STATE OF MICHIGAN

COURT OF APPEALS

KANELLA HANTZIS,

Plaintiff-Appellee/Cross-Appellant,

v

PERRY DRUGS 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UNPUBLISHED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.

PER CURIAM.

This is a personal injury slip and fall case. Defendant appeals from an amended judgment awarding mediation sanctions to plaintiff. Plaintiff cross-appeals from the trial court's denial of her motions for an additur and for prejudgment interest on the mediation sanctions. We affirm in part, reverse in part, and remand.

Defendant first argues that the trial court erred in awarding mediation sanction to plaintiff. We disagree. "The interpretation and application of court rules . . . present[s] a question of law that is reviewed de novo." *McAuley v General Motors Corp*, 457 Mich 513, 518; 578 NW2d 282 (1998). "However, a trial court's decision whether application of new court rules would 'work injustice' under MCR 1.102 entails an exercise of discretion" which we review for abuse. *Reitmeyer v Schultz Equip and Parts Co, Inc*, ___ Mich App ___; ___ NW2d ___; slip op at 2 (No. 212063, pub'd 8/24/99).

On July 12, 1993, a mediation panel unanimously evaluated plaintiff's case at $15,000. Both parties rejected the mediation evaluation. On September 13, 1993, defendant made an offer of judgment in the amount of $5,000, to which plaintiff failed to respond. On November 25, 1997, after reduction for comparative negligence, the jury awarded plaintiff $45, 500 in lost wages and medical expenses. Judgment for plaintiff was entered on January 5, 1998. On February 20, 1998, the trial court entered an amended judgment awarding plaintiff mediation sanctions in the amount of $35,479.50, for a total judgment of $100, 925.

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

At all relevant times, the mediation rule provided that:

> 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 the party than the mediation evaluation. [MCR 2.403(O)(1).]

The parties agree that, under this rule, plaintiff would be entitled to mediation sanctions because the verdict was more favorable to her than the mediation evaluation. However, when the case was mediated, the offer of judgment rule provided that:

> 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* [of judgment] 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. [MCR 2.405(E) (emphasis added).]

Therefore, before MCR 2.405(E) was amended, this case would have been governed by the offer of judgment rule, which at all relevant times provided that:

> . . . an offeree who has not made a counteroffer [of judgment] may not recover actual costs.[1] [MCR 2.405(D)(2).]

Accordingly, under the pre-amendment offer of judgment rule, plaintiff would not be entitled to costs because she did not respond to defendant's post-mediation offer of judgment. However, effective October 1, 1997, the offer of judgment rule was amended to provide that:

> Costs may not be awarded under this rule in a case that has been submitted to mediation under MCR 2.403 unless the mediation award was not unanimous. [MCR 2.405(E).]

Accordingly, under the amended offer of judgment rule, plaintiff's entitlement to sanctions would be governed by the mediation rule which, as discussed above, would entitle her to recover actual costs. See MCR 2.403(O)(1).

The parties do not dispute the outcome under either rule. Rather, the parties' dispute concerns whether the trial court should have applied the offer of judgment rule as it existed in 1993, when the case was mediated and defendant made its offer of judgment, instead of applying the amended rule as it existed when the case went to trial.

Concerning amendments to the court rules, MCR 1.102 provides that:

> These rules take effect on March 1, 1985. They govern all proceedings in actions brought on or after that date, and all further proceedings in actions then pending. *A*

> *court may permit a pending action to proceed under the former rules if* it finds that the *application of these rules* to that action *would not be feasible or would work injustice*. [Emphasis added.]

"[S]ince MCR 1.102 provides its own specific rules for the application of new and amended court rules[,] that [analysis] should take precedence over the generalized rules of retrospectivity and prospectivity." *Reitmeyer, supra*, slip op at 3. "Thus, 'the norm is to apply the newly adopted court rules to pending actions unless there is reason to continue applying the old rules.'" *Reitmeyer, supra*, slip op at 3 (quoting *Davis v O'Brien*, 152 Mich App 495, 500; 393 NW2d 914 (1986)); see also *Sullivan Indus, Inc v Double Seal Glass Co, Inc*, 192 Mich App 333, 354-355; 480 NW2d 623 (1991).

The parties do not argue that applying the amended rule would be unfeasible in this case. Rather, the only question is whether doing so would "work injustice" upon defendant. "However, an injustice is not present merely because a different result would be reached under the new rules." *Davis, supra*, 152 Mich App at 501. "Rather, [application of] a new court rule would 'work injustice' 'where a party acts, or fails to act, in reliance on the prior rules and the party's action or inaction has consequences under the new rules that were not present under the old rules.'" *Reitmeyer, supra*, slip op at 3 (quoting *Sullivan, supra*, 192 Mich App at 355).

"In practice, however, the test of whether a new court rule would 'work injustice' is less [than] clear" because, "[w]here a party complies with a prior rule, it could almost always be argued that the party acted in 'reliance' on the prior rule;" further, application of the old and new rules would almost always lead to different results. *Reitmeyer, supra*, slip op at 3. Thus, absent "unusual circumstances," care should be taken not to read the exception "so broadly that it effectively nullifies the general rule that new court rules should be applied to pending cases." *Reitmeyer, supra*, slip op at 3.

