

STATE OF MICHIGAN
COURT OF APPEALS

SAVILLA BARE, Individually; CANAN
INVESTMENTS, INC, a Michigan corporation; and
SAVILLA BARE as Co-Trustee of the MARTIN K.
BARE, JR TRUST and as Personal Representative of
the Estate of MARTIN K. BARE, JR, Deceased,

Plaintiff-Appellants,

v

BODMAN, LONGLEY & DAHLING, a Michigan
partnership; and LARRY R. SHULMAN, jointly and
severally,

Defendant-Appellees.

UNPUBLISHED
September 25, 1998

No. 198710
Wayne Circuit Court
LC No. 93-316534-NM

Before: O'Connell, P.J., and Kelly and Hood, JJ.

PER CURIAM.

This is a legal malpractice case involving the conduct of Defendants Bodman, Longley & Dahling and Larry R. Shulman, a partner of Bodman, Longley & Dahling, in representing plaintiffs' interests in a commercial real estate development. On July 12, 1996, the trial court entered a judgment of no cause of action after a lengthy bench trial. Plaintiffs filed a timely motion to amend findings, for new trial, and for judgment notwithstanding the verdict. On October 1, 1996, the trial court entered an order denying the motion. Plaintiffs' filed their claim of appeal on October 22, 1996. MCR 7.203(A)(1).

Plaintiffs raise two issues: 1) whether plaintiffs sustained their burden of proving that Defendant Shulman failed to deliver the Garity credit report to Martin Bare, failed to adequately and completely discuss and explain its significance, and thereby caused plaintiffs' damages, and 2) whether the trial court erred in finding Thomas Garity unavailable and thereby admitting his deposition testimony into the trial record.

The facts of this case involve the dealings of Martin and Savilla Bare, over a three year period, with their then best friend Thomas Garity in a shopping center construction project. After five weeks of trial, the evidence established a complex array of business negotiations, promises, and assurances made between Thomas Garity and plaintiffs. Our review focuses on the circumstances surrounding the issuing of a credit report regarding Garity; therefore, we will limit our summary of the facts to those circumstances.

On September 29, 1988, Martin Bare's trust account acquired a 20% interest in the shopping center project known as Scott Lake. Prior to that date, Larry Shulman, acting as plaintiffs' attorney, informed plaintiffs that title to the project's real estate was not clear and that they should refrain from investing further in the project.¹ Plaintiffs did not request that Shulman attend the meeting formalizing their investment in Scott Lake.

After the initial investment, the project applied for a \$1,000,000 construction loan from First Federal Bank. The bank required the generation of a credit report for Thomas Garity. This was the bank's policy since Garity was the general contractor for the project. Plaintiffs claim this event occasioned the negligent conduct of attorney Shulman.

After receiving the credit report, the bank loan officer, Kevin Ball, contacted Martin Bare and expressed concerns over Garity's credit history. Apparently there had been several lawsuits filed against Garity. Bare then called Shulman and asked him to contact Ball and discuss the bank's concerns. Bare was ostensibly unaware of the specifics of the credit report, nor did he mention to Shulman that Ball had a credit report. After talking with Ball, Shulman asked that a copy of the credit report be faxed to him. The time records of Shulman and the fax cover sheet indicate that the credit report was sent on November 22, 1988. Shulman testified that Martin Bare picked up the credit report in the evening after Shulman received it from Ball. Plaintiffs contend Martin Bare never picked up the report, nor discussed its contents with Shulman. Plaintiffs' witness, Rick O' Connor, testified that on November 22, 1988, plaintiffs were at his office until 7:30 p.m. Shulman testified that he did not remember when he arrived home that night, but that he normally arrived home around 6:30 p.m. Plaintiffs claim that this establishes the proof that the Martin Bare did not arrive at Shulman's home after 6:30 p.m. on the night of November 22, 1988. Shulman testified that he discussed the credit report with Martin Bare the next day. The time records of Shulman indicate conversations took place with Martin Bare on November 23, 1988. Further, Shulman testified Martin Bare specifically instructed him not to do a litigation search in light of Garity's questionable credit status as indicated in the report. Shulman testified that Martin Bare told him that he had spoken with Thomas Garity about the credit report and that he was satisfied with Garity's explanations. The expert witnesses of both plaintiffs and defendants agree that it would have been a breach of the standard of care for Shulman not to deliver the report to Bare and not discuss its contents with him.

