# STATE OF MICHIGAN

# COURT OF APPEALS

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PHILLIP M. SCHULTZ,

Plaintiff-Appellee,

v

HAZEL PARK RACING ASSOCIATION, INC.,

Defendant-Appellant.

UNPUBLISHED
November 17, 2000

No. 212980
Oakland Circuit Court
LC No. 96-532026-CZ

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JOHN SHAWAY,

Plaintiff-Appellee,

v

HAZEL PARK RACING ASSOCIATION, INC.,

Defendant-Appellant.

No. 213514
Oakland Circuit Court
LC No. 96-532024-CZ

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Before: Hoekstra, P.J., and Cavanagh and White, JJ.

PER CURIAM.

In this consolidated appeal, defendant appeals by leave granted from an order denying its motion for attorney fees and costs in Docket No. 212980, and from an order denying its motion for sanctions against counsel in Docket No. 213514. Defendant also raises an issue pertaining to the trial court's refusal to award the full amount of attorney fees in Docket No. 213514. We affirm in part, reverse in part, and remand Docket No. 213514 to the lower courts for further action.

In Docket No. 212980, defendant argues on appeal that the trial court erred when it found that Schultz' case, which had been disposed by the grant of summary disposition in favor of defendant, was not frivolous. We disagree. We review a trial court's finding as to whether a claim was frivolous for clear error. *In re Attorney Fees and Costs*, 233 Mich App 694, 701; 593 NW2d 589 (1999); *Szymanski v Brown*, 221 Mich App 423, 436; 562 NW2d 212 (1997). "A trial court's 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 has been made." *In re Attorney Fees, supra*.

> A claim is frivolous when:
>
> (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. [MCL 600.2591(3)(a); MSA 27A.2591(3)(a); *Broadway Coney Island, Inc v Commercial Union Ins Cos (Amended Opinion)*, 217 Mich App 109, 117; 550 NW2d 838 (1996).]

The circumstances existing at the time that an action is filed determine whether the action is frivolous. *In re Attorney Fees*, *supra* at 702; *Meagher v Wayne State University*, 222 Mich App 700, 727; 565 NW2d 401 (1997).

Although a close issue, we conclude that the trial court did not clearly err in determining that Schultz' claim was not frivolous. First, the trial court noted that this was a case of first impression in Michigan and had some arguable legal merit. The trial court also noted that it agreed with plaintiff that Michigan's Consumer Protection Act (MCPA), MCL 445.901 *et seq.*; MSA 19.418(1) *et seq.*, did cover illegal bookmaking. In this case, whether the MCPA applies depends on an issue of statutory interpretation, see MCL 445.904(1)(a); MSA 19.418(4)(1)(a), and absent guidance from Michigan courts, the trial court agreed with one line of federal cases. However, although the trial court found the MCPA applicable, it determined during defendant's motion for summary disposition that recovery under the MCPA requires a plaintiff to prove fraud, see *Mayhall v A H Pond Co, Inc*, 129 Mich App 178, 182; 341 NW2d 268 (1983) ("[T]he great majority of the specific prohibited practices enumerated in the statute [MCPA]--including those relied upon by [the] plaintiff--involve fraud."), and Schultz's failure to sufficiently plead its separate fraud claim precluded him from surviving defendant's request for summary disposition for failure to state a claim, MCR 2.116(C)(8).[1] The failure of plaintiff's MCPA claim to survive summary disposition did not eradicate the arguable legal merit of the claim. Because we are not left with a firm and definite conviction that a mistake was made, we affirm the trial court's decision declining to deem Schultz's claim frivolous for being devoid of arguable legal merit.[2]

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[1] The trial court also found summary disposition for defendant appropriate under MCR 2.116(C)(10) with regard to plaintiff's fraud claim.

[2] In determining that the trial court's decision that Schultz's claim was not frivolous was not clearly erroneous, we note the apparent inconsistency between this conclusion and the Shaway claim being found by a different trial court to be frivolous. However, it is not our responsibility to reconcile or harmonize these cases. Shaway did not choose to appeal the implementation of sanctions against him, and we simply are reviewing the trial court's decision in the Schutlz case.

