STATE OF MICHIGAN

COURT OF APPEALS

SUSAN FOWLER,

Plaintiff,

v

DETROIT SYMPHONY ORCHESTRA, INC., d/b/a MAX M. FISHER MUSIC CENTER,

Defendant/Third-Party Plaintiff-Appellee,

and

DIAMOND AND SCHMITT ARCHITECTS, INC.,

Third-Party Defendant-Appellant.

UNPUBLISHED
September 28, 2010

No. 293237
Wayne Circuit Court
LC No. 05-535724-NO

Before: MURPHY, C.J., and HOEKSTRA and STEPHENS, JJ.

PER CURIAM.

Third-party defendant Diamond & Schmitt Architects, Inc. (Diamond & Schmitt), appeals as of right the trial court's order denying its motion for case evaluation sanctions against third-party plaintiff Detroit Symphony Orchestra, Inc. (DSO), pursuant to the interest of justice exception, MCR 2.403(O)(11). We reverse and remand for a determination of an appropriate award of case evaluation sanctions. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

The underlying facts and procedural history are set forth in this Court's prior opinion in *Fowler v Detroit Symphony Orchestra, Inc*, unpublished opinion per curiam of the Court of Appeals, issued March 12, 2009 (Docket No. 282978), in which this Court affirmed the trial court's order granting summary disposition in favor of the DSO with respect to plaintiff's primary complaint, but reversed the trial court's order granting summary disposition in favor of the DSO on its third-party complaint for indemnification from Diamond & Schmitt. This Court held that because Diamond & Schmitt's liability for indemnification was not triggered unless there was a "negligent act or omission" on its part, and because there was no finding of negligence, it was entitled to summary disposition on the DSO's third-party complaint for indemnification. *Id*. at 7-8. Further, in light of its decision, this Court remanded the case for

reconsideration of Diamond & Schmitt's motion for case evaluation sanctions against the DSO under MCR 2.403(O) and directed the trial court to "clearly articulate, either on the record or in its order, the reasons for granting or denying Diamond & Schmitt's motion for sanctions." *Id*. at 8.

On remand, the DSO did not dispute that Diamond & Schmitt received a verdict that was more favorable than the case evaluation award, thereby subjecting the DSO to case evaluation sanctions under MCR 2.403(O)(1). The parties also agreed that because the verdict resulted from a ruling on a motion for summary disposition, the trial court had discretion under MCR 2.403(O)(11) to refuse to award sanctions. The trial court thereafter determined that it was appropriate to rely on the interest of justice exception and, accordingly, denied Diamond & Schmitt's motion for sanctions.

We review for an abuse of discretion a trial court's decision whether to apply the interest of justice exception in MCR 2.403(O)(11). *Harbour v Correctional Med Servs, Inc*, 266 Mich App 452, 465; 702 NW2d 671 (2005).

MCR 2.403(O)(11) provides that "[i]f the 'verdict' is the result of a motion as provided by subrule (O)(2)(c), the court may, in the interest of justice, refuse to award actual costs." The court rules do not define the term "interest of justice." *Haliw v City of Sterling Hts (On Remand)* (*Haliw II*), 266 Mich App 444, 447; 702 NW2d 637 (2005). But this Court has held that the term "'must not be too broadly applied so as to swallow the general rule of [MCR 2.403(O)(1)] and must not be too narrowly construed so as to abrogate the exception.'" *Id*., quoting *Haliw v City of Sterling Hts* (*Haliw I*), 257 Mich App 689, 706-707; 669 NW2d 563 (2003), rev'd on other grounds 471 Mich 700 (2005). In the *Haliw* appeals, this Court found that it was appropriate to consider decisions that addressed the term "interest of justice" in MCR 2.405(D)(3), because both rules serve the same purpose of deterring protracted litigation and promoting settlement. In *Haliw I*, 257 Mich App at 707, this Court discussed and quoted relevant portions of *Luidens v 63rd Dist Court*, 219 Mich App 24; 555 NW2d 709 (1996), regarding the "interest of justice" exception as follows:

> This Court further held that factors normally present in litigation, such as a refusal to settle being viewed as "reasonable," or that the rejecting party's claims are "not frivolous," or that disparity of economic status exists between the parties, are insufficient "without more" to justify not imposing sanctions in the "interest of justice." Rather, the unusual circumstances necessary to invoke the "interest of justice" exception may occur where a legal issue of first impression is presented, or
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> > "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[.]"
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> > "The common thread in these examples is that there is a public interest in having an issue judicially decided rather than merely settled by the parties. In such cases, this public interest

> may override MCR 2.405's purpose of encouraging settlement. These examples involve unusual circumstances under which the 'interest of justice' might justify an exception to the general rule that attorney fees are to be awarded. We recognize, of course, that the factors suggested here as relevant to the 'interest of justice' exception are not exclusive. We offer them only as examples. Other circumstances, including misconduct on the part of the prevailing party, may also trigger this exception." [Citations omitted.]

This Court repeated this analysis in *Haliw II*, 266 Mich App at 448-449.

