

STATE OF MICHIGAN
COURT OF APPEALS

SHAWN SPEARS and ELIZABETH SPEARS,

Plaintiffs-Appellants,

v

ROBERT CERIOTTI, KIMBERLY ANN
CERIOTTI and ROBERT WATSON,

Defendants-Appellees,

and

HOME TECH SERVICES and BILL
GREENHALGH,

Defendants.

UNPUBLISHED
November 17, 2005

No. 256267
Wayne Circuit Court
LC No. 02-206485-CH

Before: Davis, P.J., and Fitzgerald and Cooper, JJ.

PER CURIAM.

Plaintiffs appeal as of right the order denying their motion for case evaluation sanctions against defendants, Robert Ceriotti, Kimberly Ceriotti and Robert Watson, in this action for breach of a residential real estate contract.¹ We reverse.

A trial court's decision to grant or deny case evaluation sanctions is subject to de novo review on appeal. *Harbour v Correctional Medical Services, Inc*, 266 Mich App 452, 465; 702 NW2d 671 (2005). However, because a trial court's decision whether to award costs pursuant to the "interest of justice" provision set forth in MCR 2.403(O)(11) is discretionary, this Court reviews that decision for an abuse of discretion. *Id.*

MCR 2.403(O) provides in pertinent part:

¹ Home Tech Services and Bill Greenhalgh were dismissed from this case by stipulation and are not parties to this appeal.

(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. 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 case evaluation.

(2) For the purpose 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 after rejection of the case evaluation.

* * *

(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.

MCR 2.403(O)(11) is an exception to the mandatory rule set forth in MCR 2.403(O)(1) that a party who rejects a case evaluation "must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the case evaluation."

Here, the parties do not dispute that both parties rejected the case evaluation and that the verdict was more favorable to plaintiffs than the rejected case evaluation. The case evaluation was \$20,000, and the trial court awarded plaintiffs \$163,000. Plaintiffs requested case evaluation sanctions within twenty-eight days of the judgment as required by MCR 2.403(O)(8). The threshold question is whether the verdict in this case was "a judgment entered as a result of a ruling on a motion after rejection of the case evaluation." MCR 2.403(O)(2)(c). If so, the court may refuse to award actual costs in the "interest of justice." MCR 2.403(O)(11). If the judgment was entered as a result of a jury or non-jury trial, the court rule requires the trial court order that defendants pay plaintiffs' actual costs, including reasonable attorney fees, necessary to obtain a favorable verdict after rejection of a case evaluation. MCR 2.403(O)(2); *Haliw v City of Sterling Heights (On Remand)*, 266 Mich App 444, 447-450; 702 NW2d 637 (2005).

Here, the trial court granted plaintiffs' motion for summary disposition with respect to liability and then held a three-day trial on the damages. Thus, while the decision that defendants were liable for damages was the result of a motion, the damage verdict was the result of a non-jury trial. MCR 2.403(O)(2)(b). Under MCR 2.403(O)(1), plaintiffs are entitled to recover their actual costs, and the court erred when it denied plaintiffs' motion for costs and attorney fees. The court determined that the requested fees were reasonable, and defendants do not challenge

the reasonableness of the fees. Therefore, we remand this case for the trial court to award \$29,488.91 in costs and attorney fees to plaintiffs.²

Additionally, although defendants did not argue on appeal that Robert Watson should not be assessed attorney fees, he should not be held liable because he had no contractual obligations vis-à-vis plaintiffs. A court may go beyond the issues raised on appeal to address issues which justice requires be considered and resolved. *LME v ARS*, 261 Mich App 273, 287; 680 NW2d 902 (2004). It undisputed that Watson had no ownership interest in the property and did not

² Even if we assumed that this case involved MCR 2.403(O)(2)(c) and that the court had discretion under MCR 2.403(O)(11) to deny plaintiffs' motion for costs and attorney fees, the court abused that discretion when it denied plaintiffs' motion "in the interests of justice." In *Haliw (On Remand)*, *supra* at 447-450, citing *Luidens v 63rd Dist Court*, 219 Mich App 24, 31; 555 NW2d 709 (1996), this Court interpreted MCR 2.403(O)(11) by analogy to the "interest of justice" exception found in the offer of judgment rule, MCR 2.405(D)(3), because both court rules "serve identical purposes of deterring protracted litigation and encouraging settlement." *Id.* at 448. The "interest of justice" exception should be invoked only in "unusual circumstances," such as where a legal issue of first impression or public interest is present, the law is unsettled and substantial damages are at issue, there is a significant financial disparity between the parties, or where the effect on third persons may be significant. *Id.* at 448-449, quoting *Luidens*, *supra* at 36. These factors are not exclusive. *Id.* "Other circumstances, including misconduct on the part of the prevailing party, may also trigger this exception." *Id.*, quoting *Luidens*, *supra*. This Court concluded that if the trial court finds on the basis of all the facts and circumstances of a particular case, and viewed in light of the purposes of MCR 2.403(O), that unusual circumstances exist, it may invoke the "interest of justice" exception found in MCR 2.403(O)(11). *Haliw*, *supra* at 449, quoting *Luidens*, *supra* at 31.

It follows that if the exception applies, the trial court may, in the exercise of its discretion refuse to award any costs or attorney fees, or may award something less than 'actual costs,' i.e., something less than taxable costs and reasonable attorney fees. The trial court must, however, articulate the bases for its decision. [*Haliw*, *supra* at 449-450, quoting *Luidens*, *supra* at 32.]

Here, the trial court denied plaintiffs' motion for case evaluation sanctions in the interest of justice, stating that plaintiffs had won a "substantial verdict." The court did not specifically articulate the interests of justice it relied upon when it denied plaintiffs' motion for case evaluation sanctions. It stated that it was exercising discretion to deny plaintiffs' motion "in equity and fairness." The court cited no unusual circumstances that would justify invoking the interests of justice exception to MCR 2.403(O). Defendants rejected the \$20,000 award to plaintiffs even though the admissions conclusively established that defendants were liable for damages because of their misconduct. Defendants chose to pursue litigation rather than accept the case evaluation, and plaintiffs accrued significant attorney fees as a result. Viewed in light of the purposes of MCR 2.403(O), the trial court abused its discretion when it denied plaintiffs' motion for costs and attorney fees.

contract to sell it. Plaintiffs argue that they thought that Watson was Kimberly's agent and that neither Kimberly Ceriotti nor Robert Ceriotti ever indicated that Watson lacked authority to make representations about the conditions of the house. While the actions of an agent bind a principal when the agent acts with either actual or apparent authority, apparent authority must be traceable to the principal and cannot be established only by the acts and conduct of the agent. *Alar v Mercy Memorial Hosp*, 208 Mich App 518, 528; 529 NW2d 318 (1995). Here, nothing in the record indicates that any of Kimberly's actions reasonably lead plaintiffs to believe that an agency relationship existed. Plaintiffs' assumptions are not sufficient to create an agency relationship between Kimberly and Watson. Thus, because Watson is not liable for the breach of contract judgment, Watson is not liable for the costs and attorney fees.

Plaintiffs also argue that they should be awarded costs for appellate fees. But appellate attorney fees and costs are not recoverable as case evaluation sanctions under MCR 2.403(O). *Haliw v Sterling Heights*, 471 Mich 700, 711; 691 NW2d 753 (2005). Thus, plaintiffs are not entitled to recover fees incurred on appeal.

Reversed and remanded for entry of a judgment consistent with this opinion. We do not retain jurisdiction.

/s/ Alton T. Davis
/s/ E. Thomas Fitzgerald
/s/ Jessica R. Cooper