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STATE OF MICHIGAN

COURT OF APPEALS

BARRY D. TOORNMAN and HEIDI E. TOORNMAN,

Plaintiffs-Appellants,

v

DUANE BURNHAM, MARJORIE BURNHAM, PPWM, LLC, doing business as BERKSHIRE HATHAWAY HOMESERVICES MICHIGAN REAL ESTATE, and MARJORIE BURNHAM, as agent for PPWM, LLC,

Defendants-Appellees.

UNPUBLISHED
November 24, 2020

Nos. 350864; 350982
Kalamazoo Circuit Court
LC No. 2018-000346-CK

Before: SAWYER, P.J., and M. J. KELLY and SWARTZLE, JJ.

PER CURIAM.

In Docket No. 350982, plaintiffs appeal by delayed leave granted[1] the trial court's orders granting summary disposition under MCR 2.116(C)(8) and (10) in favor of defendants Marjorie Burnham and Duane Burnham (the Burnhams), PPWM, LLC, doing business as Berkshire Hathaway Homeservices Michigan Real Estate, and Marjorie Burnham as an agent for Berkshire Hathaway (the Real Estate Defendants). In Docket No. 350864, plaintiffs also appeal as of right the trial court's order granting defendants' motions for actual costs and attorney fees. We reverse and remand.

This case arose from a real estate transaction between plaintiffs and the Burnhams. Marjorie was a licensed real-estate agent of Berkshire Hathaway and acted as the listing agent for the sale of the single-family residence (the Property) located on West Indian Lake Drive in Vicksburg, Michigan. The Burnhams listed the Property for sale and provided a seller's disclosure statement regarding the condition of the Property. The Burnhams indicated in the seller's

[1] *Toornman v Burnham*, unpublished order of the Court of Appeals, entered February 14, 2020 (Docket No. 350982).

disclosure statement that there were no encroachments, easements, zoning violations, or nonconforming uses of the Property. At about the time that the Burnhams listed the Property for sale, the Burnhams and Kalamazoo County Road Commission (KCRC) representatives discussed issues related to West Indian Lake Drive.

In September 2017, the Burnhams accepted plaintiffs offer to purchase the Property. The purchase agreement provided that the Burnhams and the Real Estate Defendants did not warrant the boundaries or condition of the Property.

In October 2017, the KCRC executed a license agreement with the Burnhams. The license agreement provided that there were improvements on the Property that encroached on the public road, including retaining walls, a storage shed, and a paved parking area (Encroachments). The KCRC authorized that the Encroachments could continue, but the KCRC had the option to require the Burnhams to remove the Encroachments.

At the end of October 2017, plaintiffs and the Burnhams completed a closing, and the Burnhams conveyed title to the Property to plaintiffs. The Burnhams executed a closing affidavit in which they provided that they had no knowledge of unrecorded easements or claims of easement, boundary disputes, or improvements on the Property that encroached on boundary lines. Plaintiffs executed a closing agreement that provided that all contingencies had been met or resolved and removed; plaintiffs purchased the Property "as is"; and defendants did not warrant the condition of the Property.

Thereafter, plaintiffs filed fraud claims against defendants.[2] Defendants moved for summary disposition pursuant to MCR 2.116(C)(8) and (10). The trial court found that plaintiffs had the opportunity to obtain a survey of the Property but that plaintiffs declined to have a survey. The trial court also determined that the Burnhams did not make the representations in the seller's disclosure statement with the intent that plaintiffs would act on the representations because the seller's disclosure statement provided that the Burnhams did not warrant the condition of the Property. The trial court also found that plaintiffs acknowledged in the purchase agreement and the closing agreement that they purchased the Property in "as is" condition. Additionally, the trial court found that the plain language of the closing agreement provided that all contingencies had been met or were resolved and removed. The trial court determined that, even if plaintiffs established the elements of a fraudulent misrepresentation claim, plaintiffs released all contingencies and took the Property "as is." Regarding the Real Estate Defendants, the trial court

[2] We note that plaintiffs alleged in their complaint claims of "intentional misrepresentation/fraud." To determine the nature of a claim, courts must look beyond the labels or names given by the parties and evaluate the complaint as a whole and the substance of the pleadings. *Jahnke v Allen*, 308 Mich App 472, 475; 865 NW2d 49 (2014). Although plaintiffs did not address whether they brought a claim of fraudulent misrepresentation, silent fraud, or innocent misrepresentation, we conclude, on the basis of reading the complaint as a whole, that plaintiffs sufficiently pleaded facts to support each of these claims. See *Roberts v Saffell*, 280 Mich App 397, 403-405, 414; 760 NW2d 715 (2008).

