STATE OF MICHIGAN

COURT OF APPEALS

DAVID LYCETTE, Personal Representative of the ESTATE OF TIMOTHY LYCETTE,

Plaintiff-Appellant,

v

JOSEPH P. EARLY, LLC, doing business as EARLY CONSTRUCTION, LEITRIM CORPORATION, and JOSEPH P. EARLY,

Defendants-Appellees,

and

MIDTOWN CHARLOTTE, LLC, UNILAND CORPORATION, and SCHNEIDER ELECTRIC USA, INC.,

Defendants.

UNPUBLISHED
September 21, 2023

No. 360698
Wayne Circuit Court
LC No. 20-001741-NO

DAVID LYCETTE, Personal Representative of the ESTATE OF TIMOTHY LYCETTE,

Plaintiff-Appellee,

v

JOSEPH P. EARLY, LLC, doing business as EARLY CONSTRUCTION, MIDTOWN CHARLOTTE, LLC, UNILAND CORPORATION, and SCHNEIDER ELECTRIC USA, INC.,

Defendants,

and

No. 361265
Wayne Circuit Court
LC No. 20-001741-NO

LEITRIM CORPORATION and JOSEPH P. EARLY,

Defendants-Appellants.

Before: GADOLA, P.J., and CAVANAGH and K. F. KELLY, JJ.

PER CURIAM.

In Docket No. 360698, plaintiff appeals by right the trial court's order granting summary disposition in favor of defendants Leitrim Corporation and Joseph P. Early ("Early defendants") under MCR 2.116(C)(8) and (10).[1] In Docket No. 361265, the Early defendants appeal by right the trial court's order denying their motion for prevailing-party costs and case evaluation sanctions. Because we conclude the trial court abused its discretion when it denied the Early defendants' request for prevailing-party costs, we vacate that portion of the order and remand for further proceedings. In all other respects, we affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

This case arises out of the death of Timothy Lycette ("decedent"), an electrician who was fatally injured on September 24, 2018, while working on electrical equipment in a building in Detroit, Michigan. The owner of the building, defendant Midtown Charlotte, LLC, had hired defendant Uniland Corporation to do renovation work to install 40 individual electrical meters. The decedent's employer, J. Simon & Sons Electrical, was subcontracted to perform the work. At some point while decedent was working under existing electrical equipment, the equipment separated from the wall fatally injuring the decedent. The building where the accident occurred was previously owned by Leitrim, which was owned by defendant John Early. Leitrim sold the building to Midtown Charlotte "as is" on November 20, 2017.

Plaintiff filed a complaint asserting claims against Leitrim Corporation, defendant Joseph P. Early LLC, doing business as Early Construction, and Joseph Early for negligence.[2] The Early defendants moved for summary disposition under MCR 2.116(C)(8) and (10), arguing that they had no relationship with the decedent that would give rise to a duty of care and that, regardless of how plaintiff labeled his claim, it was one for premises liability, rather than negligence. Because the Early defendants did not own, possess, or control the property at the time of the accident, they argued they could not be liable under a theory of premises liability. The trial court agreed and

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[1] The trial court previously dismissed defendant Joseph P. Early, LLC, doing business as Early Construction, and it is not a party to these appeals. Defendants Midtown Charlotte, LLC, Uniland Corporation, and Schneider Electric USA, Inc., are also no longer parties to the case and are not parties to these appeals.

[2] Plaintiff also filed claims for premises liability, product liability, and negligence against the other defendants; however, these claims are not relevant to this appeal.

granted the Early defendants' motion for summary disposition. The Early defendants subsequently moved for prevailing-party costs under MCR 2.625, and Joseph Early requested case evaluation sanctions under former MCR 2.403(O)(1). The trial court denied both requests, and these appeals followed.

II. SUMMARY DISPOSITION

In Docket No. 360698, plaintiff argues the trial court erred when it granted the Early defendants' motion for summary disposition. We disagree.

