STATE OF MICHIGAN

COURT OF APPEALS

MARY E. ARNOLD, Successor Personal Representative of the Estate of JOSEPH F. CERVENKA, Deceased,

Plaintiff-Appellee,

v

EUGENE J. STROIA, Individually and as Former Personal Representative of the Estate of JOSEPH F. CERVENKA,

Defendant-Appellant.

UNPUBLISHED
July 23, 1999

No. 203153
Macomb Probate Court
LC No. 96-146616 CZ

Before: Neff, P.J., and Kelly and Hood, JJ.

PER CURIAM.

Before this Court is an action brought by plaintiff as the personal representative of the estate of Joseph F. Cervenka, alleging that defendant exerted undue influence over the decedent with regard to a mortgage transaction and that $11,000 given by the decedent to defendant was a loan, not a gift. Defendant appeals as of right from the trial court's order entering judgment in favor of plaintiff for $11,000, following a jury trial, in addition to setting aside defendant's mortgagee's interest in a parcel of land. We reverse.

I

Defendant challenges several of the trial court's evidentiary rulings. On appeal, this Court reviews challenges to evidentiary rulings under an abuse of discretion standard. *Lopez v General Motors Corp*, 224 Mich App 618, 634; 569 NW2d 861 (1997). However, "[o]bjections to the admission of evidence may not be raised for the first time on appeal absent manifest injustice." *Phinney v Perlmutter*, 222 Mich App 513, 558; 564 NW2d 532 (1997).

First, defendant argues that the probate court erred by admitting Robert White's hearsay testimony into evidence because the statements were not admissible under an exception specifically enunciated in MRE 804(B). We agree. "A hearsay statement is an unsworn, out-of-court statement

that is offered to establish the truth of its contents." *People v Jensen*, 222 Mich App 575, 580; 564 NW2d 192 (1997); MRE 801(c). Unless the rules of evidence provide otherwise, hearsay statements are inadmissible as substantive evidence. MRE 802.

In the instant case, White's testimony clearly constituted inadmissible hearsay if it was offered for nothing more than to establish that defendant did in fact owe decedent money. White's testimony indicated that decedent told him defendant owed him money and that he kept track of the amount in his ledger book, also that the decedent told White if anything were to happen to him that he wanted White to remove the ledger book from his house. Further, says White, when decedent was admitted to the hospital shortly before his death, he instructed White to remove the ledger from his home.

In her response brief, plaintiff states that White's statements were properly admitted under MRE 804(a)(4).[1] We disagree with plaintiff's assertion. While death of a declarant is proof positive of an unavailable status, it is only the first step in admitting a declarant's statements. Once the declarant is determined to be unavailable, the declarant's statements must fall within specific exceptions to the general rule precluding hearsay evidence. Accordingly, under MRE 804(b) the following types of hearsay evidence are admissible when a declarant is deemed unavailable: (1) the former testimony of the declarant, (2) a statement made under belief of impending death, (3) a statement made against the interest of the declarant, (4) a statement of personal or family history, and (5) a general "catch all" exception. We find that none of these exceptions apply to the statements in question.

In deeming the statements made by decedent to White as admissible, the trial court found the statements to fall under "an exception to the Hearsay Rule relative to probate proceedings and would allow the testimony to proceed." After review of the Michigan Rules of Evidence, we find no such exception to the hearsay rule. It should be noted that the trial court could have been relying on MRE 803(3) which states:

> **(3) Then Existing Mental, Emotional, or Physical Condition.** A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed *unless it relates to the execution, revocation, identification, or terms of declarant's will.* [Emphasis added.]

MRE 803(3) clearly relates to a declarant's will. However, at issue in the present lawsuit is an accounts receivable ledger. While it could be argued that White's testimony related to the decedent's beliefs concerning the nature and importance of the ledger book, we decline to extend the exception outlined in MRE 803(3) to the present case. In viewing all of the testimony and exhibits admitted at trial, except for White's testimony, it is unclear whether the money given by decedent to defendant was in fact a loan or a gift. The facts of this case indicate decedent to have destroyed the promissory note drafted by defendant, thus indicating that the money given by decedent might, in fact, have been intended as a gift. On the other hand, defendant's name was present in decedent's ledger book with the amount of money he received noted next to his name.

