STATE OF MICHIGAN

COURT OF APPEALS

KIM T. CAPELLO and JODI A. CAPELLO,

Plaintiffs-Appellants,

v

KEVIN WALTON and MELISSA WALTON,

Defendants-Appellees.

UNPUBLISHED
December 7, 2023

No. 364006
Oakland Circuit Court
LC No. 2021-190542-CH

Before: BOONSTRA, P.J., and GADOLA and MALDONADO, JJ.

PER CURIAM.

In this breach of contract action arising from the failed sale of plaintiffs' house, the trial court granted summary disposition in favor of defendants pursuant to MCR 2.116(C)(7) (release), (8) (failure to state a claim), and (10) (no genuine issue of material fact).[1] Plaintiffs appeal by right the trial court's order granting sanctions pursuant to MCR 2.405(D), also known as the offer of judgment rule. Because the trial court failed to address plaintiffs' argument that the interest-of-justice exception to the offer of judgment rule should bar recovery of attorney fees, we must vacate the court's order and remand for additional proceedings.

I. BACKGROUND

Kevin Walton, with his wife Melissa Walton acting as his agent, entered into a contract to purchase plaintiffs' house for $680,000. However, after the purchase agreement was executed but before the sale closed, Kevin Walton's brother was struck by a drunk driver and killed. Because Kevin Walton's brother was predeceased by his wife, defendants were suddenly entrusted with the care of their two minor nieces, one of whom had serious medical problems and also passed away during the pendency of this litigation. As a result of this sudden upheaval, defendants decided that

[1] In a separate appeal, plaintiffs' delayed application for leave to appeal the order granting summary disposition was denied. *Capello v Walton*, unpublished order or the Court of Appeals, entered June 28, 2023 (Docket No. 364509).

it was not the right time in their lives to purchase this house. Two days after Kevin Walton announced his intent to breach and prior to relisting the house for sale, plaintiffs sued for breach of contract and fraud. The house subsequently sold for $703,000, and Kevin and Melissa Walton tendered separate offers of judgment for $821.71 and $1, respectively. This offer was declined, and the court ultimately granted summary disposition in favor of defendants. With respect to Melissa, the court concluded that the purchase agreement released her, as the buyer's agent, from any liability arising from failure to close the sale. With respect to both defendants, the court concluded the plaintiffs failed to establish damages. Defendants moved for offer-of-judgment sanctions, and the court ordered defendants to pay $28,281.25 in attorney fees as well as $61.80 in costs.

II. DISCUSSION

A. STANDARDS OF REVIEW

"In general, the interpretation and application of the offer-of-judgment rule is reviewed de novo." *AFP Specialties, Inc v Vereyken*, 303 Mich App 497, 516; 844 NW2d 470 (2014). However, the trial court's decision regarding whether to apply the interest-of-justice exception as a basis for refusing an award of attorney fees is reviewed for abuse of discretion. *Id*. "An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes." *Id*. at 517 (quotation marks and citation omitted). Any factual findings "underlying an award of attorney fees are reviewed for clear error. A finding of the trial court is clearly erroneous when, although there is evidence to support it, this Court is left with a definite and firm conviction that a mistake was made." *Id*. at 516.

B. INTEREST-OF-JUSTICE EXCEPTION

Plaintiffs argue that the trial court erred by failing to address their argument that the interest-of-justice exception barred recovery of attorney fees. We agree.

Pursuant to MCR 2.405(B), a party may "offer to stipulate to the entry of a judgment for the whole or part of the claim, including interest and costs then accrued." The offering party may recover "actual costs incurred in the prosecution or defense of the action" if the offer is rejected and the offering party obtains a verdict more favorable than the offer. MCR 2.405(D)(1). MCR 2.405(D)(3)(*i*) confers limited discretion upon the court to deny attorney fees "in the interest of justice" in "cases involving offers that are token or de minimis in the context of the case . . . ." In its order granting offer-of-judgment sanctions, the trial court failed to acknowledge the existence of this exception despite it having been raised by plaintiffs.

