

STATE OF MICHIGAN
COURT OF APPEALS

BRAD CARLSON and MARY ELLEN BACON,

Plaintiffs-Appellees,

v

CLIFFORD WILCOX and SANDRA WILCOX,

Defendants-Appellants.

UNPUBLISHED
February 22, 2002

No. 228815
Lapeer Circuit Court
LC No. 98-025592-CZ

Before: Smolenski, P.J., and Doctoroff and Owens, JJ.

MEMORANDUM.

Defendants appeal as of right the order denying their motion for case evaluation sanctions under MCR 2.403(O). We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

The trial court granted defendants summary disposition in this fraud action after striking plaintiffs' previously unlisted expert witness from an amended witness list. Plaintiffs could not establish a prima facie case without an expert witness. Defendants moved for sanctions based on plaintiffs' rejection of the case evaluation. The trial court denied the motion, exercising its discretion under MCR 2.403(O)(11).

Under MCR 2.403(O)(1), a rejecting party must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the case evaluation. For purposes of the rule, "verdict" includes a judgment entered as a result of a ruling on a motion after rejection of the case evaluation. MCR 2.403(O)(2)(c).

MCR 2.403(O)(11) provides:

(11) If the "verdict" is the result of a motion as provided by subrule (O)(2)(c), the court may, in the interest of justice, refuse to award actual costs.

This Court must apply the clear language of the court rule as written. *Bruwer v Oaks (On Remand)*, 218 Mich App 392, 397; 554 NW2d 345 (1996). The use of the word "may" rather than "must" indicates that when a case is decided by motion, the award of costs is discretionary, not mandatory. *Great Lakes Gas Transmission LP v Markel*, 226 Mich App 127, 130; 573 NW2d 61 (1997).

The court rule makes a clear distinction between cases decided by trial, where sanctions are mandatory, and cases decided by motion, where sanctions are discretionary. There is no showing that the trial court abused its discretion in denying sanctions in this case. *Joerger v Gordon Food Service, Inc*, 224 Mich App 167, 178; 568 NW2d 365 (1997).

Affirmed.

/s/ Michael R. Smolenski

/s/ Martin M. Doctoroff

/s/ Donald S. Owens