A. STANDARDS OF REVIEW

"We review a trial court's decision on a motion for summary disposition de novo." *Albitus v Greektown Casino, LLC*, 339 Mich App 557, 561; 984 NW2d 511 (2021). A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of a claim on the basis of the allegations in the complaint. *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 159-160; 934 NW2d 665 (2019). When reviewing a motion under MCR 2.116(C)(8), "a trial court must accept all factual allegations as true, deciding the motion on the pleadings alone." *Id*. at 160. "A motion under MCR 2.116(C)(8) may only be granted when a claim is so clearly unenforceable that no factual development could possibly justify recovery." *Id*.

A motion under MCR 2.116(C)(10) tests the factual sufficiency of a claim. *Albitus*, 339 Mich App at 561. "When considering a motion under MCR 2.116(C)(10), the trial court must consider all evidence submitted by the parties in the light most favorable to the party opposing the motion." *Blackwell v Livonia*, 339 Mich App 495, 500-501; 984 NW2d 780 (2021). "A trial court must grant the motion if it finds no genuine issue as to any material fact' and determines that 'the moving party is entitled to judgment or partial judgment as a matter of law." *Id*. at 501 (quotation marks and citation omitted).

Whether a duty of care exists is a question of law for the trial court that this Court also reviews de novo. *Finazzo v Fire Equip Co*, 323 Mich App 620, 625; 918 NW2d 200 (2018).

B. ANALYSIS

"In a premises liability action, a plaintiff must prove the elements of negligence: (1) the defendant owed the plaintiff a duty, (2) the defendant breached that duty, (3) the breach was the proximate cause of the plaintiff's injury, and (4) the plaintiff suffered damages." *Tripp v Baker*, ___ Mich App ___, ___; ___ NW2d ___ (2023) (Docket No. 360960); slip op at 3. In this case, the trial court concluded that plaintiff could not establish the first element, namely, that the Early defendants owed decedent a duty of care. We agree.

Without a duty of care, it is "axiomatic that there can be no tort liability." *Fultz v Union-Commerce Assoc*, 470 Mich 460, 463; 683 NW2d 587 (2004). A duty of care in a premises liability action arises only when the defendant has both possession and control of the property. *Finazzo*, 323 Mich App at 627. The rationale for such a rule is that the party with possession and control of the property is in the best position to prevent harm to others. *Id*. Plaintiff does not dispute that the Early defendants did not have possession or control of the property at the time of the decedent's

accident, as Leitrim sold the property to Midtown Charlotte approximately 10 months before. Plaintiff contends, however, that the Early defendants are nevertheless liable for the death because they knew or should have known about the dangerous condition on the property and should have disclosed that fact to Midtown Charlotte during the sale.

In *Christy v Glass*, 415 Mich 684, 688; 329 NW2d 748 (1982), the plaintiffs were homeowners in a subdivision who alleged that they incurred property damage, inconvenience, and discomfort because of issues with the water supply to their homes. The plaintiffs named as defendants, among others, Prestige Builders, the vendee builder who sold them their homes, and the former owners, Mr. and Mrs. Glass, who platted the subdivision and conveyed the property to Prestige. *Id*. At issue in that case was whether Mr. and Mrs. Glass had a common-law duty of care to the plaintiffs to protect them from Prestige's negligence. *Id*. at 687.

Ultimately, the Michigan Supreme Court concluded that the former landowners did not owe a duty of care to the plaintiffs. *Id*. The Court held that "under the common law, a land vendor who surrenders title, possession, and control of property shifts all responsibility for the land's condition to the purchaser." *Id*. at 694. Therefore, subject to two exceptions—the first of which is relevant here—a vendor of real property will not be held liable for any harm due to defects that are in existence at the time of sale. *Id*.