In *Simcor Constr, Inc v Trupp*, 322 Mich App 508, 512; 912 NW2d 216 (2018), the plaintiff rejected an offer of judgment then saw their case wholly dismissed by an arbitrator. The defendant's motion for offer-of-judgment sanctions was denied, however, because the district court mistakenly believed that an arbitrator's decision is not a "verdict" for the purposes of MCR 2.405. *Id*. at 513-514. This Court concluded that, despite the district court's error, it could not impose offer-of-judgment sanctions because the district court never addressed that issue:

> The district court's order does not address this exception. A court speaks through its written orders and judgments, not through its oral pronouncements. Because the district court did not reach the issue of whether the 'interest of justice' exception applies in its order, we cannot determine whether the exception in MCR 2.405(D)(3) applies to the facts of this case. For that reason, we must remand the case to the district court for a determination of the applicability of the exception and to articulate the basis for its decision. [*Id*. at 522 (quotation marks, citations, and alterations omitted).]

The application of *Simcor* to this case is straightforward. The trial "court's order does not address this exception," so this Court "must remand the case to the [circuit] court for a determination of the applicability of the exception and to articulate the basis for its decision." *Id*.

Moreover, the court's order in no way acknowledged the existence of this exception, and the trial court made comments at the two hearings suggesting that it lacked awareness of the fact that an award was in any way discretionary. For example, at the motion hearing, the court asked plaintiffs if they had "any basis upon which I would even be allowed to disregard the offer of judgment." This comment was made after defendants' attorney said, "*There is no discretion* that's offered with that when an offer is submitted to the other side and rejected and the offeree is more successful, our case having been dismissed in its entirety. The rule requires that *the other side must pay*." These comments, combined with the absence of any mention of the court's discretion, suggest that the court may not have been aware that it had any discretion to exercise. "It is by now well-settled that a trial judge commits reversible error if he or she does not recognize that he or she has discretion and therefore fails or refuses to exercise it." *People v Merritt*, 396 Mich 67, 80; 238 NW2d 31 (1976).

C. OTHER ARGUMENTS

The other arguments plaintiffs raised on appeal are either without merit or not ripe for appellate review.

Plaintiffs argue that Kevin and Melissa Walton's respective offers of judgment should have been analyzed separately when the court determined if they were *de minimis* offers and not genuine attempts to settle. However, as discussed above, the trial court has yet to actually address this argument. Therefore, the issue is not ripe for appellate review. It is well settled that this Court will not consider hypothetical issues on appeal, reach the merits of issues that are not ripe for review, or issue advisory opinions. See *People v Hart*, 129 Mich App 669, 674; 341 NW2d 864 (1983); *Rozankovich v Kalamazoo Spring Corp (On Rehearing)*, 44 Mich App 426, 428; 205 NW2d 311 (1973).

Finally, plaintiffs make a cursory and underdeveloped argument that "[t]he Court should have made a separate finding as to costs and attorney fees incurred by **each** Defendant." Plaintiffs fail to cite any authority in support of this argument and fail to offer any explanation for how this alleged error harmed them. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give issues cursory treatment with little or no citation of supporting authority." *In re Warshefski*, 331 Mich App 83, 87; 951 NW2d 90 (2020) (quotation marks and citation omitted). Therefore, review of this issue

is waived. Regardless, Kevin and Melissa Walton were codefendants whose potential liability stemmed from the same transaction and the same facts. Aside from Melissa Walton's simple release argument, they both raised the same defense: lack of damages. Presumably, most—if not all—of the work performed by the attorneys in this matter was performed on behalf of both defendants.

III. CONCLUSION

We vacate the trial court's order granting attorney fees. This case is remanded for the limited purpose of considering plaintiffs' argument that defendants did not make a genuine effort to settle the case. The reasonableness and amount of fees were not among the issues raised on appeal; therefore, with the exception of any additional attorney fees incurred during this appeal, the issue shall not be revisited on remand. To facilitate expeditious review of the proceedings on remand, we retain jurisdiction.

/s/ Michael F. Gadola
/s/ Allie Greenleaf Maldonado

Court of Appeals, State of Michigan

ORDER

KIM T CAPELLO v KEVIN WALTON

Docket No. 364006

LC No. 2021-190542-CH

Mark T. Boonstra
Presiding Judge

Michael F. Gadola

Allie Greenleaf Maldonado
Judges

Pursuant to the opinion issued concurrently with this order, this case is REMANDED for further proceedings consistent with the opinion of this Court. We retain jurisdiction.

Proceedings on remand in this matter shall commence within 28 days of the Clerk's certification of this order, and they shall be given priority on remand until they are concluded. The proceedings on remand are limited to the issues specifically addressed in the opinion issued concurrently with this order.

