

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF LEELANAU

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THOMAS R. and VICTORIA H. WILLS,  
husband and wife,

Plaintiffs,

v

File No. 97-4251-CK  
HON. PHILIP E. RODGERS, JR.

THE LEELANAU CENTER FOR  
EDUCATION/THE LEELANAU SCHOOL,

Defendant.

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DECISION AND ORDER OF THE COURT REGARDING  
THE DEFENDANT'S VERIFIED MOTION FOR IMPOSITION OF SANCTIONS

INTRODUCTION

In December of 1997, the Plaintiffs Tom and Victoria Wills (the "Wills") filed this action against the Defendant, Leelanau Center for Education/The Leelanau School (the "Leelanau School"). In October of 1998, a court rules mediation panel unanimously found no cause for action and that "the action . . . is frivolous." The Plaintiffs did not pursue judicial review of the panel's finding in the manner allowed by MCR 2.403(N)(2), nor did they timely file a bond pursuant to MCR 2.403(N)(3)(a).

In December of 1998, the Defendant filed a Motion to Dismiss pursuant to MCL 2.403(N)(3)(c). On January 4, 1999, this Court entered an Order of Dismissal. The Plaintiffs filed

a Motion for Reconsideration which was denied. On January 29, 1999, the Defendant filed a Verified Motion for Imposition of Sanctions. On June 7, 1999, this Court entertained oral arguments on the motion and invited the parties to file additional briefs. The parties have each filed supplemental briefs.

Before addressing the issues raised by the Defendant's motion for sanctions, this Court takes this opportunity to comment on the inappropriate, unwarranted, unjustifiable conduct of counsel in this case. First, counsel for the Defendant violated MCR 2.403(J)(4) by supplying this Court with copies of the mediation summaries and mediation award. Second, former counsel for the Plaintiffs, while complaining of defense counsel's violation of the court rules, himself violated MCL 691.1557; MSA 27.15(57) by supplying this Court with information regarding various offers of settlement. See, *Kitchen v Kitchen*, 231 Mich App 15; 585 NW2d 47 (1998). Finally, counsel for the Defendant filed briefs with this Court that contained venomous personal attacks on the Plaintiffs and their son. No useful purpose was served by making the Plaintiffs and their son the objects of a spiteful, derogatory commentary. In the future, counsel should confine their remarks to facts and legal issues which are relevant to the resolution of the parties' legal dispute.<sup>1</sup>

That being said and the Court having reviewed the motion, the briefs, the arguments of counsel and otherwise being fully advised in the premises, the Court issues this written Decision and Order denying the Defendant's Motion for Sanctions for the reasons stated herein. MCR 2.517.

#### ISSUES PRESENTED

There are two issues before the Court: (1) whether the Defendant is entitled to sanctions under the mediation court rule, MCR 2.403(O)(1); and (2) whether the Defendant is entitled to sanctions pursuant to MCR 2.114(F), MCR 2.625(A)(2) and MCL 600.2591 because the mediation panel decided that the Plaintiffs' claims were frivolous.

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<sup>1</sup>The Court will not sanction the offending counsel. It believes they are competent, understand their errors and will not repeat them.

## I.

The overall purpose of the mediation court rule is to encourage settlement and to deter protracted litigation.<sup>2</sup> *Sanders v Monical Machinery Co*, 163 Mich App 689, 691-692; 415 NW2d 276 (1987). Accordingly, the purpose behind the mediation sanction rule is to place the burden of litigation costs upon the party who insists upon a trial by rejecting a proposed mediation award. *Bien v Venticinque*, 151 Mich App 229, 232; 390 NW2d 702 (1986). *Warren v Pickering*, 192 Mich App 153, 156; 480 NW2d 306 (1992); *Forest City Ent, Inc v Leemon Oil Co*, 288 Mich App 57, 78-79; 577 NW2d 150 (1998).