determined that the Real Estate Defendants did not make any representations or false representations to plaintiffs and that the Real Estate Defendants could not be liable to plaintiffs for fraud. The trial court granted defendants' motions for summary disposition regarding plaintiff's fraud claims pursuant to MCR 2.116(C)(8) and (10).[3]

Defendants subsequently moved the trial court for actual costs pursuant to MCR 2.405(D) on the basis of plaintiffs' rejection of their offers to stipulate to entry of judgment in plaintiffs' favor. The trial court indicated that defendants were the prevailing parties and that they did not engage in fraudulent conduct. The trial court found that the adjusted verdicts were more favorable to defendants than the average offers of judgment. The trial court awarded defendants actual costs and attorney fees. Plaintiffs now appeal.

Plaintiffs argue that the trial court erroneously granted defendants summary disposition when the Burnhams provided false representations regarding the condition of the Property. We agree.

This Court reviews de novo a trial court's decision whether to grant a motion for summary disposition. See *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009). This Court also reviews de novo whether the trial court properly selected, interpreted, and applied the court rules applicable to the motion for summary disposition. See *Brecht v Hendry*, 297 Mich App 732, 736; 825 NW2d 110 (2012).

A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of a claim and may be granted when there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 206; 815 NW2d 412 (2012). In reviewing such a motion, a court considers the pleadings, affidavits, depositions, admissions, and documentary evidence in a light most favorable to the nonmoving party. *Id*. "A genuine issue of material fact exists when the record leaves open an issue on which reasonable minds could differ." *Bennett v Detroit Police Chief*, 274 Mich App 307, 317; 732 NW2d 164 (2006). The moving party "must specifically identify the issues as to which the moving party believes there is no genuine issue as to any material fact." MCR 2.116(G)(3)(b), (4). A trial court may not weigh the evidence, make findings of fact, or make credibility determinations when deciding a motion for summary disposition. *Patrick v Turkelson*, 322 Mich App 595, 605; 913 NW2d 369 (2018). If there is conflicting evidence before the trial court, summary disposition is not proper. *Id*. at 605-606.

As a threshold issue, defendants argue that plaintiffs' fraud claim was based only on the Burnhams' representations in the seller's disclosure statement because plaintiffs acknowledged that they did not review or rely on the closing affidavit before the closing, and plaintiffs acknowledged that they only relied on the representations in the seller's disclosure statement when

[3] We treat defendants' motions as having been decided under MCR 2.116(C)(10) because the trial court considered material outside the pleadings to dismiss the case. See *Jawad A Shah, MD, PC v State Farm Mut Auto Ins Co*, 324 Mich App 182, 207; 920 NW2d 148 (2018).

they purchased the Property. We agree and limit our discussion of plaintiffs' fraud claims to the representations in the seller's disclosure statement.

The Seller Disclosure Act (SDA), MCL 565.951 *et seq*., applies to "the transfer of any interest in real estate consisting of not less than 1 or more than 4 residential dwelling units . . . ." MCL 565.952. MCL 565.954(1) provides that "[t]he transferor of any real property in [MCL 565.952] shall deliver to the transferor's agent or to the prospective transferee or the transferee's agent the written statement required by this act." The SDA requires a transferor to honestly disclose and to disclose in good faith information known to the transferor at the time the seller's disclosure statement is completed. See MCL 565.956; MCL 565.957; MCL 565.960; *Roberts v Saffell*, 280 Mich App 397, 413; 760 NW2d 715 (2008). Regarding liability for an error in the seller's disclosure statement,

> The transferor or his or her agent is not liable for any error, inaccuracy, or omission in any information delivered pursuant to this act if the error, inaccuracy, or omission was not within the personal knowledge of the transferor, or was based entirely on information provided by public agencies or provided by other persons specified in subsection (3), and ordinary care was exercised in transmitting the information. It is not a violation of this act if the transferor fails to disclose information that could be obtained only through inspection or observation of inaccessible portions of real estate or could be discovered only by a person with expertise in a science or trade beyond the knowledge of the transferor. [MCL 565.955(1).]

