STATE OF MICHIGAN

COURT OF APPEALS

KEVIN J. O'GRADY, VICKI L. O'GRADY, KEVIN A. O'GRADY, KYLE J. O'GRADY, and THE 81 DEVELOPMENT COMPANY, LLC,

Plaintiffs-Appellants/Cross-Appellees,

v

MARK STANTON LESLIE, M.D.,

Defendant-Appellee/Cross-Appellant.

UNPUBLISHED
September 19, 2024

No. 362684
Grand Traverse Circuit Court
LC No. 2020-035252-NI

KEVIN J. O'GRADY, VICKI L. O'GRADY, KEVIN A. O'GRADY, KYLE J. O'GRADY, and THE 81 DEVELOPMENT COMPANY, LLC,

Plaintiffs-Appellants,

v

MARK STANTON LESLIE, M.D.,

Defendant-Appellee.

No. 364060
Grand Traverse Circuit Court
LC No. 2020-035252-NI

Before: PATEL, P.J., and YATES and SHAPIRO,* JJ.

PER CURIAM.

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

These consolidated appeals[1] arise from the criminal vandalism of a sea wall, a county road, and a development site's monument entrance signs by defendant, Mark Stanton Leslie, M.D. As part of a plea deal, Dr. Leslie pleaded guilty to two misdemeanors—attempted malicious destruction of property and stalking—and paid $7,500 in restitution. Plaintiffs, Kevin J. O'Grady, Vicky L. O'Grady, Kevin A. O'Grady, Kyle J. O'Grady, and The 81 Development Company, LLC, filed this action against Dr. Leslie alleging various tort claims. Ultimately, all claims were dismissed except the trespass claims by Kevin J., Vicki, and 81 Development. The trial court entered a judgment of $0 after offsets against Dr. Leslie in favor of Kevin J. and Vicki on their trespass claims, and a judgment of $2,286.01 after offsets against Dr. Leslie in favor of 81 Development on its trespass claim. The trial court concluded that the "primary purpose in initiating the action . . . was to harass, embarrass, or injure [Dr. Leslie]" and thus the action was frivolous. The court determined that Dr. Leslie prevailed on the entire record and awarded his costs and attorney fees incurred in defending this frivolous action under MCL 600.2591. The trial court also awarded Dr. Leslie offer-of-judgment sanctions under MCL and MCR 2.405(D).

On appeal, Kevin J. and Vicki challenge the dismissal of their stalking claims. The O'Gradys and 81 Development further challenge the trial court's award of frivolous action and offer-of-judgment sanctions to Dr. Leslie. We affirm.[2]

I. BASIC FACTS

Kevin J. and Vicki are husband and wife. Kevin A. and Kyle are their adult sons. Kevin J. and Vicki purchased a waterfront lot along Bluff Road on the Old Mission Peninsula in 2012. Kevin J. also owned 81 Development. 81 Development owned land farther north on Bluff Road, which 81 Development began developing into a planned unit development of site condominiums. 81 Development obtained final approval for its plans in December 2018. The record showed that 81 Development's project was controversial in the Traverse City area and garnered a great deal of opposition.

During the night of July 3 to July 4, 2019, someone painted "Land Raper lives here" in letters that were about four feet tall and spanned 45 feet along the seawall in front of the O'Gradys' home. Then, on July 18, 2019, someone spray painted "LAND RAPIST" on the road outside the O'Gradys' home with an arrow pointing to the driveway of the O'Gradys' home.

In October 2019, 81 Development affixed the name of its project to two large limestone walls on either side of the entrance to the development site. On the night of October 9 to October 10, 2019, someone spray painted the walls with the words "LAND RAPE." Because cameras had been installed at the work site, police officers were able to determine that Dr. Leslie vandalized the walls. Officers arrested him in November 2019.

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[1] This Court consolidated the appeals on its own motion. *O'Grady v Leslie*, unpublished order of the Court of Appeals, entered February 6, 2023 (Docket No. 362684).

[2] Given our resolution of the claims of error by the O'Gradys and 81 Development, we decline to address Dr. Leslie's claim of error on cross-appeal in Docket No. 362684 as moot.

In December 2019, Dr. Leslie pleaded guilty as part of a plea deal to one count of misdemeanor attempted malicious destruction of property and one count of misdemeanor stalking arising from his acts. As part of the plea, Dr. Leslie agreed that he entered onto the property near the O'Gradys' home and spray painted words on an ornamental wall. Dr. Leslie also affirmed that he engaged in two acts of unconsented contact that caused harassment or intimidation and that he intended to harass or intimidate the developer of the property.

The trial court presiding over Dr. Leslie's criminal case sentenced him in January 2020. The trial court ordered him to serve probation for one year, pay a fine of $100, pay court costs of $800 and $75, and to pay $7,500 in restitution. The court also ordered him to perform 10 days of community service, to be subject to random drug and alcohol screening, to have no contact with the O'Gradys or be anywhere near their properties, and to serve 11 days in jail.

The O'Gradys and 81 Development sued Dr. Leslie in February 2020. The O'Gradys alleged two claims specific to them: stalking and intentional infliction of emotional distress. In addition, the O'Gradys and 81 Development alleged that Dr. Leslie was liable to them for trespass, defamation, false light invasion of privacy, and injurious falsehood. There was record support for the proposition that the O'Gradys and 81 Development then deliberately delayed discovery.

Dr. Leslie filed three motions for summary disposition during the litigation. The trial court granted his first motion, in part, and dismissed the claims for defamation, false light invasion of privacy, and injurious falsehood.

