STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND
BUSINESS COURT

WIRELESS ADVOCATES LLC

Plaintiff/Counter-Defendant,

v **Case No. 2021-186474-CB**
Hon. Michael Warren

VARILEASE FINANCE, INC.

Defendant/Counter-Plaintiff/
Third-Party Plaintiff,

and

VFI KR SPE I LLC

Third-Party Plaintiff,

v

CAR TOYS, INC.,

Third-Party Defendant.

_____/

OPINION AND ORDER
DENYING MOTION TO REOPEN CASE AND TO AMEND JUDGMENT TO ADD CONTRACTUAL ATTORNEY FEES, INTEREST, AND COSTS, OR FOR CASE EVALUATION SANCTIONS

At a session of said Court, held in the
County of Oakland, State of Michigan
on May 19, 2022

PRESENT: HON. MICHAEL WARREN

_____/

I
INTRODUCTION

Before the Court is the Defendants/Counter-Plaintiffs' Varilease Finance, Inc. and VFI KR SPE I LLC (together, "VFI") Motion to Reopen Case and to Amend Judgment to Add Contractual Attorney Fees, Interest, and Costs, or for Case Evaluation Sanctions. Having reviewed the Motion and Response filed by Plaintiff/Counter-Defendant Wireless Advocates LLC ("WA"), and otherwise being fully informed in the premises, oral argument is dispensed as it would not assist the Court in rendering a decision. MCR 2.119(E)(3).

At stake is whether VFI is entitled to amend the judgment to add contractual attorney fees, interests, and costs when (1) VFI fails to cite the authority permitting the amendment, (2) VFI asked the Court to enter a judgment in its victorious motion for summary disposition but abandoned its request for attorney fees and costs, and never requested interest, (3) the contract does not provide that attorney fees be awarded to the prevailing party, and (4) VFI egregiously misrepresents the actual contractual language? Because the argument is deemed abandoned, based on a false premise, and is defective, the answer is "no."

Also, at stake is whether VFI is entitled to case evaluation sanctions when at the time the case evaluation was conducted, case evaluation sanctions were mandated under these circumstances, but the Supreme Court has subsequently eliminated sanctions?

Because there is no showing that applying the current Rule of Court is not feasible or would work an injustice, the answer is "no" and case evaluation sanctions are denied.

II
PROCEDURAL POSTURE

A
Contractual Attorney Fees and Costs & Judgment Interest

VFI filed a motion seeking summary disposition in its favor. In its argument, VFI asked for a judgment in the amount of $1,638,432.01, or in the alternative, $1,200,148.38 based on the breach of a contract. See, e.g., Defendants' Motion for Summary Disposition Under MCR 2.116(C)(10) and Brief in Support, page 1 ("Accordingly, VFI requests the Court to enter an order (a) granting this Motion; (b) entering a judgment in favor of VFI and against Wireless and Car Toys in the amount of $1,636,432.01; and (c) granting VFI any other relief deemed appropriate under the circumstances, including cost and attorney fees as allowed under Section 16(b) of the Master Lease Agreement"). The Court ruled in VFI's favor, awarding $1,200,148.38 in damages (minus an offset of $66,674.91 previously received by VFI) and as requested entered a judgment in favor of VFI. VFI's victorious motion (1) only cursorily argued that VFI was contractually entitled to attorney fees and costs, (2) failed to cite any law or conduct any analysis whatsoever about the amount of contractual attorney fees and costs it should be awarded, (3) did not request to preserve the issue of contractual attorney fees and costs until liability was established, and (4) never even mentioned judgment interest. As requested, the Court entered a

judgment in VFI's favor, but did not award contractual attorney fees and costs, as the argument was abandoned, and did not award interest because it was never requested.

B
Case Evaluation

An August 2, 2021 order of the Court reflected that "In lieu of case evaluation, the parties . . . agreed that the mediator will issue an award which will be treated with the same process and have the same legal effect as a case evaluation award." VFI accepted the facilitator's award while WA declined. This accept and rejection of the award occurred in June 2021. Pursuant to an Order dated December 2, 2021, the Michigan Supreme Court amended the case evaluation rules to eliminate any case evaluation liability for costs effective January 1, 2022. This Court's Opinion and Order and Judgment granting VFI's motion for summary disposition was issued March 28, 2022.