MCR 2.403(O)(6) provides for an award of actual costs which are defined to include “(a) taxable costs in any civil action, and (b) a reasonable attorney fee . . . for services necessitated by the rejection of the mediation evaluation.” *Joerger v Gordon Food Service*, 224 Mich App 167, 179; 568 NW2d 365 (1997); *Troyanowski v Village of Kent City*, 175 Mich App 217, 226-227; 437 NW2d 266 (1988).

By its motion, the Defendant claims it is entitled to court rule mediation sanctions pursuant to MCR 2.403(O)(1) because the Plaintiffs rejected the mediation award. In support of its position, the Defendant argues that the dismissal of the Plaintiffs’ Complaint constitutes a “verdict” for the purposes of MCR 2.403(O)(2)(c), rendering the Plaintiffs liable for the Defendant’s actual costs necessitated by the Plaintiffs’ rejection of the mediation.

In response, the Plaintiffs argue that the Defendant is not entitled to sanctions because this action has not proceeded to “verdict” as required by MCR 2.403. MCR 2.403(O)(2) defines “verdict” as (a) a jury verdict; (b) a judgment by the court after a non-jury trial; or (c) a judgment entered as a result of a ruling on a motion after rejection of the mediation evaluation. Subparts (a) and (b) clearly do not apply in this case. The question presented is whether the Court’s Order of Dismissal is “(c) a judgment entered as a result of a ruling on a motion after rejection of the mediation evaluation.”

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<sup>2</sup>Relevant portions of the mediation rule are reproduced in the Notes to this Decision and Order.

MCR 2.403(O)(1) provides, in pertinent part, as follows: "If a party has rejected [a mediation] evaluation and the action **proceeds to verdict**, that party must pay the opposing party's actual costs. . ."

Not every final judgment following rejection of mediation is a "verdict." In both *Larson, supra* and *Sheffer v North American Ins Co*, 227 Mich App 723; 578 NW2d 691 (1998), the Court held the mediation award itself is not a "verdict" entitling a party to an award of mediation sanctions under MCR 2.403 or judgment sanctions under MCR 2.405. In *Saint George Greek Orthodox Church of Southgate v Laupmanis Associates, PC*, 204 Mich App 278; 514 NW2d 516 (1994), the Court held that confirmation of an arbitration award is not a "verdict" within the meaning of MCR 2.403(O)(1).

In the instant case, the Defendant's motion was granted and the Plaintiffs' Complaint was dismissed because of the Plaintiffs' failure either to seek judicial review or timely post bond pursuant to MCR 2.403(N)(2) and (3)(c) after the mediation panel determined that the Complaint was frivolous. The Complaint was dismissed on a post-mediation motion because of procedural deficiencies, i.e. the failure to seek judicial review of the mediation panel's findings or to post bond. The Court's Order of Dismissal is "a judgment entered as a result of a ruling on a motion after rejection of the mediation evaluation." MCR 2.403(O)(2)(c). However, under all of the facts and circumstances of this case, as will be more fully discussed ahead, and in the interest of justice, this Court declines to award the Defendant actual costs. MCR 2.403(O)(11).

## II.

The Defendant claims that it is also entitled to sanctions pursuant to MCR 2.114. In the recent case of *FMB-First National Bank v Bailey, et al*, Docket No. 200958, Court of Appeals of Michigan, 1998, the Court of Appeals held that MCL 600.2591; MSA 27A.2591 is incorporated by reference into MCR 2.114(F), which provides that the trial court "shall award to the prevailing party the costs and fees incurred." Any sanction awarded under MCR 2.114(F) is restricted to the costs and fees as described in MCL 600.2591(2); MSA 27A.2591(2), which does not include attorney fees. Attorney fee sanctions are not available under MCR 2.114(F). If sanctions are awarded under subparagraph (F), the trial court's sanction is limited to the terms of MCL 600.2591; MSA 27A.2591.