The ledger did not contain evidence of a loan payment date or applicable interest rate. Of all of the

proffered evidence, decedent's statements to White best support plaintiff's claim that the money given by decedent was a loan. Therefore, we find decedent's out of court statements to White to have had the effect of factually supporting plaintiff's claim that the transfer of money was intended to be a loan. Thus, the statements were offered for the truth of the matter asserted and their admission should have been precluded by MRE 802. The trial court abused its discretion in admitting the testimony of White concerning the statements made by decedent about the contents of the ledger book.

Second, defendant asserts that the trial court improperly admitted the Michigan Rules of Professional Conduct as an exhibit during trial. By admitting the MRPC into evidence, defendant argues that the jury was allowed to measure his conduct against a higher standard of care than would be required of any other fiduciary. We disagree

In the instant case, defendant is an attorney. As an attorney, defendant is subject to the Michigan Rules of Professional Conduct, whether or not he actively counsels any clients. The MRPC dictates a code of conduct for all members of the bar. In addition to regulating the lawyer/client relationship, the MRPC also requires that an attorney conduct his or her daily affairs avoiding conduct involving dishonesty, fraud, deceit, misrepresentation, or violation of criminal law. MRPC 8.4. It appears that defendant acted as decedent's lawyer on numerous occasions. While money may not have exchanged hands for defendant's legal services, defendant drafted a will for decedent, drafted two mortgage transactions, and handled decedent's estate upon his death. Therefore, defendant was subjected to the MRPC based upon his lawyer/client relationship with decedent.

Based upon defendant's professional relationship with decedent, MRPC 1.8 would apply. The rule prohibits a lawyer from entering into business transactions with a client unless certain precautions are met. MRPC 1.8(a) provides:

> A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client unless:
>
> (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner that can be reasonably understood by the client;
>
> (2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and
>
> (3) the client consents in writing thereto.

The rule was designed to ensure that all transactions between a lawyer and his or her client would be fair and reasonable to the client. See comments to MRPC 1.8.

Generally, all relevant evidence is admissible. MRE 402. Evidence is relevant if it has any tendency to make the existence of a fact which is of consequence to the action more probable or less probable than it would be without the evidence. MRE 401. However, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. MRE 403.

Unfair prejudice exists when there is a tendency that the evidence will be given undue or preemptive weight by the jury, or when it would be inequitable to allow the use of the evidence. *In re Flury Estate*, 218 Mich App 211, 217; 554 NW2d 39 (1996). See also *People v Mills*, 450 Mich 61, 75-76; 537 NW2d 909, modified, remanded 450 Mich 1212 (1995).

In the instant case, the MRPC were relevant. The rules enabled the jury to evaluate whether defendant breached his fiduciary duty to decedent, as an attorney, by placing his name as an additional mortgagee on the mortgage documents and by accepting $11,000 as a gift from decedent. Furthermore, we do not believe that the probative value of the MRPC was substantially outweighed by the danger of unfair prejudice. There was no indication that the evidence would be given undue or preemptive weight by the jury, or that it would be inequitable to allow the use of the MRPC. Moreover, the trial court cautioned the attorneys that any discussions of malpractice should not be utilized during arguments, voir dire, or cross-examination. Therefore, we believe that the MRPC were properly admitted as an exhibit into evidence.

Third, defendant contends that the trial court erred by admitting the testimony of plaintiff's expert witness into evidence. Since the instant case did not involve legal malpractice, defendant argues that the jury did not require any technical or specialized knowledge to assist them in understanding the evidence. We disagree.

If the trial court determines that recognized scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert may testify to the knowledge by opinion or otherwise. MRE 702; *McDougall v Eliuk*, 218 Mich App 501, 506-507; 554 NW2d 56 (1996). Expert knowledge can assist the trier when there are facts which require interpretation or analysis and the witness' knowledge is of particular value. MRE 702.