After discovery disputes and appeals to this Court, the O'Gradys and 81 Development moved for leave to amend their complaint. They asserted only two claims in the amended complaint: trespass and stalking. The trial court granted leave to amend.

Shortly thereafter, Dr. Leslie filed his second motion for summary disposition. He argued that Kevin A. and Kyle failed to plead viable claims of trespass and stalking. Dr. Leslie similarly claimed that Vicki could not establish that she was the target of stalking, or suffered emotional distress or any damages from stalking. Dr. Leslie further maintained that Kevin J. could not establish that he suffered emotional distress or damages from stalking. Finally, Dr. Leslie conceded that he was liable for trespass and that Kevin J., Vicki, and 81 Development were entitled to damages, but he asserted that he was entitled to an offset for the $7,500 in restitution he paid. Dr. Leslie asserted that he was entitled to a dismissal of all claims except the trespass claims. He requested that the trial court enter a judgment against him for nominal damages as to Kevin J. and Vicki, and for the fixed amount of identified damages as to the trespass involving 81 Development.

The trial court concluded that Kevin A. and Kyle had not pleaded viable trespass and stalking claims and thus dismissed all their claims against Dr. Leslie. The trial court further determined that 81 Development, Kevin J., and Vicki were entitled to damages for their trespass claims. But because they had not pleaded special damages beyond the cost to repair the property, the trial court concluded that their damages were limited to presumed nominal damages and restoration costs subject to an offset by any restitution paid by Dr. Leslie. Finally, the trial court concluded that there was a genuine issue of material fact on the stalking by Kevin J. and Vicki, but it limited their recovery to damages that they actually incurred and held that any claim for exemplary damages shall not include economic losses.

In his third motion for summary disposition, Dr. Leslie argued that Vicki could not establish her stalking claim because there was no evidence that Dr. Leslie targeted her. He further asserted that, even if his acts amounted to stalking, Kevin J. and Vicki could not establish that they suffered any damages beyond the costs for which they were already compensated through the restitution order. Dr. Leslie also maintained that there was no evidence that he acted with malice and thus there was no factual support for an award of exemplary damages for the stalking claims. Finally, Dr. Leslie requested that the court award $2 to Kevin J., Vicki, and 81 Development for their presumed nominal damages on their trespass claims.

At the motion hearing, the trial court struck the response brief filed by the O'Gradys and 81 Development as untimely under MCR 2.116(G)(1)(a)(ii) because it was filed at 11:00 p.m. the night before the hearing. The trial court determined that Kevin J., Vicki, and 81 Development were each entitled to $2 in nominal damages for the trespass claims, and the cost of restoration had already been determined and paid by the restitution in the criminal matter. As for the stalking claim, the trial court agreed that, after striking the response, Vicki had no evidence that Dr. Leslie targeted her. Because she was not a target, the court dismissed Vicki's stalking claim. The trial court also dismissed Kevin J.'s stalking claim because he failed to establish that he actually incurred damages as a result of stalking and he failed to present any evidence of malice to support a claim for exemplary damages. The trial court entered an order consistent with its rulings on the record and reserved the issue of costs and attorney fees.

In August 2022, the trial court entered an order of final judgment. The court entered a judgment of no cause of action against Kevin A. and Kyle. The court entered a judgment of $0, after offsets required by MCL 769.1a, against Dr. Leslie in favor of Kevin J. and Vicki for trespass and entered judgment of no cause of action against Kevin J. and Vicki for all other counts. The trial court entered judgment in favor of 81 Development for its trespass claim, but it offset the award by the order of restitution and the order requiring 81 Development and the O'Gradys to pay a sanction,[3] which resulted in a judgment of $2,286.01 in favor of 81 Development against Dr. Leslie.

Dr. Leslie moved for an award of costs and attorney fees against the O'Gradys and 81 Development. Dr. Leslie asserted that he was entitled to taxable costs and fees as the prevailing party under MCR 2.625(A)(1), or he was entitled to frivolous action costs and fees under MCL 600.2591 because the O'Gradys and 81 Development alleged "frivolous theories of liability and exaggerated, if not imaginary, claims of damage." The O'Gradys, he stated, also engaged in a deliberate plan to delay and avoid discovery, while submitting discovery requests to Dr. Leslie that were harassing or irrelevant. Dr. Leslie maintained that the record supported an award of $9,916.56 in taxable costs and $229,218.50 in attorney fees as a sanction for the O'Gradys' and 81 Development's frivolous claims. Alternatively, Dr. Leslie argued that he was entitled to his actual costs under the offer-of-judgment rule. Dr. Leslie stated that, because he believed that the

[3] On March 14, 2022, the trial court entered an order excusing the failure of the O'Gradys and 81 Development to submit final pretrial/settlement conference filings required by the scheduling order. The court gave the O'Gradys and 81 Development 24 hours to comply with the requirements and ordered them to pay $1,225 as a sanction to Dr. Leslie.

O'Gradys had no intention of settling the dispute and wished to pursue vexatious litigation, he submitted an offer of judgment to the O'Gradys in November 2020; he offered to pay $25,000 to Kevin J. and $15,000 to each of the remaining plaintiffs. The O'Gradys did not respond to the offer of judgment. Dr. Leslie stated that he was forced to request a judgment against him in the admitted amounts for the trespass claims because the O'Gradys and 81 Development never took any action to end the litigation. Dr. Leslie requested an award of $9,916.56 for expenses and $156,991 for attorney fees incurred since the November 2020 offer of judgment.