III
The Request to Amend the Judgment is Defective and the Contractual Attorney Fees & Costs and Interest Were Abandoned & Unproven

A
The Amendment is Unwarranted as VFI Fails to Cite Appropriate Authority Warranting the Amendment to the Judgment

VFI argues it is entitled to amend the Judgment it requested pursuant to MCR 2.611. However, VFI fails to explain what subsection of MCR 2.611 applies here. Although VFI cites authority to argue that its request is timely, it fails to explain under what provision of MCR 2.611 applies to relieve VFI from the judgment reflecting the relief it

sought. "Trial Courts are not the research assistants of the litigants; the parties have a duty to fully present legal arguments for its resolution of their dispute." *Walters v Nadell,* 481 Mich 377, 388 (2008). Because VFI has failed to cite appropriate authority to support its argument to amend the judgment, the argument is deemed abandoned. See, e.g., *Mitcham v City of Detroit,* 355 Mich 182, 203 (1959); *Houghton v Keller,* 256 Mich App 336, 339-340 (2003); *People v Odom,* 327 Mich App 297, 311 (2019) ("As a preliminary matter, defendant has failed to identify any authority that requires a trial court to consider a motion for substitute counsel before it may consider any subsequently filed motion by the attorney who was the subject of the motion for substitution. Accordingly, defendant has abandoned this issue. See *People v Martin,* 271 Mich App 280, 315 (2006)"); MCR 2.119(A)(2) ("A motion or response to a motion that presents an issue of law must be accompanied by a brief citing the authority on which it is based").

B
Contractual Attorney Fees and Costs and Judgment Interest were Abandoned in the Motion for Summary Disposition

Contractual attorney fees are a category of damages that must be pled and proven to be awarded. See, e.g., *Fleet Business Credit, LLC v Kraphol Ford Lincoln Mercury,* 274 Mich App 584, 598 (2007); *Pransky v. Falcon Group, Inc.,* 311 Mich App 164 (2015). Utterly ignored by VFI is that it never proved its entitlement to contractual attorney fees in its motion for summary disposition. VFI extensively briefed the issue of damages, but only cursorily argued that it was entitled to attorney fees and costs and failed to substantiate any of the same. In a parallel fashion, VFI failed to request interest. This would be like

going to the jury and demanding attorney fees, costs, and interest without ever presenting any evidence of the sums at issue. The result would be a directed verdict against VFI. Because contractual attorney fees and cost damages were never substantiated or proven, and interest was never requested, they were abandoned. *Mitcham,* 355 Mich at 203; *Houghton,* 256 Mich App at 339-340; *Odom,* 327 Mich App at 311; MCR 2.119(A)(2).[1]

C
The Contract Does Not Provide for Attorney Fees

The bulk of VFI's argument is based on a completely false premise - an all but sanctionable one. VFI argues that the contract provides that the prevailing party is entitled to "attorney fees and costs." However, the contract says no such thing. It simply (if unusually) awards "all attorney and court costs." Actually, inserting the phantom word "fees" on page 5 of the Brief in a purported verbatim quote of the contract is false misrepresentation which cannot be countenanced or awarded. MCR 1.109(E). The argument is denied on that basis alone. MCR 1.109(E)(6).

In any event, Michigan law has long distinguished between attorney *fees* and *costs,* and the omission of "fees" means no such attorney fees are awardable as contractual damages under the agreement. See, e.g., *Ivezaj v Auto Club Insurance Association,* 275 Mich

[1] Again, VFI requested a *judgment,* and now complains that the judgment is flawed because it failed to prove some of damages that it now wants to add to the judgment.

App 349, 364 (2007). Because the contract never permitted the awarding of attorney fees, there is no cause to amend the judgment to award them.