The first exception is "the vendor's duty to disclose to the purchaser any concealed condition *known to him* which involves an unreasonable danger." *Id*. (emphasis added). If a vendor fails to make such a disclosure or takes efforts to actively conceal the dangerous condition, the vendor may be liable in tort for any resulting injuries. *Id*. Under the second exception, "a vendor is liable to those outside the land for a dangerous condition on the land after the sale until the purchaser discovers or should have discovered it." *Id*. at 694. The Court in *Christy* explained:

> Once the purchaser discovers the defect and has had a reasonable opportunity to take precautions, third parties such as subvendees have no further recourse against the vendor. Under both exceptions, then, knowledge of the defect on the part of the purchaser relieves the vendor of any duty or liability. Because of this knowledge requirement, neither of the exceptions to the general rule of vendor non-liability exists in this case. [*Id*. at 695-696.]

In *Christy*, the record revealed that Prestige, who sold the homes to the plaintiffs, was aware of the water problems. *Id*. The Court held, therefore, that the plaintiffs' recourse was limited to pursuing their claims against Prestige and that they did not have any claim against Mr. and Mrs. Glass. *Id*. at 695.

Under *Christy*, we conclude the trial court did not err when it held that the Early defendants did not owe a duty of care to the decedent. It is undisputed that Leitrim conveyed the property to Midtown Charlotte in November 2017 on an "as is" basis, that Midtown Charlotte took title after having an inspection performed on the property, and that after purchasing the property, Midtown Charlotte began significant renovations of the property, including electrical work. There was no actual relationship between the Early defendants and the decedent. Moreover, the Early defendants no longer had possession or control of the property and were, therefore, not in any position to prevent the accident. See *Finazzo*, 323 Mich App at 627. Thus, unless plaintiffs can show that

an exception under *Christy* applies, the Early defendants had no duty to the decedent to prevent the accident. See *Christy*, 415 Mich at 695-696.

To that end, plaintiff failed to show that the Early defendants did not disclose to Midtown Charlotte any concealed conditions known to them that involved an unreasonable danger, i.e., the improperly installed electrical equipment. See *id*. at 694. Joseph Early testified that whenever he had electrical work performed on the property, it was done by electricians and the work was performed under permits. He was unable to recall when the electrical equipment that fell was installed and claimed to have no knowledge of any issues with the electrical equipment. Plaintiff suggests that this Court should read *Christy* for the proposition that a former landowner is liable if the concealed condition is actually known or if the former landowner *should have known* of the dangerous condition. To that end, plaintiff contends that there were issues of fact for trial regarding whether Joseph Early should have known about the dangerously-installed electrical equipment.

We decline, however, to read *Christy* so expansively, and plaintiff cites no court opinion following *Christy* that would support such a reading. Instead, plaintiff relies on nonbinding treatises cited by the Court in *Christy* which, according to plaintiff, supports such a position. But the language cited by plaintiff in the treatises does itself not appear in *Christy*. We must presume, therefore, that the Michigan Supreme Court was aware of the distinction when it decided the case and, notwithstanding the treatises' formulation, the Court in *Christy* did not go as far. Instead, we read *Christy* as requiring a plaintiff to show that the former landowner had actual knowledge of the dangerous condition and either failed to disclose it when selling it or actively took steps to conceal it. Because plaintiff did not come forward with such evidence, the trial court did not err when it granted summary disposition in favor of the Early defendants.

III. CASE EVALUATION SANCTIONS

The Early defendants argue in Docket No. 361265 that the trial court erred when it declined to award case evaluation sanctions to Joseph Early under former MCR 2.403(O)(1). We disagree.

A. STANDARDS OF REVIEW

A trial court's decision whether to award case evaluation sanctions is reviewed de novo. *McNeel v Farm Bureau Gen Ins Co of Mich*, 289 Mich App 76, 97; 795 NW2d 205 (2010). Likewise, this Court reviews de novo whether a trial court properly interpreted and applied a court rule. *Franks v Franks*, 330 Mich App 69, 86; 944 NW2d 388 (2019). However, "a trial court's decision whether application of new court rules would 'work injustice' under MCR 1.102 entails an exercise of discretion." *Reitmeyer v Schultz Equip & Parts Co, Inc*, 237 Mich App 332, 336; 602 NW2d 596 (1999). A court abuses its discretion when its decision is outside the range of reasonable and principled outcomes. *Komendat v Gifford*, 334 Mich App 138, 147 n 2; 964 NW2d 75 (2020).