Thus, under MCR 2.114(F) the Defendant would be entitled to costs only and not to an award of attorney fees.<sup>3</sup>

The Defendant claims it is entitled to sanctions pursuant to MCR 2.114(F) because the mediation panel determined that the Plaintiffs' Complaint was frivolous. The Defendant argues and relies upon the fact that the mediation panel's determination of no cause for action and that the Complaint was frivolous constitutes a verdict and a judicial finding that the Plaintiffs' Complaint was frivolous such that the Defendant is entitled to sanctions pursuant to MCR 2.114(F).<sup>4</sup>

In response, the Plaintiffs argue for the first time that the bond required by MCR 2.403(N)(3) applies only if the claim is one in tort and it is found frivolous under MCR 2.403(K)(4). The Plaintiffs state that their claims against the Leelanau School are primarily contract claims. Thus, they contend that the mediation panel erroneously determined that their claims were frivolous and that they were not required to post bond under MCR 2.403(N)(3) and that the Court erroneously dismissed all of their claims.<sup>5</sup>

As stated above, the Plaintiffs' Complaint was dismissed because of the Plaintiffs' failure to seek judicial review or timely post bond pursuant to MCR 2.403(N)(2) and (3)(c) after the mediation panel determined that the Complaint was frivolous. MCR 2.403(K)(4). The Complaint was not dismissed because the Court determined that the Complaint lacked merit.

This Court is not bound by the mediation panel's determination that the Complaint was frivolous. To hold otherwise would be tantamount to giving the mediators judicial power and

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<sup>3</sup>Curiously, the Defendant makes no claim for attorneys fees under MCR 2.114(E). The sole claim for compensation under MCR 2.114 is limited to those costs described in MCR 2.114(F).

<sup>4</sup>Although the wording varies slightly, the definition of frivolous found in MCR 2.403(K)(4) is substantially identical to the definition found in MCR 2.114(D).

<sup>5</sup>The law has not changed since the Plaintiffs' Complaint was dismissed and the motion to reconsider decided. This Court will not revisit the propriety of the dismissal in consideration of Plaintiffs' response to Defendant's motion for sanctions, which response is a thinly disguised second motion for reconsideration. If the tort/contract distinction was ever a viable defense to Defendant's motion to dismiss, it has been waived. However, given the tort claims in the Plaintiffs' Complaint, this waiver may have done no harm.

making the mediators' evaluation a binding final judgment. See, *Knoke v Michlin Chemical Corp*, 188 Mich App 456, 459-460; 470 NW2d 420 (1991) (plaintiff whose products liability action was found to be frivolous by a mediation panel was entitled to de novo judicial review of the panel's determination, even though the plaintiff did not post bond as required by the court rule) and *Straman v Lewis*, 220 Mich App 448; 559 NW2d 405 (1996) (plaintiff, without posting a bond, was entitled to a review de novo of the mediators' determination that her complaint was frivolous).

Granted, the Plaintiffs could have requested judicial review of the mediation panel's determination pursuant to MCR 2.403(N)(2) by filing a motion within 14 days after the mediation clerk sent notice of the rejection of the mediation award. The Plaintiffs did not request such judicial review.<sup>6</sup> However, this failure cannot convert a mediation award into a judicial determination. The Court has conducted its own review and does not agree with the mediation panel's conclusion.

In order to find that the Plaintiffs' Complaint was frivolous, this Court must assess whether at least one of the following conditions is met:

(a) The Plaintiffs' primary purpose in initiating the action was to harass, embarrass, or injure the opposing party; or

(b) The Plaintiffs had no reasonable basis to believe that the facts underlying their legal position were in fact true; or

(c) The Plaintiffs' legal position was devoid of arguable legal merit.

MCR 2.403(K)(4); MCR 2.114(F); *Broadway Coney Island, Inc v Commercial Union Ins Co*, 217 Mich App 109, 116-117; 550 NW2d 838 (1996).