Additionally, a transferor is not liable for information that becomes inaccurate after the delivery of the required disclosures. MCL 565.956. However, the SDA "does not limit or abridge any obligation for disclosure created by any other provision of law regarding fraud, misrepresentation, or deceit in transfer transactions." MCL 565.961. Regarding the liability of the seller's agent under the SDA, "[a]n agent of a transferor shall not be liable for any violation of this act by a transferor unless any agent knowingly acts in concert with a transferor to violate this act." MCL 565.965.

Generally, " 'a land vendor who surrenders title, possession, and control of property shifts all responsibility for the land's condition to the purchaser.' " *Roberts*, 280 Mich App at 402 (citation omitted). However, there are fraud theories that are exceptions to the common-law rule of *caveat emptor*[4] in real estate transactions: (1) fraudulent misrepresentation, or common-law fraud; (2) silent fraud, or fraudulent concealment; and (3) innocent misrepresentation. *Id*. at 403. To establish a claim for fraudulent misrepresentation, a plaintiff must prove:

> (1) the defendant made a material representation; (2) the representation was false; (3) when the representation was made, the defendant knew that it was false, or made it recklessly, without knowledge of its truth, and as a positive assertion; (4) the defendant made it with the intention that the plaintiff should act upon it; (5) the

[4] Latin for "let the buyer beware." *Black's Law Dictionary* (9th ed).

> plaintiff acted in reliance upon the representation; and (6) the plaintiff thereby suffered injury. [*Id*.]

In other words, "the plaintiff must establish that the defendant knowingly or recklessly misrepresented a material fact with the intent that the other party rely on it." *Id*. at 404-405. A party's reliance must be reasonable. *Bergen v Baker*, 264 Mich App 376, 389; 691 NW2d 770 (2004).

A silent fraud claim requires more than a failure to disclose a hidden defect. *Roberts*, 280 Mich App at 404. "[A] plaintiff must show some type of representation by words or actions that was false or misleading and was intended to deceive." *Id*. The plaintiff must also show that the seller had a legal or equitable duty to disclose the information. *Id*. The SDA creates a duty for a seller to complete the seller's disclosure statement with the information available and actually known by the seller regarding the condition of the property. *Id*. at 409-410; MCL 565.954(1); MCL 565.957. Additionally, "a duty of disclosure may be imposed on a seller's agent to disclose newly acquired information that is recognized by the agent as rendering a prior affirmative statement untrue or misleading." *Alfieri v Bertorelli*, 295 Mich App 189, 194; 813 NW2d 772 (2012). Therefore, a seller may be liable for fraud or silent fraud if a plaintiff proves the elements of those claims, including that the seller had personal knowledge of an item on the seller's disclosure statement but failed to exercise good faith and failed to disclose that information. See *Roberts*, 280 Mich App at 414; MCL 565.960.

" 'A claim of innocent misrepresentation is shown where a party detrimentally relies on a false representation in such a manner that the injury inures to the benefit of the party making the misrepresentation.' " *Id*. at 404 (citation omitted). Unlike a fraudulent misrepresentation or a silent fraud claim, a plaintiff need not prove that the party making the representation had knowledge that it was false or that the party making the representation intended to deceive the plaintiff into relying on the representation. *Id*. at 405. A seller cannot be liable for innocent misrepresentation under the SDA for an error, inaccuracy, or omission in a seller's disclosure statement because liability for an innocent misrepresentation may be imposed without regard to whether the party making the representation knew it was false or was acting in good faith, whereas MCL 565.955(1) precludes imposition of liability on a seller who lacks personal knowledge regarding a representation on a seller's disclosure statement. *Id*. at 414.

Regarding plaintiffs' fraudulent misrepresentation claim, plaintiffs demonstrated a question of fact whether the Burnhams made a material misrepresentation in the seller's disclosure statement regarding the rights to the Property. The Burnhams indicated that there were no encroachments, easements, zoning violations, or nonconforming uses of the Property. Although the Burnhams did not sign the license agreement until October 2017, which established that portions of the improvements on the Property encroached on the KCRC's right of way, it appears that the KCRC mailed the Burnhams the license agreement in July 2017. Whether the Burnhams knew that the Property encroached on West Indian Lake Drive before they executed the seller's disclosure statement created a question of fact—if the Burnhams received notice of the Encroachments before they executed the seller's disclosure statement, then the Burnhams' material representation that they had no knowledge of any encroachments related to the Property was false. See *id*. at 403.

