STATE OF MICHIGAN

COURT OF APPEALS

BENJAMIN F. PETTIT, M.D.,

Plaintiff-Appellee/Cross-Appellant,

v

HFP, LLC,

Defendant-Appellant/Cross-Appellee,

and

BURNS CLINIC MEDICAL CENTER, P.C., BURNS CLINIC MEDICAL CENTER, P.C. RETIREMENT INCOME PLAN, HEALTH FACILITIES PARTNERSHIP, DANIEL MCDONNELL, M.D., JOHN HALL, M.D., and HARRY COLFER, M.D.,

Defendants.

UNPUBLISHED
October 1, 2002

No. 231078
Emmet Circuit Court
LC No. 99-005294-NZ

Before: Whitbeck, C.J., and Bandstra and Talbot, JJ.

PER CURIAM.

Defendant, HFP, LLC, appeals as of right the order granting summary disposition to plaintiff Benjamin F. Pettit, M.D. Pettit cross-appeals the denial of his motion for case evaluation sanctions.[1] We affirm summary disposition, but reverse the denial of Pettit's motion for case evaluation sanctions.

I. Basic Facts And Procedural History

Pettit worked at defendant Burns Clinic Medical Center, P.C., which is now defunct, and was a member of HFP, the limited liability company that owns the real estate where the Burns Clinic operated. When Pettit retired from the Burns Clinic in December 1998, he believed he

[1] The additional defendants to this suit are not parties to the appeal.

was entitled to two payments from HFP: (1) $50,000 for the buy-back of his interest in HFP, and (2) the last of three annual $12,000 payments being made to compensate doctors for discounting their interests in HFP's predecessor, defendant Health Facilities Partnership. HFP refused to make these payments to Pettit. When Pettit sued, he was awarded these sums with interest after the trial court granted his motion for summary disposition.

II. The Application Of MCL 450.4307

A. Standard of Review

HFP argues that the trial court erred in requiring it to pay Pettit the buy-out amount because MCL 450.4307 prohibits the distribution. We review a trial court's ruling on a summary disposition motion de novo.[2]

B. MCL 450.4307

MCL 450.4307 reads, in relevant part, as follows:

> (1) Except as otherwise provided in subsection (5), a distribution shall not be made if, after giving the distribution effect, 1 or more of the following situations would occur:
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> (a) The limited liability company would not be able to pay its debts as they become due in the usual course of business.
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> (b) The limited liability company's total assets would be less than the sum of its total liabilities plus, unless an operating agreement provides otherwise, the amount that would be needed, if the limited liability company were to be dissolved at the time of the distribution, to satisfy the preferential rights of other members upon dissolution that are superior to the rights of the member or members receiving the distribution.

C. The Evidence

The trial court reasoned that, while there was testimony submitted with various pleadings describing HFP's general financial difficulties at a later date, there was no definitive evidence that making the buy-out payment to Pettit would have, at the time, caused HFP to be unable to pay its debts as they came due or increased its liabilities to an amount greater than its assets. We agree with that assessment of the evidence. Therefore, HFP failed to prove the existence of a material factual dispute, and the trial court properly granted Pettit summary disposition with respect to the $50,000 buy-out payment.[3]

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[2] *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

[3] *Quinto v Cross & Peters Co*, 451 Mich 358, 362-363; 547 NW2d 314 (1996).

D. The Final $12,000 Payment

HFP also argues that it was not obligated to make the last $12,000 annual payment to plaintiff. Again, we disagree. HFP admitted that the buy-in price for new physicians had become financially prohibitive, and that the price was reduced from $75,000 to $50,000 in 1996. It also admitted that, to compensate members for the decrease in value of their interests caused by this reduction, it recommended that the Burns Clinic provide the members who had bought in under the original formula three payments of $12,000. This plan was subject to approval by all the HFP partners and the Burns Clinic did make the first two annual payments.