This Court has conducted an independent review of the record. The record does not support the Defendant's argument that the Plaintiffs' claims were frivolous. Issues of fact existed regarding Plaintiffs' claimed deficiencies in the Defendant's provision of educational services to the Plaintiffs'

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<sup>6</sup>The Supreme Court is presumed to have been aware of *Knoke* and *Straman* when it amended MCR 2.403(N)(2) to provide for judicial review of a mediation panel's determination that a claim is frivolous. This amended provision does not reach the instant situation where the time for filing such a motion expires before the party fails to timely file a bond. The rationale in *Knoke* and *Straman*, therefore, support this Court's conclusion that it is not bound by the mediation panel's determination and is required to make an independent determination of whether the Plaintiffs' Complaint is frivolous before deciding whether to award sanctions.

son. There is no indication that the Plaintiffs filed their Complaint with the primary purpose being to harass, embarrass, or injure the Defendant or that the Plaintiffs had no reasonable basis to believe the facts underlying their legal position. The Plaintiffs' legal position was not devoid of arguable legal merit. Under the facts and circumstances as the Plaintiffs reasonably believed them to be, Plaintiffs could assert that the Defendant had failed to provide educational services for their son as promised and avoid an award of sanctions.

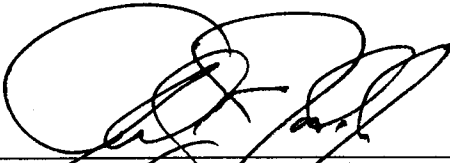
### CONCLUSION

In conclusion, the Plaintiffs did not request a judicial review of the mediation panel's determination that their Complaint was frivolous pursuant to MCR 2.403(N)(2) nor did they timely post a bond pursuant to MCR 2.403(N)(3). Thus, their Complaint was properly dismissed on Defendant's motion pursuant to MCR 2.403(N)(3)(c). The Plaintiffs' Complaint was dismissed for procedural deficiencies and the dismissal constituted a verdict. In the interest of justice, this Court declines to award sanctions. MCR 2.403(O)(11).

Furthermore, to assess the propriety of sanctions under MCR 2.114, this Court is not bound by the mediation panel's determination that the Plaintiffs' Complaint was frivolous. MCR 2.403(K)(4). This Court has reviewed the record and made an independent determination that the Plaintiffs' Complaint was not frivolous. MCR 2.114. Therefore, the Defendant is not entitled to sanctions under either MCR 2.403 or MCR 2.114. The Defendant's Motion for Imposition of Sanctions should be and hereby is denied.

IT IS SO ORDERED.

This Decision and Order resolves the last pending claim and closes the case.

  
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HONORABLE PHILIP E. RODGERS, JR.  
Circuit Court Judge

Dated: 7/09/99

NOTES

MCR 2.403 provides, in pertinent part, as follows:

**(A) Scope and Applicability of Rule.**

(1) A court may submit to mediation any civil action in which the relief sought is primarily money damages or division of property.

(2) Mediation of tort cases filed in circuit court is mandatory beginning with actions filed after the effective dates of Chapters 49 and 49A of the Revised Judicature Act, as added by 1986 PA 178; however, the court may except an action from mediation on motion for good cause shown if it finds that mediation of that action would be inappropriate.

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**(K) Decision.**

(1) Within 14 days after the hearing, the panel will make an evaluation and notify the attorney for each party of its evaluation in writing. If an award is not unanimous, the evaluation must so indicate.

(2) The evaluation must include a separate award as to the plaintiff's claim against each defendant and as to each cross-claim, counterclaim, or third-party claim that has been filed in the action. For the purpose of this subrule, all such claims filed by any one party against any other party shall be treated as a single claim.

(3) The evaluation may not include a separate award on any claim for equitable relief, but the panel may consider such claims in determining the amount of an award.