The three requirements for the admission of expert testimony are: "(1) the witness must be an expert; (2) there must be facts which require an expert's interpretation or analysis; and (3) the witness' knowledge must be peculiar to experts rather than to lay persons." *Green v Jerome-Duncan Ford, Inc*, 195 Mich App 493, 498; 491 NW2d 243 (1992) (citations omitted). When determining whether an expert's testimony would assist the trier of fact, it is helpful to apply a common sense inquiry whether an untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from experts. *People v Smith*, 425 Mich 98, 105-106; 387 NW2d 814 (1996); *King v Taylor Chrysler-Plymouth, Inc*, 184 Mich App 204, 215; 457 NW2d 42 (1990).

In the instant case, we believe that the trial court properly concluded that an expert's testimony was necessary to assist the jury in their understanding of the topic of fiduciary duty. Without a legal background, the jurors would probably be unclear as to the fiduciary duties which a lawyer owes his or her client and the fiduciary duties a personal representative has to the estate of the deceased. The expert's testimony assisted the trier of fact in understanding the evidence and in determining whether defendant breached his fiduciary duties to decedent.

With regard to defendant's argument that the court should have prohibited plaintiff's expert from testifying pursuant to MCR 2.313(B)(2)(b) and (c), because plaintiff failed to file timely answers to interrogatories, which were directed at the expert, we disagree. Plaintiff was provided with the substance of the expert's proposed testimony at the motion to exclude the expert witness on January 6, 1997, which was three days prior to trial. Even defendant admits in his brief on appeal that plaintiff did file answers to his interrogatories within one week of trial, although he maintains that plaintiff's answers to the interrogatories were unresponsive and evasive. The expert's testimony was straightforward and did not relate to a subject that defense counsel, as an attorney, would have had a difficult time comprehending. As a result, we do not believe that defendant was prejudiced by plaintiff's alleged discovery violations. Therefore, we do not believe that the trial court abused its discretion by allowing plaintiff's expert witness to testify.

Finally, defendant argues that the probate court erred by allowing plaintiff to testify that her daughter is disabled. According to defendant, the testimony served no purpose other than to generate sympathy from the jurors. We note that defendant failed to object below and, therefore, we review the issue for manifest injustice. *Phinney, supra*. Plaintiff testified that she was a widow and that she was the mother of two children, one of whom is disabled. There were no specific questions regarding the nature of plaintiff's daughter's handicap. Because there is no indication that t he testimony was offered merely to solicit sympathy from the jury, we do not believe that manifest justice will result if we decline to review this issue.

II

Next, defendant argues that the trial court erred by denying his motion for summary disposition based upon the doctrine of res judicata. On appeal, this Court reviews de novo a court's grant or denial of a motion for summary disposition pursuant to MCR 2.116(C)(7) to determine whether the moving party was entitled to judgment as a matter of law. *Limbach v Oakland Co Bd of Co Road Comm'rs*, 226 Mich App 389, 395; 573 NW2d 336 (1997); *Energy Reserves, Inc v Consumers Power Co*, 221 Mich App 210, 215-216; 561 NW2d 854 (1997).

The doctrine of res judicata bars a subsequent suit between the same parties when the evidence or essential facts remain the same. *Energy Reserves, Inc, supra* at 215; *Eaton Co Bd of Co Rd Comm'rs v Schultz*, 205 Mich App 371, 375; 521 NW2d 847 (1994). In order for the doctrine to apply (1) the former suit must have been decided on the merits, (2) the issues in the second action were or could have been resolved in the former one, and (3) both actions must involve the same parties or their privies. *Energy Reserves*, *supra* at 215-216. Res judicata bars a subsequent action between the same parties when the facts or evidence essential to the action are identical to those essential to a prior action. *Dart v Dart*, 224 Mich App 146; 568 NW2d 353 (1997).

Defendant argues that because plaintiff accepted the mediation award in the probate proceedings, the mediation judgment in the case precludes plaintiff from raising the issues in the instant case. We disagree.