Regarding plaintiffs' reliance on the seller's disclosure statement, the Burnhams provided an affirmative statement that there were no encroachments of the Property. Notwithstanding that the seller's disclosure statement was not a warranty regarding the condition of the Property, the Burnhams' failure to disclose knowledge that they had about the Property's boundaries and the right of way is circumstantial evidence that the Burnhams intended that plaintiffs would rely on the seller's disclosure statement and make an offer to purchase the Property. See *Bergen* 264 Mich App at 387 (explaining that circumstantial evidence can be used to prove a party's state of mind or intent). Additionally, Heidi testified that she relied on the seller's disclosure statement at the closing. And plaintiffs testified that they would not have purchased the Property without additional negotiations had they known of the Encroachments, which supports that plaintiffs relied on the Burnhams' representation when they decided to purchase the Property. Therefore, plaintiffs demonstrated a question of fact whether the Burnhams intended that plaintiffs would rely on the representation in the seller's disclosure statement regarding the Encroachments and that plaintiffs in fact relied on the representations when they purchased the Property. See *id*.

Plaintiffs reliance on the Burnhams' representations in the seller's disclosure statement was reasonable. Plaintiffs did not have any information to the contrary of the Burnhams' representations. Plaintiffs alleged that they did not have notice of the Encroachments or the license agreement until after the closing and after they purchased the Property. The inspection of the residence did not reveal the Encroachments and boundary issues, and there was no indication that the Encroachments over the road were apparent on the basis of a casual inspection of the Property without a survey. Although Barry was aware that the KCRC intended to replace the road on the basis of his review of the listings, there was no indication that plaintiffs had notice that the Property encroached on the right of way. Therefore, plaintiffs established a question of fact whether they reasonably relied on the seller's disclosure statement. See *id*. at 289-290.

Arguably, plaintiffs did not allege an injury involving the Encroachments because plaintiffs were not parties to the license agreement, and the KCRC had not requested plaintiffs to remove the Encroachments. However, plaintiffs testified that they would not have purchased the Property without additional negotiations. Therefore, plaintiffs presented a question of fact whether they could have purchased the Property for a lower price or negotiated other terms for the purchase of the Property, which could support plaintiffs' injury for the Burnhams' misrepresentation regarding the Encroachments. See *Roberts*, 280 Mich App at 403. Plaintiffs alleged sufficient facts to support each element of their fraudulent misrepresentation claim. See *id*.

Regarding plaintiffs' silent fraud claim, plaintiffs demonstrated a question of fact whether the Burnhams made a false representation in the seller's disclosure statement and the closing affidavit regarding the rights to the Property. The Burnhams indicated that there were no encroachments, easements, zoning violations, or nonconforming uses of the Property, but there were facts alleged that the Burnhams were aware of the Encroachments in July 2017. Construing the facts in a light most favorable to plaintiffs, the Burnhams suppressed that the Property encroached on the KCRC's right of way when the Burnhams were obligated to disclose any encroachments involving the Property and when the Burnhams had knowledge that the KCRC was concerned about the Encroachments and intended to reconstruct the road where the Encroachments were located. See *id*. at 404, 414; MCL 565.954(1); MCL 565.957. Additionally, the Burnhams' failure to disclose knowledge that they had about the Property's boundaries and the right of way

could support that the Burnhams' disclosures were made in bad faith, which demonstrated an intent to deceive plaintiffs. See *Roberts*, 280 Mich App at 404, 414; MCL 565.960.

Regarding a claim of innocent misrepresentation, the SDA precludes liability because the Burnhams had personal knowledge regarding a false representation on the seller's disclosure statement that there were no encroachments involving the Property. See MCL 565.955(1); *Roberts*, 280 Mich App at 414.

Generally, a plaintiff cannot maintain their claim of fraud if the plaintiff had the means to determine the truth of the matter. *Alfieri*, 295 Mich App at 194-195. However, this rule applies when the plaintiff was " 'either presented with the information and chose to ignore it or had some other indication that further inquiry was needed.' " *Id*. at 195. (citation omitted). A plaintiff does not have a duty to investigate whether a representation is false. *Titan Ins Co v Hyten*, 491 Mich 547, 555 n 4; 817 NW2d 562 (2012). Additionally, "as is" clauses allocate the risk of loss arising from conditions unknown to the parties. *Lorenzo v Noel*, 206 Mich App 682, 687; 522 NW2d 724 (1994). An "as is" clause also transfers the risk of loss from the seller to the buyer when a defect should have reasonably been discovered through an inspection of the property but was not discovered. *Id*. However, an "as is" clause does not transfer the risk of loss to a buyer when " 'a seller makes fraudulent representations before a purchaser signs a binding agreement.' " *Id*. (citation omitted).