The parties shall promptly file with this Court a copy of all papers filed on remand. Within seven days after entry, appellant shall file with this Court copies of all orders entered on remand.

The transcript of all proceedings on remand shall be prepared and filed within 21 days after completion of the proceedings.

Presiding Judge

A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

December 7, 2023
Date

Chief Clerk

STATE OF MICHIGAN

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BOONSTRA, P.J. (*concurring in part and dissenting in part*).

I generally concur with the majority except to the extent it holds that remand is required for the trial court to consider plaintiffs' interest-of-justice argument. On that issue, I respectfully dissent.

Contrary to the majority opinion, I do not believe that the trial court's statements at the two motion hearings indicated that it may have been unaware of the interest-of-justice exception. The initial motion hearing involved extensive discussions of MCR 2.405, the court rule in which the exception may be found. See MCR 2.405(D)(3)(*i*). Although plaintiffs did not raise the issue of the interest-of-justice exception in their initial briefing, or argue it at the first motion hearing, the trial court, in setting the matter for an evidentiary hearing, specifically told plaintiffs "if you do have any other arguments you want to bring as to what might protect you from 2.405, the sanctions imposed there, then you could—you could submit that in advance and argue it at that time." The trial court allowed supplemental briefing, and plaintiffs in fact raised an extensive interest-of-justice argument in that briefing. At the evidentiary hearing, plaintiff Kim Capello, representing plaintiffs, did not specifically refer to the interest-of-justice argument, but he was given the opportunity to do so; in fact, when given the opportunity to present additional argument, Capello stated, "Your Honor, I'm just going to rely on my brief and my supplemental brief. . . . Everything in there is true and accurate, and I would rely upon that as my testimony." The trial court subsequently issued an opinion and order addressing the operation of MCR 2.405 and holding that plaintiffs had not stipulated to the offers of judgment within 21 days—and had therefore rejected them—entitling defendants to actual costs and a reasonable attorney fee.

Although the trial court did not specifically state that it had rejected plaintiffs' interest-of-justice argument, its opinion displays a thorough understanding of MCR 2.405, under which the trial court held that defendants were entitled to certain costs and attorney fees. The trial court's order therefore, by necessary implication, rejected plaintiffs' argument concerning the interest-of-justice exception. It is not unusual for a trial court to deny arguments by reasonable implication—in fact, MCR 2.119(F)(3) provides that generally "a motion for rehearing or reconsideration which merely presents the same issues ruled on by the court, *either expressly or by reasonable implication*, will not be granted." MCR 2.119(F)(3) (emphasis added). I would hold that the trial court's grant of defendants' motion for costs and fees under MCR 2.405 necessarily encompassed a rejection of plaintiffs' interest-of-justice exception argument.

The majority concludes otherwise, based on its reading of *Simcor Constr, Inc v Trupp*, 322 Mich App 508; 912 NW2d 216 (2018). But *Simcor* does not compel a different result. In that case, the trial court held that an arbitrator's award was not a "verdict" for the purposes of MCR 2.405. *Id.* at 513-514. This Court held that the trial court erred by doing so and concluded that remand was appropriate "because the district court did not reach the issue of whether the 'interest of justice' exception applies in its order" denying the defendant's motion. *Id.* at 522 (quotation marks, citations, and alterations omitted). In other words, because the interest-of-justice exception is "the exception to a general rule,"[1] see *AFP Specialties, Inc v Vereyken*, 303 Mich App 497, 518; 844 NW2d 470 (2014), the trial court in *Simcor* had never reached the issue of whether the exception applied, because it had preliminarily held that the arbitrator's award did not satisfy the first necessary element of the general rule—that there be a "verdict" that was more favorable to the offeror than the average offer. *Simcor*, 322 Mich app at 513-514. Remand was therefore appropriate to allow the parties to address the interest-of-justice issue before the trial court in the first instance. *Id.* at 522.

In this case, by contrast, the trial court, after being provided with plaintiffs' interest-of-justice argument via supplemental briefing, determined that the general rule of MCR 2.405(D) applied without exception. I believe the majority reads *Simcor* too broadly—*Simcor* did not establish a bright-line rule that trial courts, in granting a defendant's motion for costs under MCR 2.405(D), must always explicitly state that they have considered the interest-of-justice exception and have rejected it. Rather, this Court in *Simcor* simply recognized that the relevant analysis under MCR 2.405(D) had not occurred in that case because it had been cut off by the trial court's finding that the arbitrator's award was not a verdict. Because the circumstances of this case are distinguishable from those in *Simcor*, I would hold that *Simcor* does not compel a remand in this case.