The trial court concluded that the statute governing frivolous actions applied, and held that Dr. Leslie was also entitled to his costs and fees under the offer-of-judgment rule. The court first observed that 81 Development's project was "politically very contentious" in the township and resulted in a lot of litigation. The court recognized that Dr. Leslie had vandalized the O'Gradys' home and property owned by 81 Development and that Dr. Leslie pleaded guilty to crimes arising from that conduct. The court stated that the O'Gradys and 81 Development dropped their large damage claims when Dr. Leslie tried to obtain discovery, which left claims for petty damages that were mostly covered by the order of restitution. The court found that the O'Gradys and 81 Development knew that the facts did not support their large damage claims. The court inferred from this that the O'Gradys and 81 Development brought the action to punish Dr. Leslie for his actions, which had already been done in the criminal case. The trial court found that the "primary purpose in initiating the action . . . was to harass, embarrass, or injure the prevailing party." The trial court agreed that the judgment was in favor of the O'Gradys and 81 Development, but it disagreed that Dr. Leslie was not the prevailing party under MCL 600.2591(3)(b). The court determined that "there's no doubt who the winner of this case was. And taken on the record as a whole, it's just common sense, this was—Leslie won the case, and—so he's the prevailing party." Accordingly, the trial court concluded that Dr. Leslie was entitled to sanctions under MCR 2.625(A)(2) and MCL 600.2591.

With respect to Dr. Leslie's requests for offer-of-judgment sanctions, the trial court determined that the November 2020 offers of judgment to each plaintiff controlled rather than the January 2022 letter from defense counsel that proposed dismissal of all claims with prejudice and a mutual release that included Dr. Leslie relinquishing his claim for costs and attorney's fees. The trial court concluded that Dr. Leslie was entitled to his costs and fees under the offer-of-judgment rule. After making its rulings, the trial court allowed the parties some time to determine whether they could reach an agreement on the amount of the costs and fees, and it adjourned the hearing.

Because the parties were unable to reach an agreement, the trial court held another hearing. The trial court determined that the amount of time spent by defense counsel was reasonable under the circumstances. The trial court further concluded that $350 was a reasonable hourly rate. Accordingly, the trial court entered an order granting Dr. Leslie's motion for sanctions. The court ordered the O'Gradys and 81 Development to pay Dr. Leslie's costs of $21,783.49 and attorney fees of $211,356.32 as a sanction under MCL 600.2591. The trial court further ordered that Dr. Leslie was awarded $159,171 under the offer-of-judgment rule.

The O'Gradys and 81 Development appealed by right the trial court's August 2, 2022 judgment. This Court assigned that appeal Docket No. 362684. On cross-appeal, Dr. Leslie appealed by right the trial court's order denying his motion in limine to bar the O'Gradys from presenting any evidence about their physical or mental conditions. The O'Gradys and 81

Development also appealed by right the trial court's November 14, 2022 order awarding frivolous action and offer-of-judgment sanctions to Dr. Leslie. This Court assigned that appeal Docket No. 364060. This Court consolidated the appeals on its own motion.

II. STALKING

In Docket No. 362684, Kevin J. and Vicki argue that the trial court erred by granting Dr. Leslie's motion for summary disposition under MCR 2.116(C)(10) regarding their stalking claims. We disagree.

A. STANDARDS OF REVIEW

"We review de novo a trial court's decision on a motion for summary disposition." *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 159; 934 NW2d 665 (2019). Summary disposition under MCR 2.116(C)(10) is warranted when "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2.116(C)(10). When reviewing a motion for summary disposition under MCR 2.116(C)(10), we must consider the evidence submitted by the parties in the light most favorable to the non-moving party. *El-Khalil*, 504 Mich at 160. "A genuine issue of material fact exists when the record leaves open an issue upon which reasonable minds might differ." *Id*. (cleaned up). Summary disposition under MCR 2.116(C)(10) is proper when, after considering all evidence in the light most favorable to the non-moving party, the court determines there is no genuine issue of material fact. *Id*. We are "not permitted to assess credibility, or to determine facts" in analyzing whether a genuine issue of material fact exists. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). "Instead, the court's task is to review the record evidence, and all reasonable inferences therefrom, and decide whether a genuine issue of any material fact exists to warrant a trial." *Id*.

We also review de novo whether the trial court properly interpreted and applied the applicable statutes and court rules. *Franks v Franks*, 330 Mich App 69, 86; 944 NW2d 388 (2019).

B. ANALYSIS

Preliminarily, the O'Gradys and 81 Development limit their claims of error regarding the stalking claims to the trial court's decision on Dr. Leslie's third motion for summary disposition and have not raised any claim of error regarding the trial court's dismissal of Kevin A.'s and Kyle's stalking claims in granting Dr. Leslie's second motion for summary disposition.

The trial court's order stated that Dr. Leslie's third motion for summary disposition regarding Kevin J's and Vicki's civil stalking claims were "granted for the reasons stated on the record." Because the O'Gradys' response to Dr. Leslie's motion was stricken, the trial court determined that Vicki failed to present any evidence that Dr. Leslie targeted her. The trial court stated, "It's a (C)(10) motion, facts were presented, nothing [was] presented in response." Accordingly, the court granted "summary disposition as to Mrs. O'Grady, as she was not a target of the stalking." The trial court granted the motion as to Kevin J. because he did not identify any damages that he incurred as a result of stalking. On appeal, the O'Gradys focus their attack on the trial court's determination that Kevin J. did not establish that he incurred damages as a result of stalking. But the O'Gradys do not address the court's determination that Vicki failed to present

any evidence that Dr. Leslie targeted her and thus Dr. Leslie was entitled to summary disposition on her stalking claim. Therefore, the only issue before us regarding the stalking claim is whether the trial court erred when it concluded that Kevin J. had not identified any damages that were causally related to Dr. Leslie's conduct that amounted to stalking.

