STATE OF MICHIGAN

COURT OF APPEALS

DEBORAH RYKER, Plaintiff/Counterdefendant-Appellee,	UNPUBLISHED October 19, 2001
v	Nos. 226216; 226629 St. Joseph Circuit Court
ALAN EUGENE THRASHER, Defendant/Counterplaintiff-Appellant.	LC No. 99-000015-AZ

Before: Gage, P.J., and Jansen and O'Connell, JJ.

PER CURIAM.

In these cases consolidated on appeal, defendant appeals as of right from the trial court's March 8, 2000, judgment awarding plaintiff $424 in damages and costs, the trial court's March 8, 2000, order converting its March 30, 1999, preliminary injunction against defendant into a permanent injunction and, (3) the trial court's March 29, 2000, judgment awarding plaintiff $7,063.05 in offer of judgment sanctions. We affirm. Further, we find defendant's appeals to be vexatious, and, accordingly, remand to the trial court for an award of plaintiff's actual damages and expenses, including reasonable attorney fees, incurred in defending against defendant's appeals.

On appeal, defendant first claims that the trial court was biased against him. Because defendant did not move for the trial court's disqualification pursuant to MCR 2.003, this claim is not properly preserved for our review. *Meagher v Wayne State Univ*, 222 Mich App 700, 725; 565 NW2d 401 (1997); *In re Schmeltzer*, 175 Mich App 666, 673; 438 NW2d 866 (1989). In any event, after a thorough review of the record, we conclude that defendant has failed to demonstrate "*actual* bias" on the part of the trial court. See *Cain v Dep't of Corrections*, 451 Mich 470, 495; 548 NW2d 210 (1996) (emphasis in original); MCR 2.003(B)(1). Moreover, defendant has not demonstrated "personal" bias of the trial court. *Cain, supra* at 495. Generally, to satisfy the requirement of personal bias, "the challenged bias must have its origin in events or sources of information gleaned outside the judicial proceeding." *Id.* at 495-496. However, in *Cain* our Supreme Court recognized that a court's unfavorable predisposition toward a party that flows from the proceedings may be classified as bias.

> Thus, *Liteky* [*v United States*, 510 US 540, 550; 114 S Ct 1147; 127 L Ed 2d 474 (1994)] indicates that a favorable or unfavorable predisposition that springs from facts or events occurring in the current proceeding may deserve to be characterized as "bias" or "prejudice." However, these opinions will not constitute a basis for disqualification "*unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible.* [*Cain, supra* at 496, quoting *Likety, supra* (emphasis in original).]

On this record, defendant has failed to "overcome [the] heavy presumption of judicial partiality" because the trial court did not display a deep-rooted favoritism that would make fair judgment impossible. *Cain, supra* at 496-497. In support of his contention that the trial court was biased, defendant points to comments made by the trial court that he claims are unduly critical. However, comments that are critical of the parties or their counsel ordinarily will not sustain a finding of bias. *People v Wells*, 238 Mich App 383, 391; 605 NW2d 374 (1999); *Cain, supra* at 497 n 30.

The thrust of defendant's second argument on appeal is that the trial court "consistently stymied" his efforts to admit favorable evidence. Once again, this issue is without merit.

As a preliminary matter, we note that defendant has failed to point to any portion of the record substantiating his assertion that the trial court refused to allow him to present the testimony of witness Pat Law. See MCR 7.212(C)(7). Moreover, our independent review of the record does not support defendant's claim that the trial court precluded him from introducing Law's evidence. At one point during trial, defendant made a cursory and ambiguous reference to a "rebuttal witness." Defendant did not identify this witness, nor is there any indication that the trial court foreclosed defendant from presenting this evidence. Further, following trial, the parties agreed to forgo rebuttal evidence, and submit their closing arguments to the trial court. Thus, defendant's argument that the trial court erroneously precluded him from presenting this evidence is simply without merit.[1]

Similarly, defendant has failed to persuade us that the trial court abused its discretion in precluding him from questioning plaintiff about her psychological counseling. "A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion." *Barrett v Kirtland Community College*, 245 Mich App 306, 325; 628 NW2d 63 (2001). In response to defendant's attorney's pointed queries, plaintiff readily admitted that she had undergone counseling in relation to the incidents giving rise to these appeals. However, when defendant's attorney sought to question plaintiff about her counselor's opinion about the "root" of her problems, the trial court sustained plaintiff's attorney's objections. Because we share the trial court's view that this evidence was not relevant to the issues at trial, we find no abuse of discretion.

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[1] Likewise, we reject defendant's claim that the trial court prevented defendant from admitting the evidence of Phyllis Parsons because there is nothing in the record to support plaintiff's claim.

Moreover, to the extent that defendant challenges the admission of evidence concerning his criminal history and prior personal protection orders (PPO), defendant has waived these issues on appeal by expressly agreeing to their admission at trial. See *People v Carter*, 462 Mich 206, 209; 612 NW2d 144 (2000). The trial in this matter was conducted on December 21, 1999. Before opening arguments, counsel for both parties told the trial court that they stipulated to the admission of the exhibits at trial, including evidence of defendant's prior criminal history and the information concerning the prior PPOs. According to defendant's attorney, he was satisfied with "let[ting] the evidence in to save time and to avoid spending all our day with objections."

Later in the trial, when plaintiff's attorney was informing the court about the information relating to the PPOs, defendant's attorney once again told the court that the parties stipulated to the admission of the exhibits. Specifically, defendant's attorney went on to make the following comments.