In deciding whether application of the new court rule would "work injustice," this Court must keep in mind that the purpose of both rules is to "encourage settlement and deter protracted litigation." *Reitmeyer, supra*, slip op at 4 (quoting *Luidens v 63rd Dist Ct*, 219 Mich App 24, 31; 555 NW2d 709 (1996)). "I]n keeping with this overall purpose, the Supreme Court amended MCR 2.405(E) . . . because [it] determined that the offer of judgment rule was actually undermining the mediation process under MCR 2.403." *Reitmeyer, supra*, slip op at 4; see also Report of Supreme Court, Mediation Rule Committee, 451 Mich 1205, 1206 (1995) ("Report"). It is therefore appropriate, as in *Reitmeyer*, to examine the tension between the two rules and the goals of the amendment to MCR 2.405(E).

The Committee's "principal concern was that the availability of the offer of judgment procedure gives a party a way of avoiding mediation sanctions, or at least of substituting the potential offer of judgment sanctions, which may be more favorable to that party." Report, *supra*, 451 Mich at 1232-1233. "The typical situation is one in which Party A has accepted the mediation award (and thus cannot be subject to sanctions), but Party R has rejected [it], and would be potentially liable for sanctions if an unfavorable verdict ultimately results." Report, *supra*, 451 Mich at 1233. "The [pre-amendment] offer of judgment procedure gives R an opportunity to make A potentially subject to offer

of judgment sanctions, and to avoid such vulnerability itself if A does not make a counteroffer." Report, *supra*, 451 Mich at 1233. The amendment was designed to remedy this "gamesmanship" problem. Report, *supra*, 451 Mich at 1206, 1233.

In this case, the mediation award of $15,000 was rejected by both parties, potentially subjecting them to mediation sanctions. Defendant then made an even lower offer of judgment, which plaintiff would almost certainly reject, but which might subject plaintiff to offer of judgment sanctions and might remove that possibility from defendant if plaintiff failed -- as she did -- to make a counteroffer. We conclude that defendant's conduct in this case falls within the class of conduct that the amendment was designed to stop. We therefore decline to find that applying the amended rule in this case would work an injustice upon defendant. The trial court properly awarded plaintiff mediation sanctions in accordance with the amended rule.

On cross-appeal, plaintiff argues that the trial court erred in denying her motion for additur as to damages for pain and suffering. We disagree. This Court reviews a trial court's decision to grant or deny a motion for additur for an abuse of discretion. *Arnold v Darczy*, 208 Mich App 638, 639; 528 NW2d 199 (1995).

In deciding a motion for additur, the trial court must determine whether the jury's award is supported by the evidence. *Arnold*, *supra*, 208 Mich App at 639. The trial court's inquiry is limited to objective considerations regarding the evidence adduced and the conduct of the trial, but this Court must give due deference to the trial court's unique opportunity to observe the evidence and the witnesses. *Setterington v Pontiac Gen Hosp*, 223 Mich App 594, 608-609; 568 NW2d 93 (1997). We agree with plaintiff that "Michigan law recognizes that a damages award that ignores uncontroverted evidence that a plaintiff had pain and suffering as a result of the defendant's conduct is inadequate." *Lagalo v Allied Corp (On Remand)*, 233 Mich App 514, 523; 592 NW2d 786 (1999). However, in this case, plaintiff's pain and suffering evidence was not "uncontroverted."

Defendant's expert testified that pregnancy, childbirth and obesity can cause back pain. Plaintiff had three children after her fall at defendant's store, and her medical records indicated that she suffered from severe back pain during her pregnancies. There was also evidence that plaintiff had gained a considerable amount of weight since her fall. Further, the expert testified that he found nothing wrong with plaintiff which would cause her pain or require restrictions. We therefore conclude that the trial court did not abuse its discretion in denying plaintiff's motion for and additur.

Lastly, plaintiff argues that the trial court erred in denying her motion for interest on the costs and attorney fees assessed as mediation sanctions. We agree. This Court reviews a trial court's grant or denial of prejudgment interest de novo. *Phinney v Perlmutter*, 222 Mich App 513, 540; 564 NW2d 532 (1997).

As amended in 1994, the statute concerning interest on judgments provides that "[i]nterest under this subsection *shall* be calculated on the entire amount of the money judgment, including attorney fees and other costs." MCL 600.6013(6); MSA 27A.6013(6) (actions filed after 1/1/87) (emphasis added). In actions at law such as this one, an award of interest under the statute is mandatory.

Department of Treas v Cent Wayne Co Sanitation Auth, 186 Mich App 58, 61; 463 NW2d 120 (1990). Further, the statute allows interest to be awarded on costs and attorney fees imposed as mediation sanctions. *Pinto v Buckeye Union Ins Co*, 193 Mich App 304, 312; 484 NW2d 9 (1992).[2] We therefore find that the trial court erred in refusing to award interest on the mediation sanctions. However, we remand for a determination of whether defendant's offer of judgment was a "bona fide, reasonable . . . offer of settlement" which would cut off plaintiff's entitlement to interest beyond the date when the offer of judgment was filed with the trial court. See MCL 600.6013(7); MSA 27A.6013(7).

Affirmed in part, reversed in part, and remanded for further proceedings not inconsistent with this opinion. We do not retain jurisdiction.

/s/ Roman S. Gribbs
/s/ Robert B. Burns

[1] A later amendment, allowing costs if "the offer [of judgment] was made less than 42 days before trial," is not relevant to this case. See MCR 2.405(D)(2).

[2] Although *Giannetti Bros Const Co v Pontiac*, 175 Mich App 442, 449; 438 NW2d 313 (1989), held that interest should not be allowed on an award of mediation sanctions, *Pinto* is controlling because it was published on or after November 1, 1990, and has not been reversed by the Supreme Court or by a special panel of the Court of Appeals. MCR 7.215(H).