Plaintiffs had means to discover the Encroachments by obtaining a survey of the Property. However, plaintiffs did not have a duty to investigate whether there were any encroachments involving the Property or whether the Burnhams' representations in the seller's disclosure statement were false. See *Titan*, 491 Mich at 555 n 4. Considering the facts in a light most favorable to plaintiffs, they did not have any information or indication that there was a dispute regarding the Property boundaries or that the Property encroached on the KCRC's right of way, which would put plaintiffs on notice that further inquiry was needed. See *Alfieri*, 295 Mich App at 195. Additionally, because the Burnhams made the false representation in the seller's disclosure statement that there were no encroachments involving the Property before plaintiffs signed the purchase agreement, the "as is" clauses in the purchase agreement and the closing agreement did not bar plaintiffs' fraud claims. See *Lorenzo*, 206 Mich App at 687. Therefore, we conclude that the trial court erred by granting the Burnhams' motion for summary disposition because there were genuine issues of material fact regarding plaintiffs' fraud claims and because the "as is" clauses did not preclude plaintiffs' claims. See *Joseph*, 491 Mich at 206.

Regarding plaintiffs' fraudulent misrepresentation and innocent misrepresentation claims against the Real Estate Defendants, plaintiffs did not demonstrate a question of fact whether the Real Estate Defendants made a material misrepresentation in the seller's disclosure statement regarding the rights to the Property. The seller's disclosure statement provided that "[t]he following are representations made solely by the seller and are not the representations of the seller's agent(s), if any." The Real Estate Defendants did not sign the document; Marjorie executed the seller's disclosure statement in her role as the seller, rather than in her capacity as the seller's agent. Plaintiffs affirmed in the purchase agreement and the closing agreement that the Real Estate Defendants did not make any representations other than those provided in the purchase agreement or warrant the condition or boundaries of the Property. Therefore, the Real Estate Defendants did not make any representations in the seller's disclosure statement. Plaintiffs did not

establish that the Real Estate Defendants made a material representation or misrepresentation regarding any encroachments on the Property or any boundary issues. See *Roberts*, 280 Mich App at 403. Plaintiffs did not allege sufficient facts to support the elements of their fraudulent misrepresentation and innocent misrepresentation claims against the Real Estate Defendants. See *id*. at 403-404.

Regarding plaintiffs' silent fraud claim against the Real Estate Defendants, plaintiffs demonstrated a question of fact whether the Real Estate Defendants failed to disclose information that rendered the seller's disclosure statement untrue or misleading. The Real Estate Defendants had a duty "to disclose newly acquired information that is recognized by the agent as rendering a prior affirmative statement untrue or misleading." *Alfieri*, 295 Mich App at 194. In the seller's disclosure statement, the Burnhams indicated that there were no encroachments, easements, zoning violations, or nonconforming uses of the Property. However, in October 2017, the Burnhams executed the license agreement. The license agreement rendered untrue the provision in the seller's disclosure statement that there were no encroachments involving the Property. Although plaintiffs did not express a particularized concern regarding the boundaries of the Property, the Real Estate Defendants had a duty to plaintiffs to disclose the Encroachments because Marjorie in her role as the seller's agent was aware that her previous statement as the seller in the seller's disclosure statement was untrue or misleading. Construing the facts in a light most favorable to plaintiffs, the Real Estate Defendants suppressed that the Property encroached on the KCRC's right of way when the Real Estate Defendants had a duty to disclose information that rendered the seller's disclosure statement untrue or misleading. See *id*. Additionally, the Real Estate Defendants' failure to disclose the information regarding the Encroachments and the license agreement could support that the Real Estate Defendants acted in bad faith, which demonstrated an intent to deceive plaintiffs, and represented that there were no encroachment or boundary issues so that plaintiffs would purchase the Property. See *id*.

Plaintiffs did not release their claims against the Real Estate Defendants. Plaintiffs acknowledged by signing the seller's disclosure statement that the Real Estate Defendants did not assume responsibility for the Burnhams' representations and that the Real Estate Defendants did not make any representations or promises to plaintiffs. Plaintiffs agreed pursuant to the purchase agreement that the Real Estate Defendants did not warrant the Property boundaries, did not assume responsibility for the representations made by the Burnhams, and did not make any representations or promises to plaintiffs other than those contained in the purchase agreement. Plaintiffs also agreed that they accepted the location of the property boundaries and improvements "as is" by closing on the Property; all contingencies and addendums to the purchase agreement had been met or removed; and the Real Estate Defendants did not make any warranties regarding the condition of the Property. However, these statements and agreements by plaintiffs did not constitute a waiver or release of their claims against the Real Estate Defendants. See *Rinke v Auto Moulding Co*, 226 Mich App 432, 435; 573 NW2d 344 (1997) (explaining that a plaintiff's claim can be barred by a release and that the scope of the release is ascertained by the intent of the parties as it is expressed in the release).