IV
Case Evaluation Sanctions are Unwarranted

In the alternative, VFI requests that the Court award case evaluation sanctions because to hold otherwise would be unjust. The amendments to MCR 2.403, which included the elimination of case evaluation sanctions, became effective on January 1, 2022. "The rule in Michigan is that changes in judicial procedure apply to all further proceedings in actions then pending." *Prosoli v Mullins,* 111 Mich App 8, 14 (1981). See also *Lindsey v Raymond,* 34 Mich App 656, 658 (1971) ("The general rule is that a new court rule or an amendment thereto may be applied only cases which are pending at the time the rule is adopted or which are filed subsequent to the adoption of the rule"). Thus, "the norm is to apply newly adopted rules to pending actions unless there is reason to continue applying the old rules." *Davis v O'Brien,* 152 Mich App 495, 500 (1986). However, under MCR 1.102, "A court may permit a pending action to proceed under the former rules if it finds that the application that would not be feasible or would work an injustice."

In the present case, the first exception of MCR 1.102 does not apply. There is no cognizable reason why applying the elimination of case evaluation sanctions is not feasible. In fact, it is quite easy to implement.

With regard to the second exception under MCR 1.102, "the 'injustice' exception to MCR 1.102 must be applied narrowly and with restraint, such that the exception does not subsume the rule itself." *Reitmeyer v Shultz Equipment & Parts Co,* 237 Mich App 332, 345 (1999). Thus, "A decision under MCR 1.102 requires an individual determination . . . whether such 'injustice' would result from the application of the amended version" of the rule." *Id.* "This determination should be based on the substance of the rule involved and the timing the plaintiff's actions, plaintiff's obvious gamesmanship or lack thereof, and thus plaintiff's reliance or lack of reliance on the rules act hey existed at the time he made the pertinent decisions in this case, and any other pertinent factors in the individual case." *Id.* "[W]hile results may be different between the old and new rule, as may ordinarily be expected, this is not the dispositive factor in the analysis." *Id.* Rather, "several factors must be considered in determine the 'injustice' in a particular case and whether a party 'relied' on a court rule to the extent that it would be 'unjust' to alter the rule in midstream."

In the instant case, the Michigan Supreme Court, after heated, years long debate, determined that it would best serve the interests of justice to eliminate case evaluation sanctions. The Court certainly could have narrowly tailored the application of the new Rule of Court to apply only prospectively to case evaluation awards that were rendered subsequent to the effective date of the rule. Since it did not, the new rule presumptively applies unless its application in this case meets the injustice exception of MCR 1.102. Again, this exception must be applied with restraint and narrowly. The cold hard reality

is that there is nothing particularly unjust about applying the new rule to the case evaluation rendered in this case. Of course, the case evaluation award was rendered approximately 6 months prior to the effective date of the new rule, but the debate about case evaluation had been raging for years. VFI has made no showing that in this particular case, the potential of case evaluation sanctions somehow fundamentally altered its course of conduct in the instant case. This case was decided on summary disposition, and there is not much of an argument that the parties would have proceeded differently had sanctions been available or unavailable. Stated another way, there has been no showing of reliance on the old rule. After all, the rule change did not affect the merits of the case or the likelihood of prevailing on the merits. Had the Supreme Court, for example, changed the Michigan Rules of Evidence to suddenly alter what the admission of key evidence at trial, drastically altered the discovery process, altered the procedures for obtaining a preliminary injunction, or changed the requirements to initiate contempt of court proceedings, these could be seen to affect an injustice on a case that was previously filed in light of the old rules. But the rule here really has nothing to do with the underlying merits. As such, the chess board (or battlefield) has not been changed and applying the general rule of application does not affect an injustice. Hence, the request of case evaluation sanctions is unwarranted.

ORDER

In light of the foregoing, Defendants/Counter-Plaintiffs' Varilease Finance, Inc. and VFI KR SPE I LLC (together, "VFI") Motion to Reopen Case and to Amend Judgment to Add Contractual Attorney Fees, Interest, and Costs, or for Case Evaluation Sanctions is DENIED.