

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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CULLEY ROBINSON and  
CATHERINE ROBINSON,

UNPUBLISHED  
May 30, 1997

Plaintiffs-Appellants,

v

No. 191048  
Wayne Circuit Court  
LC No. 94-424251-CK

MICHIGAN BASIC PROPERTY INSURANCE  
ASSOCIATION, a Michigan Corporation,

Defendant-Appellee.

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Before: Smolenski, P.J., and Kelly and Gribbs, JJ.

PER CURIAM.

Plaintiffs appeal as of right the dismissal of their claim for failure to post security for defendant's costs as ordered by the trial court. Plaintiffs ask this Court to reverse the trial court's order denying plaintiffs' motion for remediation and its order of dismissal. We reverse and remand for remediation.

Plaintiffs brought this action seeking an order requiring defendant to provide insurance coverage in the amount of \$116,685.33 for loss of their home in a fire. Defendant denied liability, claiming that the loss was excluded from coverage under the insurance policy, the fire being the result of arson committed by or at the behest of plaintiffs.

Plaintiffs' first attorney moved to withdraw as counsel following a conversation with a defense witness. The trial court granted the motion and entered an order on May 4, 1995, adjourning mediation for a minimum of thirty days and directing plaintiffs to obtain new counsel within thirty days if they intended to be further represented in this matter. Plaintiffs failed to obtain new counsel within the allotted time and instead retained new counsel two days before the scheduled mediation. At mediation, plaintiffs' new counsel attempted to make an appearance on their behalf. However, the trial court and the mediation panel refused to admit plaintiffs' attorney to the mediation hearing. The matter mediated for \$10,001.

Following mediation, the trial court denied plaintiffs' motion for remediation and granted defendant's motion for security for costs. The trial court dismissed this action because plaintiffs failed to comply with the latter order.

Plaintiffs contend that the trial court abused its discretion by refusing to grant their motion for remediation, arguing that the trial court violated their right to civil representation by barring their attorney from participating in the mediation hearing. Plaintiffs further advance that they are entitled to remediate this matter with their counsel present. We agree.

We review a trial court's decision to grant or deny remediation for an abuse of discretion. See *Kattula v D G Standhardt Assoc's, Inc*, 132 Mich App 49, 55 (1984). We will find an abuse of discretion only when, reviewing the facts upon which the trial court acted, an unprejudiced person would say a mistake has been made. *Torrico v Detroit-Macomb Hospital Corp*, \_\_\_ Mich App \_\_\_; \_\_\_ NW2d \_\_\_ (Docket No. 184860, rel'd 2/7/97) slip opinion at 3.

The Michigan Constitution guarantees "[a] suitor in any court of this state has the right to prosecute or defend his suit, either in his own proper person or by an attorney." Const 1963, Art I, § 13; *Rocky Produce, Inc v Frontera*, 181 Mich App 516, 517; 449 NW2d 916 (1989). If the suitor chooses to prosecute his or her suit with the assistance of an attorney, "the attorney may appear by an act indicating that the attorney represents a party in the action." MCR 2.117(B)(1); *id.* Such an act gives rise to an inference that the act constituted an appearance if (1) the attorney was aware of the pending legal proceedings, and (2) the attorney intended to appear at the proceedings on behalf of the client. *Ragnone v Wirsing*, 141 Mich App 263, 265-266; 367 NW2d 369 (1985).

We find that plaintiffs' counsel properly "appeared" at the mediation hearing on behalf of his clients, as consistent with MCR 2.117(B)(1), by agreeing to represent plaintiffs at mediation, physically appearing at the proceeding, and informing the mediation panel that he was plaintiffs' attorney and intended to represent them. Therefore, the trial court should have allowed plaintiffs' attorney to be admitted to the mediation hearing.

Defendant, however, argues that the trial court's refusal to allow plaintiffs' counsel to appear was justified, because plaintiffs failed to timely retain an attorney as mandated by the trial court's May 4, 1995, order. Following plaintiffs' counsel's withdrawal, the trial court entered an order adjourning mediation for a minimum of thirty days and requiring plaintiffs to retain "new counsel if they intend[ed] to be represented by an attorney." Plaintiffs did not comply with the latter part of this order; rather, they obtained counsel two days prior to the scheduled mediation on June 24, 1995. Nonetheless, plaintiffs caused no delay by obtaining counsel beyond the date contemplated in the order. Because plaintiffs did not seek to further adjourn mediation following their noncompliance with the order, the trial court was unjustified in denying counsel's proffered appearance before the mediation panel. Accordingly, we conclude that the trial court abused its discretion when it failed to correct its error and, instead, denied plaintiffs' motion for remediation.

Defendant further posits that the trial court's error was harmless. We reject this argument. Usually, an unjustified denial of the right to representation by counsel in a civil matter is so offensive to the maintenance of a sound judicial process that it can never be regarded as harmless. See *Heshelman v Lombardi*, 183 Mich App 72, 85; 454 NW2d 603 (1990). Moreover, it is impossible to determine what the outcome of the mediation hearing would have been had plaintiffs been represented by counsel.

Plaintiffs further argue that the trial court abused its discretion by granting defendant's motion for security for costs, and requiring plaintiffs to post a \$25,000 bond which they failed to do. Plaintiffs urge us to vacate the order for security for costs and reverse the order of dismissal for plaintiffs' failure to post the bond.

In support of its motion, defendant argued it was entitled to security for costs for the following reasons: (1) plaintiffs sought \$116,685.33 for their fire loss, yet the matter mediated for only \$10,001; (2) defendant exercised good faith to settle, despite the fact that it established it had strong affirmative defenses to plaintiffs' action; and (3) plaintiffs were at fault in causing discovery and other delays. The first two grounds supporting defendant's motion for security for costs may be directly attributable to the trial court's unjustified refusal to allow plaintiffs' retained counsel to represent them at the mediation hearing. In light of this, we vacate the trial court's order for security for costs and reverse its order of dismissal without prejudice to revisiting the issue after mediation is finalized when the trial court will be better able to determine the appropriateness of granting defendant's motion for security for costs.

We reverse and remand for proceedings consistent with this opinion. No party may tax costs pursuant to MCR 7.216(C), neither party having prevailed in full.

/s/ Michael R. Smolenski

/s/ Michael J. Kelly

/s/ Roman S. Gribbs