In the instant case, plaintiff sought to set aside a mortgage transaction, which she believed was obtained through defendant's undue influence over decedent. In addition, plaintiff sought to collect $11,000, which she believed was owed to decedent's estate by defendant. However, the previous mediation judgment dealt only with defendant's petition for attorney and fiduciary fees relating to his handling of decedent's estate while defendant served as personal representative from December 1994 to May 1995. Because the mediation judgment did not address the mortgage issue and/or the issue whether the $11,000 given to defendant by decedent was a loan or a gift, the former mediation action never addressed the merits of the instant lawsuit. The issues in the instant case were not and could not have been resolved during the mediation proceeding since only defendant's petition for attorney and fiduciary fees was addressed by the panel. Therefore, we do not believe that the doctrine of res judicata bars the instant action.

III

Finally, defendant asserts that the trial court erred by denying his motion for a mistrial based upon ex parte communications between the court, plaintiff's counsel and plaintiff's expert witness. "Generally, this Court will not interfere with a trial court's disposition of a motion for mistrial unless there was an abuse of discretion which results in a miscarriage of justice so that the party has not had a fair and impartial trial." *Vaughan v Grand Trunk Western R Co*, 153 Mich App 575, 579; 396 NW2d 440 (1986).

"Ex parte communications from a judge's chambers to one side in a contested lawsuit are 'clearly at odds with our adversary system of justice.'" *Knop v Johnson*, 977 F2d 996, 1011 (CA 6, 1992). According to Canon 3 of the Code of Judicial Conduct, a judge should not permit or initiate ex parte communications under most circumstances. The rule provides:

> A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding, except as follows:
>
> (a) A judge may allow ex-parte communications for scheduling, administrative purposes, or emergencies that do not deal with substantive matters or issues on the merits, provided
>
> (i) the judge reasonably believes that no party or counsel for a party will gain a procedural or tactical advantage as a result of the ex parte communication, and
>
> (ii) the judge makes provision promptly to notify all other parties and counsel for parties of the substance of the ex parte communication and allows an opportunity to respond. [Code of Judicial Conduct, Canon 3(A)(4).]

In the instant case, the trial judge admitted that he engaged in a brief conversation with plaintiff's counsel and with plaintiff's expert witness. However, the judge stated that the comments were made in passing and concerned proper impeachment techniques, which was basically the same information that

he and the parties had discussed in court during the first side bar. Based on the record, it appears that any conversation between the court and plaintiff's counsel and/or plaintiff's expert witness evolved from a chance meeting and did not deal with substantive matters or issues on the merits. Furthermore, we believe that plaintiff did not gain a procedural or tactical advantage as a result of the ex parte communications. While the judge acknowledged that his brief conversation with plaintiff's counsel and/or plaintiff's expert witness may have given an appearance of impropriety,[2] there is no reason on the record not to believe his contention that nothing improper occurred.

Reversed.

/s/ Janet T. Neff
/s/ Michael J. Kelly
/s/ Harold Hood

[1] MRE 804(a)(4) provides:

> **(a) Definition of Unavailability.** "Unavailability as a witness" includes situations in which the declarant-
>
> * * *
>
> (4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity.

[2] We note that while the record indicates that the ex parte communication between the trial judge and plaintiff's counsel most likely did not unfairly prejudice defendant nor cause plaintiff to have a tactical advantage over defendant, this Court is gravely concerned with any appearance of impropriety on the part of jurists of this state. "Not only is it a gross breach of the appearance of justice when the defendant's principal adversary is given private access to the ear of the court, it is a dangerous procedure." *United States v Minsky*, 963 F 2d 870, 874 (CA 6, 1992), citing *Haller v Robbins*, 409 F 2d 857, 859 (CA 1, 1989). While we find no reversible error on the part of the trial judge, it is clear that better judgment should have been exercised on the part of the court and plaintiff's counsel in determining the propriety of such an ex parte meeting. This practice must be discouraged since it undermines the public's confidence in the impartiality of the court. *Carroll v Princess Anne*, 393 US 175, 183; 89 S Ct 347; 21 L Ed 2d 325 (1968).