B. ANALYSIS

Case evaluation in this case occurred on December 15, 2021. As relevant to this appeal, the case evaluation panel issued separate awards for Leitrim and Joseph Early. For Award #1, the case evaluation panel issued an award of $450,000 in favor of plaintiff against Leitrim, which

plaintiff accepted and Leitrim rejected. For Award #2, the panel issued an award of $2,000 in favor of plaintiff against Joseph Early, which both sides accepted. However, plaintiff claimed that its acceptance of Award #2 was conditioned on all parties accepting both awards and, because Leitrim had rejected Award #1, there was no mutual acceptance of Award #2. The trial court agreed and denied a motion brought by Joseph Early to enforce Award #2.

MCR 2.403 was amended, effective January 1, 2022, to eliminate case evaluation sanctions. Plaintiff argues, however, that the trial court erred by failing to apply the former version of the rule that was in effect at the time of case evaluation. The version of MCR 2.403 in effect when the parties participated in case evaluation on December 15, 2021, stated, in pertinent part:

> **(O) Rejecting Party's Liability for Costs.**
>
> (1) If a party has rejected an evaluation and the action proceeds to verdict, the 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 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.
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> * * *
>
> (4) In cases involving multiple parties, the following rules apply:
>
> (a) Except as provided in subrule (O)(4)(b), in determining whether the verdict is more favorable to a party than the case evaluation, the court shall consider only the amount of the evaluation and verdict as to the particular pair of parties, rather than the aggregate evaluation or verdict as to all parties. However, costs may not be imposed on a plaintiff who obtains an aggregate verdict more favorable to the plaintiff than the aggregate evaluation.
>
> (b) If the verdict against more than one defendant is based on their joint and several liability, the plaintiff may not recover costs unless the verdict is more favorable to the plaintiff than the total case evaluation as to those defendants, and a defendant may not recover costs unless the verdict is more favorable to that defendant than the case evaluation as to that defendant.

Although the trial court determined that it was required to apply the amended rule, the court failed to consider MCR 1.102, which states that "[a] court may permit a pending action to proceed under the former rules if it finds that the application of these rules to that action would not be

feasible or would work injustice." Notably, this principle also applies to later amendments to the court rules. *People v Jackson*, 465 Mich 390, 396; 633 NW2d 825 (2001), citing *Reitmeyer*, 237 Mich App at 337; see also 1 Dean & Longhofer, Michigan Court Rules Practice (4th ed), pp 4-5 ("The same principle [contained in MCR 1.102] has been applied to subsequently adopted or amended rules.").

In *Reitmeyer*, this Court stated that "the norm is to apply the newly adopted court rules to pending actions unless there is reason to continue applying the old rules," such as when application of the new rule would work an injustice on a party. *Reitmeyer*, 237 Mich App at 337 (quotation marks and citation omitted). "However, an injustice is not present merely because a different result would be reached under the new rules." *Id.* (quotation marks and citation omitted). Instead, "a new court rule would 'work injustice' where a party acts, or fails to act, in reliance on the prior rules and the party's action or inaction has consequences under the new rules that were not present under the old rules." *Id.* at 337-338 (quotation marks and citation omitted).