In June of 1989, plaintiffs personally guaranteed a construction loan with First of America Bank in the amount of \$1,200,000. By the end of 1989, Garity had drawn down the loan by ninety-five percent. The construction was nowhere near ninety-five percent complete. Shulman had recommended to plaintiffs that they terminate Garity as general contractor of the project. It was not until April of 1990, that plaintiffs agreed to terminate Thomas Garity. In June of 1990, Martin Bare died in a single

car accident. In May of 1991, Savilla Bare sold the project “as is” with the proceeds to be applied to the First of America loan. First of America sued for the deficiency and received \$375,000 from Savilla Bare in settlement.

Plaintiffs’ first issue involves a determination as to whether Defendant Shulman delivered the credit report to plaintiffs, and whether Shulman discussed its contents with plaintiffs. Analysis by this Court begins with review of the factual findings made by the trial court and its assessment of the credibility of the witnesses presented at trial. We review a trial court’s findings of fact for clear error with regard for the special opportunity given to the trial court to judge the credibility of witnesses. MCR 2.613(C); *Flynn v Korneffel*, 451 Mich 186, n 5; 547 NW2d 249 (1996). We will not substitute our judgment for that of the trial court unless the facts clearly preponderate in the opposite direction. *Arco Industries v American Motorists Ins Co*, 448 Mich 396, 410; 531 NW2d 168 (1995). The trial court, during this five week bench trial, was in the best available position to hear the evidence and assess all of the witnesses’ credibility. In its July 3, 1996, opinion the trial court stated,

The Court finds that it is more likely than not that Martin Bare had a copy of the credit report. Whatever the time or place, the Court is convinced that he received and reviewed it. Bare was known for his attention to detail and was referred to throughout this trial as Mr. Detail. Ball’s testimony that he talked to Bare about the fact that he had the credit report is entirely credible and establishes Bare had knowledge of it. This supports Shulman’s testimony that Bare called him to get a copy of the report. Shulman’s contemporaneous time records support his testimony that he talked to Bare about the report. The bill for November legal fees sent to the Bares confirms both that the Bares had knowledge of it and that Shulman was not concealing it.

Unfortunately and tragically, Mr. Bare cannot tell us about the report. It is inconceivable, however, that an intelligent, educated person who had a predisposition for detail would not have demanded a copy of it. It is even more unlikely when it is considered that Ball did not tell him what was in the report nor what his concerns were. Why there are no notes in the Bare files or why Mr. Bare did not discuss this with Mrs. Bare is something that never will be known.

We believe the trial court made an adequate determination of the credibility of the witnesses presented at trial. The trial court conducts its business with a special opportunity to personally assess the strengths and weaknesses of each witness. Without the testimony of the late Martin Bare, plaintiffs’ ability to attack Larry Shulman’s credibility was greatly diminished. We find no clear error on the part of the trial court.

Next, plaintiffs claim the trial court erred by admitting the deposition testimony of Thomas Garity since he was not unavailable as defined in MRE 804(a)(5).² We review a decision regarding the admissibility of depositions by determining whether the trial court abused its discretion. *Lombardo v Lombardo*, 202 Mich App 151, 154; 507 NW2d 788 (1993). The Rules of Evidence address the admissibility of depositions in Rule 804:

(b) *Hearsay Exceptions*. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

* * *

(5) *Deposition Testimony*. Testimony given as a witness in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

For purposes of this subsection only, “unavailability of a witness” also includes situations in which:

(A) The witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or

(B) On motion and notice, such exceptional circumstances exist as to make it desirable, in the interests of justice, and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.
[MRE 804(b)(5).]

Defendants attempted to serve a subpoena on Thomas Garity on ten separate occasions. Between January 5th and February 4th defendants attempted service either by registered mail or in person at different times of the day. Defendants were continuously informed that Garity was out of town and would not return until after the trial had been concluded. Plaintiffs never contended that the deposition was taken in an unlawful manner. Therefore, we believe that defendants exercised reasonable means in to obtain Thomas Garity’s appearance at trial as dictated by the Rules of Evidence. The trial court did not err in admitting the deposition testimony of Thomas Garity into the trial record.

Affirmed.

/s/ Peter D. O’Connell
/s/ Michael J. Kelly
/s/ Harold Hood

¹ At that time, plaintiffs had loaned Garity approximately \$37,500 to assist in his financial troubles in an unrelated matter. When Garity failed to repay the loan on time, he suggested to plaintiffs that, in exchange for the notes, they could invest in the Scott Lake project as minority investors.

² Unavailability of a witness includes where a declarant -

(5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means, and in a criminal case, due diligence is shown. [MRE 804(a)(5).]