In this case, the trial court gave the following reasons for declining to award case evaluation sanctions in the interest of justice:

> All right. We've been talking about the interest of justice exception because the case was resolved on motions as opposed to trial. And really, when a case does go to trial it's mandatory, there's no ifs, ands, or buts about it. But when a case is decided on a motion, the interest of justice is to be considered.
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> And in looking at the factors to be considered, neither counsel has indicated to me that there was a case directly on point dealing with a limited acceptance of case evaluation. So to a certain extent this is maybe a case of first impression, at least in terms of settled law.
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> Secondly, the DSO is a corporation that really, I wouldn't say that they're indigent, but they're close to that or they could be close to that. And they provide a public service and are really supported by corporations, donations, and a whole host of things like that. So I think that they're somewhat close to being considered an indigent entity. They certainly aren't a for-profit organization nor a wealthy organization.
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> And then I don't believe that there's any misconduct here on the part of the DSO, and seems like the law is somewhat unsettled. So I am going to deny the request for case evaluation sanctions under the interest of justice exception, and that's my decision on this matter.

The absence of published decisions addressing the interest of justice exception where there has been a limited acceptance of a case evaluation award does not warrant application of the exception because this purported issue of first impression does not involve the underlying case or the DSO's decision whether to accept the award. The purpose of MCR 2.403 is to promote settlement. The "common thread" in the examples that warrant application of the interest of justice exception "is that there is a public interest in having an issue judicially decided rather than merely settled by the parties." *Haliw I*, 257 Mich App at 707. Those circumstances warrant excepting a party from the usual consequences of a decision to reject or limit acceptance of a case evaluation award. At the time the DSO decided to limit its acceptance of the case evaluation award, there was no issue of first impression involved in the underlying premises liability or indemnification cases and there was no public interest in having any issue in the cases

judicially decided. The purported unsettled nature of the law governing application of the interest of justice exception where there is a limited acceptance had no bearing on the DSO's decision with respect to the evaluation. The purported unsettled nature of the law governing application of the interest of justice exception is not grounds for exempting the DSO from the consequences of its decision not to accept the award without limitation. If it were, then the exception would have applied in the leading cases that clarified the law regarding the exception, such as *Haliw I* and *Haliw II*.

The trial court's consideration of the DSO's economic status was improper because there was no evidence presented on that point. Moreover, this Court has recognized that indigency of a party *in conjunction* with "an issue [that] merits decision by a trier of fact" may be an unusual circumstance to warrant application of the exception. *Haliw I*, 257 Mich App at 707. But indigency of a party alone, even if factually established, is not an unusual circumstance that would warrant application of the exception. See *id*. ("[D]isparity of economic status exist[ing] between the parties[] [is] insufficient 'without more' to justify not imposing sanctions in the 'interest of justice.'"); see also *Luidens*, 219 Mich App at 34 ("Parties' economic standing should not determine whether they face the risk of costs and attorney fees in rejecting an offer of judgment; nor should parties be able to engage in litigation with governmental or larger corporate entities secure in the knowledge that they need not weigh the same considerations as parties suing entities that are less financially endowed.").

The facts that the DSO is supported by donations and provides a public service also are not unusual circumstances to warrant application of the exception. A conclusion that the interest of justice exception to awarding case evaluation sanctions applies because of the philanthropic or beneficial nature of the services provided by a party would eliminate the incentive to settle for a host of parties. Applying the term "interest of justice" that broadly would result in the exception swallowing the general rule in MCR 2.403(O)(1).

The trial court also observed that there was "no misconduct here on the part of the DSO." Although gamesmanship by the party seeking sanctions may be grounds for applying the interest of justice exception, see *Harbour*, 266 Mich App at 466-468, the *absence* of misconduct or gamesmanship by the party liable for sanctions is not the type of unusual circumstance to warrant application of the exception.

The DSO maintains that application of the exception is justified in this case because until plaintiff's action against it was concluded, it could not be certain of the extent of its liability and the resulting indemnification it would seek from Diamond & Sullivan. However, the uncertainty of the bargain offered by a case evaluation award is not an unusual circumstance to warrant application of the interest of justice exception. The road to resolution of a case is filled with uncertainty. The settlement process works because the parties recognize the uncertainty and choose to eliminate the risk of an unfavorable outcome by compromising their expectations and accepting a known result that may be less favorable than the outcome if the case proceeded. The DSO's argument is essentially that its decision was reasonable because it was uncertain about the extent of its liability to plaintiff. However, "factors normally present in litigation, such as a refusal to settle being viewed as 'reasonable' . . . [is] insufficient 'without more' to justify not imposing sanctions in the 'interest of justice.'" *Haliw I*, 257 Mich App at 707.

In sum, the trial court's reasons for refusing to order sanctions are not consistent with this Court's interpretation of MCR 2.403(O)(11). Because this case did not involve any unusual circumstance to warrant application of the interest of justice exception, the trial court abused its discretion in denying Diamond & Schmitt's motion for sanctions. Accordingly, we reverse the trial court's decision and remand for a determination of an appropriate award of sanctions pursuant to MCR 2.403(O)(1).

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

/s/ William B. Murphy
/s/ Joel P. Hoekstra

Stephens, J. did not participate.