The revised judicature act provides for a civil cause of action for harms arising from the conduct criminalized as stalking: "A victim may maintain a civil action against an individual who engages in conduct that is prohibited under [MCL 750.411h or MCL 750.411i] for damages incurred by the victim as a result of that conduct." MCL 600.2954(1). The civil action for stalking incorporates the same elements as the criminal statutes. See *Nastal v Henderson & Assoc Investigations, Inc*, 471 Mich 712, 721; 691 NW2d 1 (2005).[4] Based on the plain language of the statute, a plaintiff seeking damages under MCL 600.2954 must allege, and be able to prove, that he or she was the victim of conduct by the defendant that was prohibited under MCL 750.411h or MCL 750.411i, and that—as a victim—he or she incurred damages as a result of the defendant's prohibited conduct. Simply establishing that the defendant engaged in conduct prohibited by the criminal statutes, which was directed at the plaintiff, is not enough to entitle the plaintiff to civil damages. Rather, the plaintiff must establish that the defendant's conduct, which was prohibited by the statutes, had a causal connection to damages that the plaintiff actually incurred. MCL 600.2954(1); see also *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 217-218; 761 NW2d 293 (2008) (recognizing that causation is an essential element of every civil claim, and noting that the evidence of causation must not be speculative); *Lumley v Univ of Mich Bd of Regents*, 215 Mich App 125, 130; 544 NW2d 692 (1996) (stating that damages are an essential element of a tort claim).

Dr. Leslie moved for summary disposition of the stalking claim under MCR 2.116(C)(10) by challenging Kevin J.'s ability to establish a question of fact for the jury on the issue of causation and damages. See *Lowrey v LMPS & LMPJ, Inc*, 500 Mich 1, 8-9; 890 NW2d 344 (2016) (stating that a defendant has no obligation to negate one of the elements of plaintiff's claim, but need only argue that the plaintiff's evidence is insufficient to establish an element of his or her claim). In response to the motion, Kevin J. had the burden to prove all the elements of his claim for damages. But the trial court struck the O'Gradys' response as untimely and thus determined that Kevin J. failed to present any evidence that he incurred damages as a result of Dr. Leslie's conduct prohibited under MCL 750.411h.

On appeal, Kevin J. argues that the trial court erred when it determined that he had to identify medical records to establish that he suffered emotional distress. He also faults the trial court for stating that he gave up his claim for damages arising from emotional distress when he chose not to restate his claim for intentional infliction of emotional distress in the amended complaint. Contrary to Kevin J.'s contention on appeal, the trial court did not rule that damages under MCL 600.2954(1) had to be proved with medical records. The court merely recognized that

[4] Because the criminal statute includes a safe harbor for constitutionally protected activity or conduct that served a legitimate purpose, the *Nastal* Court determined that such conduct could not serve as the basis for a civil stalking claim premised on surveillance that had been authorized under the law. *Id*. at 722-723.

there were no medical records in support of any damages. It also did not state that the decision to drop the claim for intentional infliction of emotional distress necessarily precluded the O'Gradys from being able to establish damages for their civil stalking claim arising from emotional harm. Rather, the court clearly referred to the discovery disputes in which the O'Gradys appeared to have relinquished their claims for damages involving emotional distress. The court also relied on the absence of evidence that any of the O'Gradys actually suffered emotional distress. More specifically, as to Kevin J., the court determined that summary disposition was appropriate because he did not present evidence that he "incurred damages" as a result of Dr. Leslie's engagement in conduct prohibited by the criminal stalking statute.

Kevin J. argues that the trial court plainly erred in that determination because Kevin J. testified about his emotional distress at his deposition. In support of his argument, Kevin J. relies on the evidence cited in the O'Gradys' response to Dr. Leslie's third motion for summary disposition. But the trial court struck that response as untimely, and Kevin J. has not challenged the trial court's exercise of its discretion to strike the response. Nevertheless, Kevin J. contends that the evidence was before the trial court because he cited the evidence in his motion for reconsideration. The trial court had no obligation to consider evidence submitted in the motion for reconsideration when the evidence could have been presented in a timely response to Dr. Leslie's third motion for summary disposition. See *Yachcik v Yachcik*, 319 Mich App 24, 42; 900 NW2d 113 (2017). Moreover, the trial court rejected the motion for reconsideration because it presented the same issues ruled on by the court. "When reviewing a motion for summary disposition, this Court's review is limited to review of the evidence properly presented to the trial court." *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 380; 775 NW2d 618 (2009). Because the trial court struck the response and did not consider the evidence on the motion for reconsideration, that evidence is not before us. See *id.* at 381 (stating that this Court is "not at liberty to consider" evidence that was not properly before the trial court).

Kevin J. also relies on Dr. Leslie's statements during his plea hearing. In pleading to the misdemeanor crime of stalking, Dr. Leslie stated that he spray painted the words at issue with the intent to harass the person who developed the property and that a reasonable person would feel harassed. There is nothing in the record from the plea hearing that Dr. Leslie had personal knowledge that any of the O'Gradys had actually suffered emotional distress; he simply agreed that he intended to harass someone and that a reasonable person would have felt harassed. He also did not offer any testimony capable of establishing a causal connection between his acts of stalking and specific damages that any one person might have suffered. Indeed, his plea colloquy did not even establish with clarity who was harassed by his conduct; he merely suggested that he intended to harass a developer.