In this case, the trial court did not consider whether application of the amended version of MCR 2.403 would work an injustice on Joseph Early. Recently, however, in *RAD Constr, Inc v Davis*, ___ Mich App ___, ___; ____ NW2d ____ (2023) (Docket Nos. 361177 & 363142); slip op at 8, this Court reversed the trial court's decision to apply the former rule and impose sanctions in a case where the parties engaged in case evaluation in January 2021 and the plaintiff rejected the case evaluation award in February 2021, eleven months before the new rule took effect. In such a circumstance, this Court concluded that "the trial court had no authority to sanction [the plaintiff] after January 1, 2022." *Id.*

In this case, plaintiff's argument that the trial court should have applied the former version of MCR 2.403 to award sanctions to Joseph Early is foreclosed by *RAD Constr*, in which this Court concluded the court had no authority to apply the former rule. There, case evaluation was held in January 2021, and the plaintiff rejected the award in February 2021, almost 11 months before MCR 2.403 was amended to eliminate case evaluation sanctions. Conversely, in this case, case evaluation was conducted on December 15, 2021, 13 days *after* the Michigan Supreme Court issued its order amending MCR 2.403, effective January 1, 2022, to eliminate case evaluation sanctions. See 508 Mich clxiii. Further, the parties' decisions to accept or reject the case evaluation award were not required to be made until after the new effective date of January 1, 2022. In other words, all parties had full knowledge at the time of case evaluation that sanctions would no longer be available after January 1, 2022, and Joseph Early knew at the time he accepted the case evaluation award that sanctions were no longer available under the amended version of MCR 2.403. Accordingly, he cannot claim reliance on the former rule in deciding whether to accept or reject the case evaluation award, and under these circumstances, the trial court did not err by declining to award case evaluation sanctions.

IV. PREVAILING-PARTY COSTS

Lastly, the Early defendants argue that the trial court erred when it denied their request for prevailing-party costs under MCR 2.625. We agree.

A. STANDARDS OF REVIEW

A trial court's ruling on a motion for costs under MCR 2.625 is reviewed for an abuse of discretion. *Van Elslander v Thomas Sebold & Assoc, Inc*, 297 Mich App 204, 211; 823 NW2d 843 (2012). A court abuses its discretion when its decision is outside the range of reasonable and principled outcomes. *Komendat*, 334 Mich App at 147 n 2.

B. ANALYSIS

The parties do not dispute that the Early defendants, having been granted summary disposition in their favor, are prevailing parties for purposes of MCR 2.625(A). See *Fransler v Richardson*, 266 Mich App 123, 128; 698 NW2d 916 (2005) (a prevailing party under MCR 2.625 is a party whose position was improved by the litigation). MCR 2.625 states, in pertinent part:

> (A) Right to Costs.
>
> (1) *In General*. Costs will be allowed to the prevailing party in an action, unless prohibited by statute or by these rules or unless the court directs otherwise, for reasons stated in writing and filed in the action. [MCR 2.625(A)(1).]

In support of their motion for attorney fees and costs, the Early defendants submitted an itemized accounting of all costs incurred in the litigation from April 22, 2019, until January 20, 2022, as well as affidavits from their counsel verifying the accuracy of the costs. In denying the Early defendants' motion for prevailing-party costs under MCR 2.625, the trial court stated that "there isn't enough information in your motion for the Court to render a decision" with respect to the request. The court did not otherwise state its reasons in writing as required by the court rule. Likewise, the trial court did not specify what information it believed was lacking, and did not question the parties about any information that it deemed to be absent. Under such circumstances, we conclude the trial court abused its discretion by simply declining to award prevailing-party costs without an adequate explanation for why costs were not allowed or justified. See MCR 2.625(A)(1). Accordingly, we vacate the portion of the trial court's order denying the Early defendants prevailing-party costs under MCR 2.625 and remand for further proceedings consistent with this opinion.

In conclusion, in Docket No. 360698, we affirm the trial court's order granting summary disposition in favor of the Early defendants. In Docket No. 361265, we affirm the trial court's order denying case evaluation sanctions to Joseph Early, but vacate the portion of the order denying the Early defendants prevailing-party costs under MCR 2.625 and remand for further proceedings. We do not retain jurisdiction. Neither party having prevailed in full, no costs may be taxed. MCR 7.219(A).

/s/ Michael F. Gadola
/s/ Mark J. Cavanagh
/s/ Kirsten Frank Kelly