Second, defendant also argues that Schultz' lawsuit was frivolous because it was brought primarily to harass, embarrass, or injure defendant. See § 2591(3)(a)(i), *supra*. The circumstances show, however, that Schultz' case was brought in an attempt to obtain the proceeds from his winning tickets rather than to harass or embarrass defendant. Unlike Shaway, Schultz did not threaten to contact the media or to sue defendant after his tickets were dishonored, and there is no evidence that Schultz participated in an interview of Shaway aired on a popular morning radio show. Moreover, Schultz' filing of a subsequent suit for defamation does not indicate that his primary purpose for filing the initial lawsuit was to harass or embarrass defendant. To the contrary, it appears that Schultz' actions were motivated primarily to compel defendant to pay the proceeds on his winning tickets. Thus, we do not find the trial court's decision that the litigation was not brought primarily to harass, embarrass or injure defendant was clearly erroneous.

In Docket No. 213514, defendant argues that attorney fees should have been assessed against Shaway's attorney and not solely against Shaway himself. MCL 600.2591(1); MSA 27A.2591(1) provides:

> 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 [sic] attorney*. [Emphasis added.]

It is well-settled that if statutory language is clear and unambiguous, judicial construction is precluded. *Durant v Michigan (On Remand)*, 238 Mich App 185, 217; 605 NW2d 66 (1999); *Shields v Shell Oil Co*, 237 Mich App 682, 689; 604 NW2d 719 (1999). Furthermore, the use of the word "shall" in a statute indicates a mandatory duty or requirement rather than discretionary action. *Durant, supra* at 218. Accordingly, because the language of § 2591(1) is clear and unambiguous, the statute required the trial court to impose costs and fees upon both Shaway and his attorney, and the trial court was without discretion to forgo the imposition of costs and fees upon Shaway's counsel.

Defendant further contends that the trial court erred by awarding only a portion of defendant's attorney fees incurred in defending Shaway's frivolous lawsuit. We disagree. We review a trial court's award of attorney fees for an abuse of discretion. *In re Attorney Fees, supra* at 704. An abuse of discretion occurs when an unbiased person, considering the facts upon which the trial court relied, would conclude that there was no justification or excuse for the decision. *Detroit/Wayne Co Stadium Authority v 7631 Lewiston, Inc*, 237 Mich App 43, 47; 601 NW2d 879 (1999); *Auto Club Ins Ass'n v State Farm Ins Cos*, 221 Mich App 154, 167; 561 NW2d 445 (1997).

If a court finds that an action is frivolous, it must award costs pursuant to § 2591. MCR 2.625(A)(2); *Travelers Ins v U-Haul of Michigan, Inc*, 235 Mich App 273, 289-290; 597 NW2d 235 (1999). Such sanctions are mandatory, and a trial court has no discretion to forgo the imposition of sanctions. *Cvengros v Farm Bureau Ins*, 216 Mich App 261, 268; 548 NW2d 698 (1996). In the context of § 2591, "costs" includes "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*." MCL 600.2591(2); MSA 27A.2591(2); *Travelers, Ins, supra* at 290 (emphasis added). A trial court is not, however, required to award a party its actual attorney fees. *In re Attorney Fees, supra* at 705. In determining whether attorney fees are reasonable, factors to consider include: "(1) the professional standing and experience of the attorney; (2) the skill, time and labor involved; (3) the amount in question and the results achieved; (4) the difficulty of the case; (5) the expenses incurred; and (6) the nature and length of the professional relationship with the client." *Wood v DAIIE*, 413 Mich 573, 588; 321 NW2d 653 (1982), quoting *Crawley v Schick*, 48 Mich App 728, 737; 211 NW2d 217 (1973); *Head v Phillips Camper Sales & Rental, Inc*, 234 Mich App 94, 114; 593 NW2d 595 (1999).

In Shaway's case, the trial court found that $16,580 was a reasonable attorney fee. The court found that there was no basis for the substantial increase in actual attorney fees from the first motion for attorney fees to defendant's renewed motion for fees and costs. The trial court also disregarded fees listed on defendant's billing statements that were attributable to the companion case. The court stated on the record that it considered the factors enunciated in *Wood, supra*. A trial court is not required to detail its findings on each factor considered. *Id.* at 588; *In re Attorney Fees, supra* at 705. Given that the trial court considered the evidence presented, that it disregarded some of the fees itemized as attributable to the companion case and that the court found no reason for the substantial increase in fees, the trial court did not abuse its discretion in assessing attorney fees in the amount of $16,580.

Affirmed in part, reversed in part, and Docket No. 213514 is remanded for entry of an order assessing said attorney fees against Shaway *and* Shaway's attorney. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ Mark J. Cavanagh