Notwithstanding that the first two annual payments were made by the Burns Clinic, the legal obligation to make the partners whole never left HFP. "The essential elements of a contract are parties competent to contract, a proper subject matter, legal consideration, mutuality of agreement, and mutuality of obligation."[4] "The enforceability of a contract depends . . . on consideration and not mutuality of obligation."[5] "The essence of consideration . . . is legal detriment that has been bargained for and exchanged for [a] promise."[6] Those, like Pettit, who owned an interest in HFP gave consideration by giving up part of the value of their interest. HFP undertook to compensate them for this loss by recommending to the Burns Clinic that it make the $12,000 payments. These actions created an obligation in HFP under *Toussaint* and *Higgins.* Although the Burns Clinic made two of the three payments, it did nothing to create in itself the obligation to do so; it made no promise to do so; and the legal detriment suffered by the partners of HFP was not given up because of any agreement entered into with the Burns Clinic. The obligation remained with HFP because its promise to see that the partners were compensated was what induced those partners to give up a portion of the value of their interests. Accordingly, the trial court also properly granted summary disposition in favor of Pettit with respect to the final $12,000 payment for discounting his interest in HFP's predecessor.[7]

III. Filing An Answer

A. Standard Of Review

For the first time, HFP now argues that the trial court erred in failing to give HFP twenty-one days after denying a portion of HFP's motion for summary disposition to file its answer to the first amended complaint, as required by MCR 2.108(C)(1). HFP did not raise this issue below; therefore, it is not preserved.[8] Although we interpret court rules de novo,[9] HFP is entitled

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[4] *Mallory v Detroit*, 181 Mich App 121, 127; 449 NW2d 115 (1989).

[5] *Toussaint v Blue Cross & Blue Shield of Michigan*, 408 Mich 579, 600; 292 NW2d 880 (1980).

[6] *Higgins v Monroe Evening News*, 404 Mich 1, 20; 272 NW2d 537 (1978).

[7] *Quinto, supra*.

[8] *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999).

[9] See *Marketos v American Employers Ins Co*, 465 Mich 407, 413; 633 NW2d 371 (2001).

to relief only if it can demonstrate that the trial court's actions in this regard were "inconsistent with substantial justice."[10]

B. The Chronology

HFP's argument focuses on the fact that it did not get the benefit of the twenty-one day period following the entry of the July 14, 2000, written order denying its motion, but makes no mention of the fact that the trial court actually denied the motion from the bench on May 15, 2000. MCR 2.108(C)(1), however, does not distinguish between denials from the bench and denials in the form of written orders; it simply requires the responsive pleading to be filed within twenty-one days after notice of the denial. HFP's counsel was present when the trial court denied its motion from the bench on May 15, 2000, so HFP did have notice of the denial. Facially, then, MCR 2.108(C)(1) required HFP to file its answer to the first amended complaint by June 5, 2000, which it failed to do. Accordingly, the trial court's failure to allow additional time to file an answer was not an error.

Further, had there been error, it would not have affected HFP's entitlement to substantial justice. The right HFP claims to have been jeopardized was its right to arbitrate its contract dispute with Pettit. However, at no point below did HFP even bring that right to the attention of the trial court. HFP's actions in the trial court suggest that it never intended to seek arbitration.

IV. Case Evaluation Sanctions

A. Standard Of Review

On cross-appeal, Pettit argues that the trial court erred in failing to award case evaluation sanctions under MCR 2.403. This Court reviews a trial court's "decision whether to grant mediation sanctions de novo because it involves a question of law, not a discretionary matter." [11] However, because this issue turns on an interpretation of MCR 2.403(O)(11), which states that 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," we conclude that the appropriate standard is abuse of discretion. [12]

B. The Language Of The Court Rules

MCR 2.403(0) reads in relevant part as follows:

> Rejecting Party's Liability for Costs.

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[10] MCR 2.613(A).

[11] *Great Lakes Gas Transmission Ltd Partnership v Markel*, 226 Mich App 127, 129; 573 NW2d 61 (1997).

[12] Decisions based on similar court rules have applied the abuse of discretion standard. See *Luidens v 63rd District Court*, 219 Mich App 24, 35-37; 555 NW2d 709 (1996).

> (1) If a party has rejected an evaluation and the action proceeds to verdict, that party must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the case evaluation . . . .
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> (2) For the purpose of this rule "verdict" includes,
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> * * *
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> (c) a judgment entered as a result of a ruling on a motion after rejection of the case evaluation.

According to MCR 2.403(O)(11), "If the 'verdict' is the result of a motion as provided by subrule (O)(2)(c), the court may, in the interests of justice, refuse to award actual costs."