Notwithstanding these limitations in the record, Kevin J. notes that the crime of stalking requires proof of harassment, which means "repeated or continuing unconsented contact that would cause a reasonable individual to suffer emotional distress and that actually causes the victim to suffer emotional distress," MCL 750.411h(1)(d), and proof that the harassment "would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested and that actually causes the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested," MCL 750.411h(1)(e). He suggests that, by pleading to the crime of stalking, Dr. Leslie necessarily conceded that Kevin J. suffered some level of emotional distress and felt either

terrorized, frightened, threatened, harassed, or molested, which would entitle him to some level of compensation.

The plea was evidence from which a reasonable finder of fact could infer that Dr. Leslie engaged in the proscribed conduct and that he rendered someone a victim of his stalking. The plea was also evidence that Dr. Leslie agreed that someone felt harassed and terrorized, frightened, intimidated, threatened, harassed, or molested, but his plea was not evidence establishing a causal connection between his acts and any specific person who was harmed by his acts. As a plaintiff, Kevin J. bore the burden to demonstrate that he (as opposed to someone else) was the victim of Dr. Leslie's stalking and that he incurred identifiable damages. See MCL 600.2954(1); *Lowrey*, 500 Mich at 8-9. Dr. Leslie's plea did not establish those elements and, because the trial court struck the O'Gradys' response to Dr. Leslie's third motion for summary disposition, there was no evidence establishing that Dr. Leslie's conduct proximately caused Kevin J. to suffer damages. On this record, the trial court did not err when it determined that Kevin J. failed to establish an essential element of his stalking claim: namely, that Dr. Leslie's conduct proximately caused him to incur damages.

Kevin J. also argues on appeal that the trial court misapplied the law of exemplary damages by relying on a definition of exemplary damages that arose in the context of actions for libel. We find Kevin J.'s arguments unpersuasive. MCL 600.2954(1) identifies some additional remedies that "may" be available beyond recovery for "damages incurred": "A victim may also seek and be awarded exemplary damages, costs of the action, and reasonable attorney fees in an action brought under this section." By stating that a victim "may seek" and may "be awarded" exemplary damages, costs, and attorney fees, the Legislature authorized a trial court (or fact-finder) to include those in the compensation for stalking, when applicable. The statute does not, however, define exemplary damages and does not delineate the requirements applicable to the recovery for exemplary damages.

Exemplary damages are a class of compensatory damages recoverable under the common law. See *McPeak v McPeak*, 233 Mich App 483, 487; 593 NW2d 180 (1999). Under the common law, such damages are available in only extreme cases involving feelings of humiliation, outrage, and indignity. *Id*. The acts giving rise to exemplary damages must be malicious or so willful and wanton so as to demonstrate a reckless disregard for the plaintiff's rights. *Id*. at 487-488. Exemplary damages are often associated with libel because the Legislature long ago permitted exemplary damages in Michigan's libel statute. See *Peisner v Detroit Free Press, Inc*, 421 Mich 125, 129-130; 364 NW2d 600 (1984), citing MCL 600.2911. Our Supreme Court recognized that exemplary damages were compensatory damages involving feelings that had been aggravated by the defendant's degree of fault:

> It is in connection with the various degrees of blameworthiness chargeable on wrong-doers, that the discussions have arisen upon the subject of vindictive or exemplary damages, which, inasmuch as they rest upon actual fault, are by some authorities said to be designed to punish the wrong intent, while, according to others, the damages usually so called are only meant to recompense the sense of injury which is in human experience always aggravated or lessened in proportion to the degree of perversity exhibited by the offender. While the term exemplary or vindictive damages has become so fixed in the law that it may be difficult to get rid

> of it, yet it should not be allowed to be used so as to mislead, and we think the only proper application of damages beyond those to person, property or reputation, is to make reparation for the injury to the feelings of the person injured. This is often the greatest wrong which can be inflicted, and injured pride or affection may, under some circumstances, justify very heavy damages. [*Id*. at 131 (cleaned up).]

The rule for exemplary damages arose to supply a remedy for mental injury not otherwise recognized because actual damages formerly compensated only for economic losses, not noneconomic loss. See *Veselenak v Smith*, 414 Mich 567, 573; 327 NW2d 261 (1982). But now actual damages include compensation for shame, mortification, mental pain and anxiety. *Id*. at 574. An award of exemplary damages is warranted as part of actual damages for certain intentional torts, such as slander, libel, deceit, seduction, and other intentional and malicious acts. *Id*. at 575; see also *Ray v Detroit*, 67 Mich App 702, 704-705; 242 NW2d 494 (1976). Nevertheless, a jury cannot award exemplary damages to punish the defendant, but must instead award damages to compensate the plaintiff. *Veselenak*, 414 Mich at 573. The compensation, moreover, must not amount to double compensation. *Id*. at 576.

On appeal, Kevin J. argues that the Legislature authorized an award of exemplary damages in every case involving a claim under MCL 600.2954(1) and that stalking necessarily involves exemplary damages. MCL 600.2954(1) does not state that a victim will be awarded damages, including exemplary damages, as a matter of law. Rather, MCL 600.2954(1) authorizes a stalking victim to pursue a civil action "for damages *incurred* by the victim as a result of [the prohibited] conduct" and states that a victim of stalking "*may* . . . be awarded exemplary damages." (Emphasis added).[5] Thus, to establish a genuine issue of material fact that he was entitled to exemplary damages, Kevin J. had the burden to present evidence from which a reasonable juror could find that he suffered feelings of humiliation, outrage, and indignity as result of Dr. Leslie's acts which were malicious or so willful and wanton so as to demonstrate a reckless disregard for the plaintiff's rights. See *Lowrey*, 500 Mich at 8-9; *McPeak*, 233 Mich App at 487-488. But, as the trial court concluded, Kevin J. failed to present any evidence that he suffered humiliation, outrage, or indignity as a result of Dr. Leslie's acts. Indeed, because the trial court struck the O'Gradys' and 81 Development's response, Dr. Leslie's claim that it was undisputed that there was no evidence establishing that his acts proximately caused damage to Kevin J. was uncontested. The trial court did not err when it dismissed Kevin J.'s civil stalking claim.

