STATE OF MICHIGAN

COURT OF APPEALS

ROSE GUILLARD,

Plaintiff-Appellant,

v

MONTGOMERY HEGEWALD, M.D., and DIGESTIVE HEALTH ASSOCIATES OF NORTHERN MICHIGAN, PC,

Defendants-Appellees.

UNPUBLISHED
October 21, 2021

No. 353883
Grand Traverse Circuit Court
LC No. 2019-034762-NH

Before: REDFORD, P.J., and K. F. KELLY and LETICA, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendants' motion for the imposition of costs under MCR 2.405 because she rejected defendants' counteroffer to stipulate to entry of judgment. We affirm.

I. BACKGROUND

Plaintiff underwent a colonoscopy administered by defendant Dr. Montgomery Hegewald at defendant Digestive Health Associates of Northern Michigan, PC's facility on December 19, 2016. The day after the colonoscopy, plaintiff called the doctor's office complaining of stomach pain and a nurse instructed her to continue treating it with over-the-counter medications but to call back or go to an emergency room if the condition continued. The following day, plaintiff called with complaints of chills and a pain in her side. A nurse again instructed her to use over-the-counter medications and call if her condition continued or worsened. Several days later, on Saturday, plaintiff called and the office's after-hours message advised her to go to an emergency room for a medical emergency or call a specific medical center to speak with a gastroenterologist for immediate assistance. Plaintiff did neither and called two days later on December 26, 2016, and again heard the same after-hours message. The next day, Dr. Hegewald's office called plaintiff and told her to go to an emergency room. Plaintiff went to an emergency room where doctors determined that she had a ruptured appendix which required surgery and treatment for septic shock. The delay in treatment resulted in long-term consequences for her health.

On January 29, 2019, plaintiff sued for malpractice. On October 31, 2019, plaintiff offered to stipulate to entry of judgment for $250,000. On November 12, 2019, defendants rejected the offer and counteroffered to stipulate to entry of judgment for $0. Jury trial commenced in this matter on January 13, 2020 and concluded January 16, 2020, when the jury returned a verdict of no cause of action. After trial, defendants moved for actual costs and attorney fees pursuant to MCR 2.405. Following extensive briefing and multiple hearings, on June 2, 2020, the court awarded defendants costs in the amount of $27,198 and attorney fees in the amount of $51,525 for a total award of $78,723 in favor of defendants and against plaintiff.

II. STANDARD OF REVIEW

We review for an abuse of discretion a trial court's decision to award costs under MCR 2.405. *JC Building Corp II v Parkhurst Homes, Inc*, 217 Mich App 421, 426; 552 NW2d 466 (1996). We also review for an abuse of discretion a trial court's decision regarding whether the "interest of justice" exception of MCR 2.405(D)(3) applies to a particular set of facts. *Derderian v Genesys Health Care Systems*, 263 Mich App 364, 374; 689 NW2d 145 (2004). We review de novo questions of law involved in construing court rules and statutes. *Id*. The interpretation and application of the offer of judgment rule is reviewed de novo. *Simcor Constr, Inc v Trupp*, 322 Mich App 508, 514; 912 NW2d 216 (2018). "An abuse of discretion occurs 'when the trial court's decision is outside the range of reasonable and principled outcomes.' " *AFP Specialties, Inc v Vereyken*, 303 Mich App 497, 517; 844 NW2d 470 (2014), quoting *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008).

III. ANALYSIS

A. $0 AS A COUNTEROFFER UNDER MCR 2.405

Plaintiff argues that defendants' counteroffer of $0 did not constitute a true counteroffer under MCR 2.405, the offer of judgment rule. We disagree.

"[T]he purpose of MCR 2.405 is to encourage settlement and to deter protracted litigation." *Stitt v Holland Abundant Life Fellowship*, 243 Mich App 461, 475; 624 NW2d 427 (2000) (quotation marks and citation omitted). Accordingly, a party may offer "to stipulate to the entry of a judgment in a sum certain," and the other party may make a counteroffer by rejecting the initial offer and making "his or her own offer." MCR 2.405(A)(1), (2). If the counteroffer is rejected, and the verdict at trial "is more favorable to the offeror than the average offer, the offeree must pay to the offeror the offeror's actual costs incurred in the prosecution or defense of the action." MCR 2.405(D)(1).

Plaintiff argues that $0 is not a valid counteroffer because an offer requires a "sum certain" and $0 cannot be a "sum certain" because it is not a payable amount. The rules of statutory interpretation also apply to the interpretation of court rules. *Simcor Constr, Inc*, 322 Mich App at 514. "If the plain meaning of the language of the court rule is clear, then judicial construction is neither necessary nor permitted, and unless explicitly defined, every word or phrase should be accorded its plain and ordinary meaning, considering the context in which the words are used." *Id*. (quotation marks and citation omitted). The term "sum certain" is left undefined by the court rule. It is appropriate to consult with a dictionary to ascertain the plain meaning of an undefined

term. *Bauer v Saginaw Co*, 332 Mich App 174, 193; 955 NW2d 553 (2020). Black's Law Dictionary defines "sum certain" as, "Any amount that is fixed, settled, or exact." *Black's Law Dictionary* (11th ed).