C. The Chronology

On June 2, 2000, the case evaluation panel evaluated this case in favor of Pettit in the amount of $30,000. Pettit accepted the evaluation and HFP rejected it. On August 9, 2000, the trial court entered judgment in favor of Pettit in the amount of $62,000 plus interest. Thus, the conditions required for imposition of costs were fulfilled.[13]

D. The Trial Court's Ruling

As we noted above, because Pettit received an award that was "more favorable" than the case evaluation as defined by that rule, costs could have been awarded under MCR 2.403. However, because the award was the result of Pettit's motion for summary disposition, the trial court was allowed discretion to deny those costs "in the interest of justice." The trial court found that Pettit was awarded his verdict on the basis of a theory that had not been presented to the case evaluators and the trial court decided not to award costs because of this change of theory, explaining:

> The Court is well aware that it is the general intent of the mediation rule to award sanctions and that any exceptions from that should be narrowly construed, however, having said that, the Court concludes that it is in the interests of justice in this case to refuse to award costs, first of all, because the issue that ultimately resulted in the Court decision in favor of Dr. Pettit was apparently first raised at the motion hearing which came after the mediation which means that the defendants did not have the opportunity and the mediators did not have the opportunity to evaluate and base their decisions on that legal argument; and secondly, as pointed out by the defendants, they filed their dispositive motions which were resolved in their favor and had them heard and decided prior to the mediation and those motions resulted in the Court deciding that the vast majority of the claims being brought by the plaintiff in this case should be dismissed. So it strike[s] this Court as fundamentally unfair that the plaintiff should recover

[13] MCR 2.404(O)(1) and (2)(c).

mediation sanctions under these circumstances. The motion for mediation sanctions is, therefore, denied.

E. The Case Law

We have been unable to locate case law directly addressing the interests of justice provision of MCR 2.403(O)(11). However, *Luidens v 63rd Dist Court*[14] discusses the "interest of justice" exception set forth in MCR 2.405(D)(3). The *Luidens* Court placed severe limitations on a trial court's discretion to refuse to award costs under MCR 2.405(D)(3):

> Finally, we turn to the issue of attorney fee awards under MCR 2.405. Difficulty regarding this issue results from the "interest of justice" provision of MCR 2.405(D)(3) – "The court may, in the interest of justice, refuse to award an attorney fee under this rule." The term "interest of justice" is not defined in the rule. We therefore look to the language and purpose of the rule to set the parameters of this term. MCR 2.405(D)(1) and (2) set forth a general rule that actual costs "must" be paid. MCR 2.405(D)(3) then sets forth an exception – that the court may refuse to award an attorney fee in the interest of justice. That this is an exception to a general rule guides interpretation of the "interest of justice" provision. The purpose of MCR 2.405 is "to encourage settlement and to deter protracted litigation." *Hamilton v Becker Orthopedic Appliance Co,* 214 Mich App 593, 596; 543 NW2d 60 (1995). In the context of this purpose and the fact that the "interest of justice" provision is an exception to a general rule, this Court has held that, "absent unusual circumstances," the "interest of justice" does not preclude an award of attorney fees under MCR 2.405. *Gudewicz v Matt's Catering, Inc,* 188 Mich App 639, 645; 470 NW2d 654 (1991). In *Butzer v Camelot Hall Convalescent Centre, Inc (After Remand),* 201 Mich App 275, 278-279; 505 NW2d 862 (1993), this Court held:
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> "The better position is that a grant of fees under MCR 2.405 should be the rule rather than the exception. To conclude otherwise would be to expand the "interest of justice" exception to the point where it would render the rule ineffective." [Citations omitted.]
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> The *Hamilton* Court stated at 596:
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> "[W]hile the rule allows the trial court discretion to deny an award, 'few situations will justify denying an award of costs under MCR 2.405 in the 'interest of justice.'" [Quoting 2 Martin, Dean & Webster, Michigan Court Rules Practice, authors' comment, 1995 Supp, p 157.]
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> With respect to a decision not to award attorney fees under MCR 2.405, the *Hamilton* Court held at 597 that "the trial court must articulate why the 'interest of justice' will be served in light of the role that MCR 2.405 was

[14] *Luidens, supra* at 31.

designed to serve in the administration of our judicial process under the Michigan Court Rules." It continued at 597:

> "[I]n the absence of any articulated and compelling rationale, we believe that the interest of justice is served by awarding attorney fees and costs to vindicate the purpose of the rule, thereby increasing the prospect that parties seriously will engage in the type of settlement process the rule clearly contemplates.[15]