III. FRIVOLOUS CLAIMS

In Docket No. 364060, the O'Gradys and 81 Development argue that the trial court erred by awarding Dr. Leslie his costs and reasonable attorney fees under MCL 600.2591. We disagree.

[5] In the absence of evidence that the Legislature intended otherwise, the Legislature's reference to exemplary damages presumptively includes the common law applicable to that class of damages. See *Peisner*, 421 Mich at 133.

A. STANDARD OF REVIEW

This Court recently restated the proper standard for reviewing a trial court's decision to award sanctions for filing a frivolous claim:

> This Court reviews a trial court's decision to award sanctions for submitting a frivolous filing for an abuse of discretion. A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. This Court reviews for clear error a trial court's findings underlying its decision to award sanctions. A finding is clearly erroneous when this Court is left with the definite and firm conviction that the trial court has made a mistake. This Court reviews de novo whether the trial court properly interpreted and applied the statutes and court rules. [*Hairston v Josh LKU*, ___ Mich App ___, ___; ___ NW3d ___ (2023) (Docket No. 363030); slip op at 8 (citations omitted).]

A trial court necessarily abuses its discretion when it premises its decision on an error of law. See *Gay v Select Specialty Hosp*, 295 Mich App 284, 292; 813 NW2d 354 (2012).

B. ANALYSIS

As part of tort reform in the 1980s, see 1986 PA 178, the Legislature provided that a trial court must assess costs against the nonprevailing party when it finds that a civil action was frivolous:

> Upon motion of any party, if a court finds that a civil action or defense to a civil action was frivolous, the court that conducts the civil action shall award to the prevailing party the costs and fees incurred by that party in connection with the civil action by assessing the costs and fees against the nonprevailing party and their attorney. [MCL 600.2591(1).]

The Legislature defined the term "frivolous" to include those situations in which the party against whom the costs and fees are assessed had no "reasonable basis to believe that the facts underlying that party's legal position were in fact true," MCL 600.2591(3)(a)(*ii*), or when the "party's legal position was devoid of arguable legal merit," MCL 600.2591(3)(a)(*iii*). A civil action will also be deemed frivolous—even if supported by the facts and the law—if the "party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party." MCL 600.2591(3)(a)(*i*). The "prevailing party" is "a party who wins on the entire record." MCL 600.2591(3)(b).

In considering Dr. Leslie's motion for costs and fees under MCL 600.2591, the trial court noted that the case began as a suit over spray painted graffiti. The court related that the O'Gradys and 81 Development wanted "very large claims" and tried to hold Dr. Leslie liable for the "financial problems" that 81 Development's development had suffered. They also claimed large sums were owed to them as a result of their emotional distress and anguish. These large damage claims, the court stated, were dropped after Dr. Leslie's lawyer began requesting discovery to support the claims. The court also stated that the damage from the spray painting was remedied by the order of restitution, which left "virtually nothing" to seek for compensation. The court agreed that there was arguable merit to the claims but found that the claims were frivolous under

MCL 600.2591. Specifically, it found that "the purpose of the O'Gradys in bringing this action was to punish . . . Dr. Leslie for his behavior—which had already been done through the criminal case, more than adequate." The trial court conceded that the O'Gradys and 81 Development had won a judgment on their trespass claims, but found that Dr. Leslie had won "on the entire record." The court related that there was "no doubt" that Dr. Leslie won given "the record as a whole."

At a subsequent hearing, the trial court reiterated that Dr. Leslie was entitled to his fees "because the primary purpose of the lawsuit was embarrassment and injury to the defendant, by the assertion of damage claims for which there, apparently, was no support whatsoever; and the minute they were questioned, they basically collapsed." The court noted that it took a "tremendous amount of litigation" to get to the point because the O'Gradys and 81 Development "litigated every point." The court opined that its decision came down to "what was recovered and what wasn't" recovered. On the basis of the record, the court found that the litigation was "vindictive, rather than a serious attempt to get recovery for damages."

On appeal, the O'Gradys and 81 Development contend that the trial court erred when it awarded Dr. Leslie his costs and fees under MCL 600.2591 because their claims had factual support and were legally valid. But a claim or defense may be deemed frivolous if it is brought for an improper purpose—namely, if a party brings the claim to "harass, embarrass, or injure the prevailing party." MCL 600.2591(3)(a)(*i*). See *Hairston*, ___ Mich App at ___; slip op at 8 ("Such a filing is also frivolous when it was interposed for an improper purpose, even if the action is otherwise supported by facts and law.").