Relevant caselaw likewise supports a conclusion that the term "sum certain" simply requires that the amount be fixed or exact. In *Central Cartage Co v Fewless*, 232 Mich App 517, 530-532; 591 NW2d 422 (1998), this Court held that an offer to pay a settlement in installments was a sum certain because the offer "was for a specific amount" and the offer "had a specific interest amount to be applied . . . ." In *Griggs v Tamaroff Motors, Inc*, unpublished per curiam opinion of the Court of Appeals, issued December 26, 2019 (Docket No. 345922), p 4, this Court, in the context of MCR 2.603, stated that the term "sum certain" was "self-explanatory, because both MCR 2.111(B)(2) and 2.603(B)(2)(a) use the term 'a sum that can by computation be made certain' as a synonym. Thus, they clearly indicate that a 'sum certain' means an amount that can be calculated precisely."[1] In *Hessel v Hessel*, 168 Mich App 390, 395; 424 NW2d 59 (1988), this Court held that a proposed property division was not a sum certain because "[e]ven if the worth of the property were considered a 'sum' for purposes of MCR 2.405, such worth is by no means 'certain' . . . ."[2] Because $0 is an amount that can be calculated with precision, we hold that $0 is a "sum certain," and that defendants, therefore, made a counteroffer under MCR 2.405.

B. INTEREST OF JUSTICE DISCRETION UNDER MCR 2.405

Plaintiff additionally argues that the trial court abused its discretion by concluding that the interest of justice would not be served by denying an award of attorney fees. We disagree.

Under the offer of judgment rule, the trial court may exercise its discretion to deny an award of attorney fees to a party that otherwise qualifies if doing so is in the interest of justice. MCR 2.405(D)(3).[3] "[T]he interest of justice exception should be applied only in unusual circumstances." *Simcor Constr*, 322 Mich App at 521 (quotation marks and citation omitted). Examples of such unusual circumstances include "where a legal issue of first impression is presented, or where the law is unsettled and substantial damages are at issue, where a party is indigent and an issue merits decision by a trier of fact, or where the effect on third persons may be significant." *Id*. at 521-522 (quotation marks, citation, and alteration omitted). The interest of justice exception may also be invoked when a party makes an offer "of judgment for gamesmanship purposes, rather than as a sincere effort at negotiation." *Luidens v 63rd Dist Court*, 219 Mich App 24, 35; 555 NW2d 709 (1996).

[1] Unpublished opinions of this Court are not binding, but may be considered for their persuasive value. *Cox v Hartman*, 322 Mich App 292, 307; 911 NW2d 219 (2017).

[2] Published opinions of this Court that were issued before November 1, 1990, are not binding, but they may be considered for their persuasive value. MCR 7.215(J)(1); *Jackson v Dir of Dep't of Corrections*, 329 Mich App 422, 428 n 5; 942 NW2d 635 (2019).

[3] The interest of justice exception applies only to attorney fees; it does not apply to costs. *Luidens v 63rd Dist Court*, 219 Mich App 24, 30; 555 NW2d 709 (1996).

In this case, the trial court did not abuse its discretion when it concluded that defendants' $0 counteroffer did not indicate gamesmanship. The record reflects that defendants made their counteroffer approximately 10 months after the filing of plaintiff's complaint and two months before trial. Further, other than the $0 counteroffer, plaintiff has offered no evidence upon which one may reasonably conclude that defendants engaged in gamesmanship. A court should consider the strength of the plaintiff's case when considering whether to apply the interest of justice exception,[4] and in this case, the trial court did that. The court reasoned that defendants' counteroffer could reasonably have been a genuine attempt to spare plaintiff the costs of going to trial. Further, the record reflects that defendants explained their rationale for their $0 counteroffer. Defendants did not believe that Dr. Hegewald had done anything wrong and were aware that medical malpractice plaintiffs in that circuit rarely prevailed. They made their counteroffer in full recognition of the potential consequences if the jury found them liable to plaintiff, particularly if Dr. Hegewald had agreed to settle and pay plaintiff which would have necessitated reporting to a national database with potential consequences to licensing to practice medicine and privileges at medical facilities. Defendants also recognized that, had plaintiff accepted their counteroffer, plaintiff could have avoided liability for all costs. Defendants' counteroffer, therefore, reasonably served as a means of facilitating settlement and did not represent gamesmanship. Accordingly, the trial court did not abuse its discretion by deciding that the interest of justice exception did not apply in this case.

Affirmed.

/s/ James Robert Redford
/s/ Kirsten Frank Kelly
/s/ Anica Letica

[4] See, e.g., *Edington v Union Square Dev, Inc*, unpublished per curiam opinion of the Court of Appeals, issued April 9, 2013 (Docket No. 303876), p 6 (stating that whether an offer is a show of gamesmanship "is a relative inquiry" that "depends on the strength and merits of plaintiff's claim").