F. The Purposes Of The Court Rule

One of the purposes of MCR 2.403 is, as is the case with MCR 2.405(D)(3), to encourage settlement and to deter protracted litigation. The rule imposes a substantial penalty in the event that a party rejects a case evaluation: unless the ultimate verdict is more favorable to the rejecting party than the case evaluation, the rejecting party must pay the opposing party's actual costs. Logic and experience both suggest that the existence of this potential penalty makes it more, rather than less, likely that parties will accept case evaluations and thereby settle their cases. Further, MCR 2.403(O)(1) sets out the general rule that the rejecting party "must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the case evaluation." MCR 2.403(O)(11) states an exception to this general rule: a trial court may, if the verdict is the result of a motion, refuse to award costs "in the interests of justice." Exceptions to general rules are construed narrowly.[16] As is the case with MCR 2.405, absent unusual circumstances, this "interests of justice" language provision should not be used to preclude an award of actual costs. The question thus becomes whether a prevailing party's change in theory following the case evaluation is such an unusual circumstance that it precludes an award of actual costs to that party when (1) the other party has rejected the case evaluation and (2) the verdict following a motion for summary disposition was less favorable to the rejecting party than the case evaluation. We conclude that a change in theory is not such an unusual circumstance.

G. Change In Theory

Nothing in the court rules or in case law interpreting these rules prohibits a party from changing its theory of the case after the case evaluation, but before the trial or motion hearing. Indeed, such a change in theory could easily be prompted by an intervening change in appellate case law, by a change in the factual circumstances surrounding the case, by additional discovery, or simply by a re-analysis of the case during preparation for argument. Given that MCR 2.11(A)(2) allows a party to plead inconsistent claims or defenses, a party might, with perfect legitimacy, emphasize one claim, to the exclusion of all inconsistent claims, at the case evaluation stage and then choose, for the reasons we have set forth above, to emphasize a totally inconsistent claim when arguing for summary disposition. Indeed, a party may move to amend

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[15] *Id.* at 31-34.

[16] See, generally, *Wechsler v Wayne Co Road Comm*, 215 Mich App 579, 595; 546 NW2d 690 (1996), remanded 455 Mich 863 (1997); *Burnside v State Farm Fire and Cas Co*, 208 Mich App 422, 427; 528 NW2d 749 (1995).

the pleadings even after trial so that they conform to the proofs actually presented.[17] At least theoretically and for a variety of reasons, therefore, a party might choose to present proofs at trial on a theory that it did not actually plead, or at least did not plead with any specificity.

Thus, a change in theory after a case evaluation is not, on its face, an unusual circumstance. Here, however, the trial court justified its ruling on it conclusion that the defendants and the case evaluators did not have the opportunity to evaluate and base their decisions on the legal theory upon which Pettit actually prevailed. We do not find this rationale to be particularly compelling. First, adopting this rationale necessarily requires us to speculate about the possible outcome of the case evaluation and how the defendants would have assessed their risk had Pettit presented his new theory at the case evaluation stage rather than the summary disposition stage. We fail to comprehend how engaging in such speculation advances the interests of justice.

Second, we fear that the application of a rule that a change in theory is an unusual circumstance would commence a process whereby the "interests of justice" exception in MCR 2.403(O)(11) might well be expanded, for cases decided by motion, to the point that the general rule requiring the award of actual costs would be rendered ineffective. Indeed, we note that determining exactly when a change in theory had occurred between the case evaluation and the motion for summary disposition – as opposed, for example, to a change in emphasis or a change in the structure of a particular argument – would necessarily be an undertaking fraught with uncertainty and subjective judgment. Again, we fail to see how such an undertaking advances the interests of justice.

Finally, when the Supreme Court adopted MCR 2.403, it set out the general rule with a single, and therefore narrow, exception. Had the Supreme Court wished this exception to be broad enough to accommodate a change in theory between the case evaluation stage and the summary disposition stage, we believe it would have structured the language that it used in MCR 2.403 to achieve this end. There is, however, nothing in the existing language of the court rule that gives the slightest indication that this was the Court's intent. We conclude that the trial court abused its discretion by expanding "interests of justice" exception in MCR 2.403(O)(11) to include a change in theory between the case evaluation stage and the summary disposition stage.

We affirm the trial court's order granting summary disposition to Pettit, but reverse the trial court's order denying Pettit's actual costs. We remand for a determination and an award of those actual costs. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Michael J. Talbot

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[17] See MCR 2.118(C).