> I would like to make a short comment about this. [Plaintiff's attorney] and I both agreed that we would let evidence in and argue its impact to you in our arguments. We have already written briefs. *I want that exhibit in actually,* and argued it in my trial brief.

Further, when plaintiff's attorney subsequently stated, "it's my understanding that [all of the exhibits] are going in," defendant's attorney did not raise an objection. Moreover, in his trial brief in which articulated his closing argument to the court, defendant further noted that he "stipulated to the admission of the court records of prior convictions and PPOs." Accordingly, defendant has waived on appeal any issue concerning the admission of these exhibits.

Defendant also contends that the trial court's decision was against the great weight of the evidence. Defendant has waived this issue on appeal because he did not file a motion for a new trial in the lower court. See *Buckeye Marketers, Inc v Finishing Services, Inc*, 213 Mich App 615, 616-617; 540 NW2d 757 (1995); *DeGroot v Barber*, 198 Mich App 48, 54; 497 NW2d 530 (1993).[2]

Finally, defendant argues that the trial court erred in awarding plaintiff $7,063.05 in offer of judgment sanctions. We review a trial court's award of offer of judgment sanctions for an abuse of discretion. See, e.g., *Stitt v Holland Abundant Life Fellowship (On Remand)*, 243 Mich App 461; 471; 624 NW2d 427 (2000).

The substance of defendant's argument on appeal is similar to that raised in the trial court. Specifically, defendant contends that the "interest of justice" exception in MCR 2.405(D)(3) applies to the extent that the trial court should have refused to award plaintiff offer

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[2] Contrary to defendant's assertion in his brief on appeal, MCR 7.211(C)(1)(c) does not allow defendant to raise this claim on appeal after failing to preserve it in the trial court. MCR 7.211(C)(1)(c) is not applicable in the present case because defendant is not seeking a remand to the trial court after filing a special motion with this Court.

of judgment sanctions.[3] In *Luidens v 63rd District Court*, 219 Mich App 24, 32; 555 NW2d 709 (1996), this Court observed:

> The purpose of MCR 2.405 is "to encourage settlement and to deter protracted litigation." *Hamilton v Becker Orthopedic Appliance Co*, 214 Mich App 593, 596; 543 NW2d 60 (1995). In the context of this purpose and the fact that the "interest of justice" provision is an exception to a general rule, this Court has held that, "absent unusual circumstances," the "interest of justice" does not preclude an award of attorney fees under MCR 2.405. *Gudewicz v Matt's Catering, Inc*, 188 Mich App 639, 645; 470 NW2d 654 (1991).

In *Luidens*, the Court reviewed some of the "unusual circumstances" that warrant application of the "interest of justice" exception. These include cases involving unsettled law or a significant public interest issue, or where an offer of judgment is made simply for gamesmanship purposes. *Luidens, supra* at 35-36; see also *Stitt, supra* at 473-474. However, the *Luidens* Court went on to observe that this list of examples is not exclusive, and that "[o]ther circumstances . . . may also trigger this exception." *Luidens, supra* at 36. Seizing on this language, defendant argues that because he pursued this case for "peace" and "justice" for himself and his family the exception in MCR 2.405(D)(3) applies.

In spite of defendant's claim that he pursued this case for noble reasons, we are not persuaded that this case presents unusual circumstances to the extent that the "interest of justice" exception is applicable. Underlying defendant's argument on appeal is his contention that his position was not frivolous. However, in *Luidens* the Court specifically recognized that a party's claim that his position was not frivolous was a factor "too common" to fit within the strict confines of the "interest of justice" exception. *Luidens, supra* at 34-35. As the trial court succinctly stated in its January 26, 2000, opinion awarding plaintiff offer of judgment sanctions:

> The reasons here urged by defendant as justifying a finding that he should be spared the rule's consequence could be commonly argued by every party who lost in litigation, which renders the circumstances as being usual, instead of unusual.

Accordingly, we are not persuaded that the trial court abused its discretion in awarding plaintiff offer of judgment sanctions.

Further, we conclude that the present appeals are vexatious because they were taken "without any reasonable basis for belief that there was a meritorious issue to be determined on appeal." MCR 7.216(C)(1)(a); see also *Dillon v DeNooyer Chevrolet Geo*, 217 Mich App 163, 169-170; 550 NW2d 846 (1996). In our view, the issues raised by defendant on appeal are so lacking in merit that these appeals are properly characterized as vexatious. Cf *Haverbush v Powelson*, 217 Mich App 228, 241; 551 NW2d 206 (1996). Moreover, these appeals are

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[3] MCR 2.405(D)(3) provides that "[t]he court shall determine the actual costs incurred. The court may, in the interest of justice, refuse to award an attorney fee under this rule."

examples of "plain cases" where "[t]he abuse of the appellate process . . . is clear." *McIntosh v Chrysler Corp*, 212 Mich App 461, 470; 538 NW2d 428 (1995). Accordingly, pursuant to MCR 2.716(C)(2), we remand to the trial court for a determination of plaintiff's actual damages and expenses, including reasonable attorney fees, incurred in defending against defendant's appeals.

Affirmed. Remanded to the trial court for an award of actual damages and expenses incurred on appeal. We do not retain jurisdiction.

/s/ Hilda R. Gage
/s/ Kathleen Jansen
/s/ Peter D. O'Connell