is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

Further, MCR 2.114(E) provides the remedy available if an attorney signs in violation of the rule:

> If a document is signed in violation of this rule, the court, on the motion of a party or on its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the document, including reasonable attorney fees. The court may not assess punitive damages.

The trial court did not abuse its discretion in denying costs on the basis that plaintiff or his attorneys signed the pleadings in violation of MCR 2.114. An attorney has an affirmative duty to conduct a reasonable inquiry into the factual and legal viability of a pleading before it is signed. *LaRose Market v Sylvan Center*, 209 Mich App 201, 210; 530 NW2d 505 (1995). The reasonableness of the inquiry is determined by an objective standard and depends on the particular facts and circumstances of the case. *Id.* Moreover, if the facts alleged in the pleadings are later found to be untrue, that does not invalidate a prior reasonable inquiry. See *Lockhart v Lockhart*, 149 Mich App 10, 14-15; 385 NW2d 709 (1986) (GCR 1963, 114). Again, plaintiff presented numerous injuries that he obtained as a result of the accident, which he contended affected his work ability. There is no evidence that at the time plaintiff filed suit against defendants, he or his attorneys knew that he would

represent a client who would be awarded $900,000 in mediation. Defendants presented no evidence that plaintiff or his attorneys failed to conduct a reasonable inquiry into the factual and legal viability of the case before they signed the pleadings.

C

Finally, MCR 2.625(A)(2) mandates that a court tax costs, as provided by MCL 600.2591; MSA 27A.2591, to reimburse a prevailing party for its costs incurred during the course of frivolous litigation. *LaRose,* 209 Mich App at 210. Since plaintiff did not bring a frivolous action, defendants, contrary to their assertion, were not entitled to taxation of costs.

Accordingly, the trial court properly denied the award of costs to defendant on the basis of MCL 600.2591; MSA 27A.2591, MCR 2.114 and MCR 2.625 because there was no evidence that plaintiff brought a frivolous claim or that he or his attorneys signed the pleadings knowing that they did not have a legally viable case.

Affirmed.

/s/ Henry William Saad
/s/ Maura D. Corrigan
/s/ Robert A. Benson

[1] Since Aetna is not a party to this appeal, we use defendants to refer only to Alan Osterdale and Osterdale Insurance Agency.

[2] Initially, both Brian and Diane Dailey were plaintiffs in this action. However, the trial court entered an order dismissing the claims of Diane Dailey. Therefore, Brian Dailey is the sole plaintiff on appeal, and we refer to him as "plaintiff."

[3] Plaintiff argues that he could have recovered from defendants regardless of whether his damages exceeded $300,000 because his claim was for negligence and misrepresentation. The reason that defendants believed plaintiff was required to prove that his damages were over $300,000 before he could begin to prove liability on the contract with Aetna and defendants is not clearly explained in the record. However, we assume that it was because Aetna claimed that plaintiff was insured for $300,000, but plaintiff wanted $1,000,000 worth of coverage, and if plaintiff had less than $300,000 worth of damages, the issue would be moot.