[1] MCR 2.405(D) provides for the imposition of costs following rejection of an offer of judgment, and MCR 2.405(D)(1) states that "[i]f 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." If the adjusted verdict is more favorable to the offeror than the average offer, the trial court "shall determine the actual costs incurred" but "may, in the interest of justice, refuse to award an attorney fee under this rule." MCR 2.405(D)(3).

Having determined that the case need not be remanded, I would affirm the trial court's grant of defendants' motion. The interest-of-justice exception "should not be applied absent unusual circumstances." *AFP Specialties*, 303 Mich App at 518-519 (quotation marks and citation omitted). "The unusual circumstances necessary to invoke the 'interest of justice' exception may occur where a legal issue of first impression is presented, or 'where the law is unsettled and substantial damages are at issue, where a party is indigent and an issue merits decision by a trier of fact, or where the effect on third persons may be significant." *Simcor*, 322 Mich App at 521-522 (quotation marks, citation, and alterations omitted). "Factors such as the reasonableness of the offeree's refusal of the offer, the party's ability to pay, and the fact that the claim was not frivolous are too common to constitute the unusual circumstances encompassed by the 'interest of justice' exception." *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 391; 689 NW2d 145 (2004).

This case did not present an issue of first impression. Although plaintiffs argue that a novel issue was raised in the post-summary disposition arguments concerning the effect of recent amendments to MCR 2.403 on potential case evaluation sanctions, the actual litigation that resulted in the offers of judgment and the rejection of those offers was a breach of contract and fraud case involving a real estate deal gone wrong. The case was resolvable using long-standing principles of the law of contracts, fraud, and summary disposition, and there was no issue of first impression presented. Further, no party has argued that plaintiffs were indigent, or that the issue merited decision by a trier of fact, or that the effects of the case on third persons would be significant. *Simcor*, 322 Mich App at 521-522.

Additionally, defendants' offers were made at a time when it seemed quite possible, even likely, that they would prevail at summary disposition. Plaintiffs had failed to identify any evidence that they had suffered any damages as a result of defendants' alleged breach of contract. Defendant Melissa Walton was further protected from liability by a provision in the purchase agreement releasing brokers from liability arising from a failure to close the sale. Plaintiffs have therefore not established that defendants' offers of judgment were de minimis or the result of gamesmanship. See *AFP Specialties*, 303 Mich App at 519-520. Accordingly, I would hold that the trial court did not abuse its discretion by granting defendants' motion for costs and attorney fees under MCR 2.405(D). *Id.* at 516.

Although I conclude that the trial court impliedly rejected plaintiffs' interest-of-justice argument,[2] I note that even if the trial court improperly failed to address this argument, a remand is not necessarily required. Under the general rules of issue preservation, plaintiffs did not preserve the issue of the trial court's alleged failure to consider their interest-of-justice argument by raising it before the trial court. See *Richard v Schneiderman & Sherman, PC (On Remand)*, 297 Mich App 271, 273; 824 NW2d 573 (2012) (holding that the plaintiff's argument that the trial court failed to rule on his motion to amend his complaint was not preserved for appellate review because the plaintiff "did not raise these claims of error before the trial court"). Plaintiffs have therefore waived appellate review of this issue. *Tolas Oil & Gas Exploration Co v Bach Serv &*

[2] As I have discussed, I do not believe that *Simcor* established a rule mandating that trial courts expressly address such arguments.

Manufacturing, LLC, ___ Mich App ___; ___ NW2d ___ (2023) (Docket No. 359090), slip op at 2-3 (noting that, in civil cases, Michigan follows the "raise or waive" rule of appellate review, and that a party seeking appellate review of a claim of error must generally "show that the same basis for the error claimed on appeal was brought to the trial court's attention") (citations omitted). And even if this Court were to disregard its issue preservation requirements, see *id.* at ___, slip op at 3, the record shows, as I have stated, that the interest-of-justice exception does not apply in this case, and plaintiffs accordingly cannot show any error requiring reversal.

For these reasons, I concur in part and respectfully dissent in part, and would affirm the trial court's order granting costs and attorney fees under MCR 2.405(D).

/s/ Mark T. Boonstra