(4) In a tort case to which MCL 600.4915(2); MSA 27A.4915(2) or MCL 600.4963(2); MSA 27A.4963(2) applies, if the panel unanimously finds that a party's action or defense as to any other party is frivolous, the panel shall so indicate on the evaluation. For the purpose of this rule, an action or defense is "frivolous" if, as to all of a plaintiff's claims or all of a defendant's defenses to liability, at least 1 of the following conditions is met:

(a) The party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the opposing party.

(b) The party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true.

(c) The party's legal position was devoid of arguable legal merit.

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**(N) Proceedings After Rejection.**

(1) If all or part of the evaluation of the mediation panel is rejected, the action proceeds to trial in the normal fashion.

(2) If a party's claim or defense was found to be frivolous under subrule (K)(4), that party may request that the court review the panel's finding by filing a motion within 14 days after the mediation clerk sends notice of the rejection of the mediation award.

(a) The motion shall be submitted to the court on the mediation summaries and documents that were considered by the mediation panel. No other exhibits or testimony may be submitted.



However, oral argument on the motion shall be permitted.

(b) After reviewing the materials submitted, the court shall determine whether the action or defense is frivolous.

(c) If the court agrees with the panel's determination, the provisions of subrule (N)(3) apply, except that the bond must be filed within 28 days after the entry of the court's order determining the action or defense to be frivolous.

(d) The judge who hears a motion under this subrule may not preside at a nonjury trial of the action.

(3) Except as provided in subrule (2), if a party's claim or defense was found to be frivolous under subrule (K)(4), that party shall post a cash or surety bond, pursuant to MCR 3.604, in the amount of \$5,000 for each party against whom the action or defense was determined to be frivolous.

(a) The bond must be posted within 56 days after the mediation hearing or at least 14 days before trial, whichever is earlier.

(b) If a surety bond is filed, an insurance company that insures the defendant against a claim made in the action may not act as the surety.

(c) If the bond is not posted as required by this rule, the court shall dismiss a claim found to have been frivolous, and enter the default of a defendant whose defense was found to be frivolous. The action shall proceed to trial as to the remaining claims and parties, and as to the amount of damages against a defendant in default.

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**(O) Rejecting Party's Liability for Costs.**

(1) If a party has rejected an evaluation and the action proceeds to verdict, that party must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the mediation evaluation. However, if the opposing party has also rejected the evaluation, a party is entitled to costs only if the verdict is more favorable to that party than the mediation evaluation.

(2) For the purpose of this rule "verdict" includes,

(a) a jury verdict,

(b) a judgment by the court after a nonjury trial,

(c) a judgment entered as a result of a ruling on a motion after rejection of the mediation evaluation.

(3) For the purpose of subrule (O)(1), a verdict must be adjusted by adding to it assessable costs and interest on the amount of the verdict from the filing of the complaint to the date of the mediation evaluation, and, if applicable, by making the adjustment of future damages as provided by MCL 600.6306; MSA 27A.6306. After this adjustment, the verdict is considered more favorable to a defendant if it is more than 10 percent below the evaluation, and is considered more favorable to the plaintiff if it is more than 10 percent above the evaluation. If the evaluation was zero, a verdict finding that a defendant is not liable to the plaintiff shall be deemed more favorable to the defendant.

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(6) For the purpose of this rule, actual costs are  
(a) those costs taxable in any civil action, and  
(b) a reasonable attorney fee based on a reasonable hourly or daily rate as determined by the trial judge for services necessitated by the rejection of the mediation evaluation.

For the purpose of determining taxable costs under this subrule and under MCR 2.625, the party entitled to recover actual costs under this rule shall be considered the prevailing party.

(7) Costs shall not be awarded if the mediation award was not unanimous.

(8) A request for costs under this subrule must be filed and served within 28 days after the entry of the judgment or entry of an order denying a timely motion for a new trial or to set aside the judgment.

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(11) If 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.