On the basis of the plain language of the seller's disclosure statement, purchase agreement, and closing agreement, plaintiffs did not release the Real Estate Defendants from any claims or agree that their acceptance of the Property "as is" disclaimed the Real Estate Defendants from liability. Cf. *id*. These provisions supported that the Real Estate Defendants did not make any

representations or warrant the condition of the Property but did not waive or release plaintiffs' claims against the Real Estate Defendants. See *id*. Additionally, because plaintiffs alleged that the Real Estate Defendants misrepresented the condition of the Property by failing to disclose information regarding the Encroachments, the "as is" clauses in the purchase agreement and the closing agreement did not bar plaintiffs' fraud claims against the Real Estate Defendants. See *Lorenzo*, 206 Mich App at 687. Therefore, the trial court erred by granting the Real Estate Defendants' motion for summary disposition because there were genuine issues of material fact regarding plaintiffs' silent fraud claim and because the "as is" clauses did not preclude plaintiffs' claims. See *Joseph*, 491 Mich at 206.

In sum, there was a genuine issue of material fact whether the Burnhams provided false representations regarding the Encroachments and the boundaries of the Property, which supported plaintiffs' fraud claims against the Burnhams. Although plaintiffs did not sufficiently allege that the Real Estate Defendants made a false representation to support their fraudulent misrepresentation and innocent misrepresentation claims, there was a genuine issue of material fact regarding whether the Real Estate Defendants suppressed that the Property encroached on the KCRC's right of way when the Real Estate Defendants had a duty to disclose that information, which supported plaintiffs' silent fraud claim against the Real Estate Defendants. Plaintiffs did not have a duty to investigate whether there were any encroachments involving the Property or whether the Burnhams' representations in the seller's disclosure statement were false, and the "as is" clauses did not preclude plaintiffs' claims. Therefore, we conclude that the trial court improperly granted the Burnhams and Real Estate Defendants summary disposition. See *Joseph*, 491 Mich at 206.

Plaintiffs also argue that the trial court erroneously granted defendants' motions for actual costs and attorney fees. Because we conclude that the trial court improperly granted defendants' motions for summary disposition, we agree that the award of actual costs was also improper.

This Court reviews de novo the interpretation and application of the offer-of-judgment rule pursuant to MCR 2.405(D). *Simcor Constr, Inc v Trupp*, 322 Mich App 508, 514; 912 NW2d 216 (2018). This Court reviews for an abuse of discretion a trial court's decision to award sanctions under MCR 2.405(D) and a trial court's decision whether to invoke the interest-of-justice exception. *Id*. "An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes." *Id*. (quotation marks and citation omitted).

Until 28 days before trial, a party may serve on his opponent a written offer to stipulate to the entry of a judgment. MCR 2.405(B); see also *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 297; 769 NW2d 234. Under MCR 2.405(D), a trial court may impose costs for a party's rejection of an offer to stipulate to entry of judgment. MCR 2.405 provides, in relevant part:

> If an offer is rejected, costs are payable as follows:
>
> (1) If the adjusted verdict 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.

"The purpose of MCR 2.405 is 'to encourage settlement and to deter protracted litigation.' " *Luidens v 63rd Dist Court*, 219 Mich App 24, 31; 555 NW2d 709 (1996) (citation omitted); see also *Marilyn Froling Revocable Living Trust*, 283 Mich App at 297.

The award of actual costs under MCR 2.405(D) requires a verdict, meaning a jury verdict, a judgment by the trial court after a bench trial, or a judgment entered as a result of a ruling on a motion. MCR 2.405(A)(4). In this case, the verdict was the result of the trial court's judgment after granting defendants summary disposition. Our conclusion that the trial court erroneously granted defendants' motions for summary disposition means that there is no verdict on which the trial court could award actual costs. Therefore, the trial court's award of actual costs under MCR 2.405(D) must also be reversed.

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

/s/ David H. Sawyer
/s/ Michael J. Kelly
/s/ Brock A. Swartzle