The trial court found that the O'Gradys and 81 Development brought their claims for an improper purpose, and the record evidence supported that finding. The O'Gradys and 81 Development claimed that Dr. Leslie was liable for millions of dollars in damages because he spray painted graffiti on a sea wall, a roadway, and the signs to a development. The record reflects that the O'Gradys and 81 Development engaged in sanctionable discovery abuses that protracted the litigation. When Dr. Leslie attempted to determine the factual support for the O'Gradys' claims that they each suffered severe emotional distress, the O'Gradys refused to provide evidentiary support and later invited Dr. Leslie to depose them if he wanted to know how they suffered. When Dr. Leslie sought sensitive records, the O'Gradys and 81 Development abruptly abandoned their claims that they previously alleged caused millions of dollars in harm. The totality of the record demonstrates that, even for the claims that had some arguable legal merit, the O'Gradys dramatically overstated the claims. As the trial court aptly noted, the remaining harms amounted to petty damages. On this record, we are not left with the definite and firm conviction that the trial court made a mistake when it found that the O'Gradys and 81 Development brought their claims to "harass, embarrass, or injure" Dr. Leslie within the meaning of MCL 600.2591(3)(a)(*i*). Indeed, we must defer to the trial court's superior ability to judge the credibility of the evidence and persons who appeared before it during this lengthy proceeding. See *Hairston*, ___ Mich App at ___; slip op at 9.

The O'Gradys and 81 Development argue that, even if the trial court did not err as a matter of law when it found that they brought their claims for an improper purpose, the trial court still erred when it awarded Dr. Leslie his costs and fees under MCL 600.2591 because he was not the prevailing party. More specifically, they note that they obtained a judgment against Dr. Leslie on their trespassing claims and, on that basis, they claim that they were the real prevailing parties.

In general, a prevailing party may tax his or her costs. See MCR 2.625(A)(1). The rules for determining a prevailing party are stated in MCR 2.625(B). Additionally, "[i]n an action filed on or after October 1, 1986, if the court finds on motion of a party that an action or defense was frivolous," the trial court must order an award of costs "as provided by MCL 600.2591." MCR 2.625(A)(2). MCL 600.2591(3)(b) defines a "prevailing party" as "a party who wins on the entire record." The statutory definition controls for purposes of assessing costs and fees under MCL 600.2591.

The phrase on the "entire record" instructs the trial court to examine the entire record in the case and determine whether the examination demonstrates that that party won. This is precisely what the trial court did in this case. The trial court recognized that three of the five plaintiffs—Kevin J., Vicki, and 81 Development—had obtained a limited judgment on one claim (trespass), but that on the entire record, Dr. Leslie had won. Dr. Leslie won the dismissal of all the claims by Kevin A. and Kyle. He also won the dismissal of all the claims premised on defamatory communications, intentional infliction of emotional distress, and stalking. Just as a plaintiff need not obtain the full amount of requested damages or prevail on every claim in order to be a prevailing party under MCL 600.2591, see *Van Zanten v H Vander Laan Co, Inc*, 200 Mich App 139, 141; 503 NW2d 713 (1993), a defendant does not have to successfully defend each and every claim in order to be the prevailing party on the entire record. Indeed, a trial court may determine that neither party truly prevailed. See *Kern v Kern-Koskela*, 320 Mich App 212, 247; 905 NW2d 453 (2017).

The record reflects that Dr. Leslie conceded all along that he was liable to 81 Development, Vicki, and Kevin J. for the actual—and quite limited—damages that his actions caused to their property and that he was liable for nominal damages to vindicate their right to exclude him from their property. He, however, vehemently denied that he was liable for any alleged mental anguish, reputational losses, or business losses. And, after years of litigation, he prevailed on every one of those defenses. On this record, we affirm the trial court's determination that Dr. Leslie was the prevailing party within the meaning of MCL 600.2591(3)(b).

We affirm the trial court's award of sanctions under MCL 600.2591.

IV. OFFER OF JUDGMENT

The O'Gradys and 81 Development also claim in Docket No. 364060 that the trial court erred by awarding Dr. Leslie his costs and attorney fees under the offer-of-judgment rule. We disagree.

A. STANDARD OF REVIEW

"We review interpretation of court rules de novo and under the same principles that govern the construction of statutes." *Dawley v Hall*, 501 Mich 166, 169; 905 NW2d 863 (2018) (cleaned up). "[T]he court rule is to be interpreted according to its plain language, giving each word and phrase its common, ordinary meaning." *Id.* (cleaned up). "[W]hen the language of the rule is unambiguous, it must be enforced as written." *Micheli v Mich Auto Ins Placement Facility*, 340 Mich App 360, 367; 986 NW2d 451 (2022) (cleaned up).

B. ANALYSIS

"Generally, attorney fees are not recoverable as an element of costs or damages unless expressly allowed by statute, court rule, common-law exception, or contract." *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 297; 769 NW2d 234 (2009). Under MCR 2.405(D), however, a trial court must order the party who rejected an offer of judgment to pay the other party's reasonable attorney fees if the offeror obtained a verdict that was more favorable than the average offer—unless the court determines that it is in the interests of justice to refuse the award. This is known as the offer-of-judgment rule. See *Simcor Constr, Inc v Trupp*, 322 Mich App 508, 514; 912 NW2d 216 (2018). The purpose of the rule is to encourage the parties to settle their disputes and prevent protracted litigation. *Id*. at 514-515.

An "offer" is "a written notification to an adverse party of the offeror's willingness to stipulate to the entry of a judgment in a sum certain, which is deemed to include all costs and interest then accrued." MCR 2.405(A)(1). "If a party has made more than one offer, the most recent offer controls for the purposes of this rule." *Id*.

In November 2020, the lawyer for Dr. Leslie sent a letter and group of documents to counsel for the O'Gradys and 81 Development. The documents included five separate offers of judgment—one for each plaintiff. Each offer of judgment contained an offer "to stipulate to the entry of a judgment in a sum certain[.]" Each offer also specifically stated that it was being made "pursuant to MCR 2.405." These documents were not ambiguous and were plainly intended as offers under MCR 2.405. None of the offers contained any conditions or limitations, which might have justified treating the offers as a disguised offer to stipulate to the dismissal of the case. See *id*. at 299-300. Accordingly, the documents were offers within the meaning of MCR 2.405(A)(1).

