

STATE OF MICHIGAN
COURT OF APPEALS

RICHARD R. ROBERTS and STACEY D.
ROBERTS,

UNPUBLISHED
June 28, 2011

Plaintiffs-Appellees,

v

No. 295500
Leelanau Circuit Court
LC No. 05-007063-CK

ROBERT L. SAFFELL and JOANNE O.
SAFFELL,

Defendants-Appellants.

Before: OWENS, P.J., and O'CONNELL and METER, JJ.

PER CURIAM.

Defendants appeal as of right the trial court's denial of their request for attorney fees, which followed this Court's reversal and remand for entry of judgment in favor of defendants in a prior appeal. Defendants based their attorney fee request on language contained in a purchase and sale agreement between the parties, which entitled the prevailing party of an action arising out of the agreement to recover reasonable attorney fees and costs. We vacate the trial court's decision and remand for further proceedings.

In the prior appeal, this Court held that the trial court had erred in denying defendants' motion for summary disposition on plaintiffs' claim for innocent misrepresentation. *Roberts v Saffell (Roberts I)*, 280 Mich App 397, 415; 760 NW2d 715 (2008). We remanded for an entry of judgment for defendants. *Id.* Our Supreme Court affirmed, stating "innocent misrepresentation does not constitute a viable cause of action under the SDA."¹ *Roberts v Saffell*, 483 Mich 1089, 1090; 766 NW2d 288 (2009).

On remand, defendants moved for entry of judgment in their favor and also requested attorney fees and costs. The trial court denied the request, finding that such a result would not be in the interest of justice. Defendants now argue the trial court erred in failing to enforce the contract between the parties. It appears in the prior appeal that defendants did not prevail on any

¹ SDA is the acronym for the Seller Disclosure Act, MCL 565.951 *et seq.*

of the issues raised in their appellate briefs. In this unusual case, defendants prevailed only because the Court of Appeals reached out and decided the case based on an issue that was not raised on appeal. It also appears that the trial court was justifiably concerned about this process and about a windfall attorney fee award to defendants. Nonetheless, we reluctantly conclude that the contract requires the trial court to hold further proceedings regarding defendants' attorney fee request.

We review de novo the issue of law underlying the trial court's denial of attorney fees. *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 296-297; 769 NW2d 234 (2009). Issues of contract interpretation are also reviewed de novo. *Manuel v Gill*, 481 Mich 637, 643; 753 NW2d 48 (2008).

The general rule in Michigan is that attorney fees are not recoverable unless authorized by statute, court rule, or contract. *In re Temple Marital Trust (After Remand)*, 278 Mich App 122, 129; 748 NW2d 265 (2008). Contract provisions that provide for the payment of reasonable attorney fees are enforceable. *Central Transport, Inc v Fruehauf Corp*, 139 Mich App 536, 548; 362 NW2d 823 (1984). Defendants' claim for attorney fees in this case is based on the following contractual language in the purchase and sale agreement:

18. ATTORNEY'S FEES: In any action or proceeding arising out of this agreement, the prevailing party, including any REALTOR (r) so involved, shall be entitled to reasonable attorney's fees and costs from the non-prevailing party.

"Clear, unambiguous, and definite contract language must be enforced as written and courts may not write a different contract for the parties" *Wausau Underwriters Ins Co v Ajax Paving Indus, Inc*, 256 Mich App 646, 650; 671 NW2d 539 (2003). "The word 'shall' unambiguously mandates an action." *Kircher v City of Ypsilanti*, 269 Mich App 224, 228; 712 NW2d 738 (2005) (applying rule of statutory construction).

Here, the plain language of the contract provision mandates the award of attorney fees to the prevailing party in an action "arising out" of the agreement. This language is broad. See *People v Warren*, 462 Mich 415, 428 n 23; 615 NW2d 691 (2000) (noting that several other jurisdictions have found the phrase "arising out of" in insurance contracts to be synonymous with "grows out of," "originating from," "having its origin in" or "flowing from"). Plaintiffs' suit was premised on the sale of the property, and thus arose out of the sales agreement. Defendants were the prevailing parties in the suit, pursuant to this Court's holding in *Roberts I*, followed by our Supreme Court's affirmance. Accordingly, the trial court was required to enforce the contract as written.

Having determined that the trial court erred in denying defendants' request for attorney fees, we remand this case to the trial court to give the defendants an opportunity to establish their fees pursuant to the terms and conditions of the contract. See *Zeeland Farm Servs, Inc v JBL Enterprises, Inc*, 219 Mich App 190, 196; 555 NW2d 733 (1996) (A party seeking attorney fees pursuant to a contract must provide evidence of the reasonableness of same). However, we reject defendants' request that we order the case be heard by a different judge upon remand. Judges are presumed to act impartially. *Van Buren Twp v Garter Belt Inc*, 258 Mich App 594, 598; 673 NW2d 111 (2003). Actual bias or prejudice against a party or party's attorney can

warrant disqualification of a judge. MCR 2.003(C)(1); *Cain v Dep't of Corrections*, 451 Mich 470, 495; 548 NW2d 210 (1996). Bias or prejudice has been defined as “an attitude or state of mind that belies an aversion or hostility of a kind or degree that a fair-minded person could not entirely set aside when judging certain persons or causes.” *Id.* at 496 n 29 (internal quotation marks and citation omitted). Here, despite the trial court’s expressions of disapproval toward defendants’ request to recover attorney fees related to this litigation, the trial court indicated it would award the attorney fees if so ordered by this Court, albeit reluctantly. Thus, we are satisfied the trial court does not hold an aversion or hostility toward defendants that cannot be set aside. Accordingly, it is not necessary to order the matter to be heard by another judge.

Given our conclusion that the attorney fee provision of the purchase and sale agreement applies to defendants’ request for fees, we need not address defendants’ alternative argument concerning MCR 2.403(O)(1).

Vacated and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ Peter D. O’Connell
/s/ Patrick M. Meter