In January 2022, defense counsel sent the lawyer for the O'Gradys and 81 Development another letter. This letter provided:

> Dear Mr. Morgan:
>
> Before all parties commit to further resources and attorney fees on this matter, Defendant Leslie has authorized me to present the following resolution of the pending action.
>
> If Plaintiffs Mr. & Mrs. O'Grady and The 81 Development Co LLC were to immediately submit a voluntary dismissal, with prejudice, pursuant to MCR 2.504(A), Defendant Leslie would stipulate to same. Thereafter, and not before, all parties would execute the attached Mutual Release of Claims. As a consideration of the mutual release, Defendant Leslie would forego recoupment of his actual costs, i.e. costs and fees taxable in a civil action and a reasonable attorney fee for services necessitated by Kevin A. O'Grady, Kyle O'Grady, and The 81's failure to stipulate to the respective offers of judgment presented by Defendant Leslie in November 2020.
>
> Because of the existing deadlines within the Court's pre-trial order, this means of resolution must be acted upon immediately by Plaintiffs. Without immediate entry of a voluntary dismissal, it will be necessary for me to undertake drafting of another

> motion for summary disposition and several motions in limine to ensure they are filed and heard in compliance with the Court's order. Thereafter, the attorneys must also work together to ensue all other requirements of the Court's pretrial order have been addressed. From past experience, I can assure you that Judge Power will look to you, as Plaintiffs' counsel, that these measures are fully addressed.
>
> I look forward to Plaintiffs' immediate response, which should not be any later than 5:00 p.m. tomorrow.

The O'Gradys and 81 Development argue that the January 2022 letter controls. This letter was not an offer of judgment within the meaning of MCR 2.405(A)(1). An offer to settle a case is not the same as an offer of judgment under MCR 2.405. See *Marilyn Froling Revocable Living Trust*, 283 Mich App at 298. An offer to settle does not necessarily result in a judgment, which is a prerequisite under the rule; it may result in a stipulated order of dismissal. *Id*. An offer of judgment—unlike a settlement process—is a unilateral attempt to conclude the litigation without arm's-length negotiations. *Id*. An offer of judgment functions as a full and final adjudication on the merits. *Id*. at 299. Even if a party couches an offer as an offer of judgment under the court rule, courts will not treat it as an offer of judgment if the offer contains conditions that render it less than a complete judgment; courts will instead treat the offer as a disguised attempt to enter a stipulated order of dismissal. *Id*. at 300.

Dr. Leslie's lawyer plainly stated that the proposed deal required Kevin J., Vicki, and 81 Development to immediately submit an order stipulating to the dismissal of their claims with prejudice. Dr. Leslie agreed to stipulate to entry of that order. By its plain terms, Dr. Leslie was not offering to stipulate to entry of a judgment; he offered to stipulate to entry of an order of dismissal by Kevin J., Vicki, and 81 Development. A stipulated dismissal is different than an offer to stipulate to a judgment. See *Marilyn Froling Revocable Living Trust*, 283 Mich App at 298-300.

The January 2022 letter also contained terms and conditions that demonstrated that the proposal amounted to an offer to settle the case. Dr. Leslie's lawyer offered the O'Gradys and 81 Development valuable consideration for entry of the stipulated order and a mutual release: he stated that, if his conditions were met, then he would not pursue entry of an order for payment of his attorney fees by Kevin A., Kyle, and 81 Development under the offer of judgment that they had already rejected and for which he was entitled to fees as a matter of law. Dr. Leslie's lawyer also put a time limit on the proposal. These terms established beyond reasonable dispute that Dr. Leslie did not make an offer of judgment under MCR 2.405.

The trial court did not err when it concluded that the only applicable offers of judgment were the offers of judgment that Dr. Leslie made in November 2020, and which the O'Gradys and 81 Development rejected. Because the O'Gradys and 81 Development have not raised any claim of error as to the amount of offer-of-judgment sanctions awarded by the trial court or raised it as an issue in their statement of questions presented, they have waived any argument as to the amount of sanctions awarded. See *Berger*, 277 Mich App at 712; *Seifeddine*, 327 Mich App at 521. We affirm the trial court's award of offer-of-judgment sanctions.

V. CROSS-APPEAL IN DOCKET NO. 362684

"Whether a case is moot is a threshold question that we address before reaching the substantive issues of a case." *Gleason v Kincaid*, 323 Mich App 308, 314; 917 NW2d 685 (2018). A claim of error is moot when a subsequent event has rendered it impossible for the appellate court to fashion a remedy. See *Garrett v Washington*, 314 Mich App 436, 450; 886 NW2d 762 (2016). Because reviewing a moot issue would ordinarily be a purposeless proceeding, this Court will generally dismiss a moot claim without reaching the merits. *Gleason*, 323 Mich App at 315. Given our resolution of the other claims of error, we decline to address Dr. Leslie's cross-appeal as moot. See *id*.

VI. CONCLUSION

The O'Gradys and 81 Development have not identified any errors in the trial court's order granting Dr. Leslie's third motion for summary disposition. They have also failed to identify any errors in the trial court's order awarding Dr. Leslie his costs and attorney fees under MCL 600.2591 and MCR 2.405(D). For these reasons, we affirm in both dockets.

Affirmed. As the prevailing party, Dr. Leslie may tax his costs. See MCR 7.219(A).

/s/ Sima G. Patel
/s/ Christopher P. Yates
/s/ Douglas B. Shapiro