STATE OF MICHIGAN

COURT OF APPEALS

JAMES GILLESPIE, Plaintiff-Appellee,	UNPUBLISHED March 8, 2007
v RUSSELL FILTRATION, INC., and RANDAL J. ARMSTRONG, Defendants-Appellants.	No. 268263 Wayne Circuit Court LC No. 04-431052-CK ON REMAND

Before: Kelly, P.J., and White and Wilder, JJ.

PER CURIAM.

While retaining jurisdiction over a pending application for leave to appeal, the Supreme Court remanded this case for us to provide "an explanation of the conclusion that the defendants' application for leave to appeal grossly disregarded the requirements of a fair presentation of the issues to the court." *Gillespie v Russell Filtration, Inc*, __ Mich __ (Docket No. 131457, issued 09/26/06). Pursuant to this order, we issue the following explanation.

MCR 7.216(C) of The Michigan Court Rules provides that this Court may impose sanctions for a vexatious appeal:

> (C) Vexatious Proceedings.
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> (1) The Court of Appeals may, on its own initiative or on the motion of any party filed under MCR 7.211(C)(8), assess actual and punitive damages or take other disciplinary action when it determines that an appeal or any of the proceedings in an appeal was vexatious because
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> > (a) the appeal was taken for purposes of hindrance or delay or without any reasonable basis for belief that there was a meritorious issue to be determined on appeal; or
> >
> > (b) a pleading, motion, argument, brief, document, record filed in the case or any testimony presented in the case was grossly lacking in the requirements of propriety, violated court rules, or ***grossly disregarded the requirements of a fair presentation of the issues to the court***. [MCR 7.216(C) (emphasis added).]

Although this Court rarely imposes sanctions, sanctions are merited when a party on appeal has grossly disregarded a fair presentation of the issues. In this case, our conclusion that defendants' presentation of their appeal was vexatious within the meaning of MCR 7.216(C) led to our imposition of sanctions.

On February 10, 2006, defendants filed an application for leave to appeal the January 20, 2006, order of Wayne Circuit Judge John Gillis, Jr., who had denied their motion for summary disposition in this breach of contract action involving the alleged nonpayment of over $1 million in commissions. Defendants included the following Question Presented:

> WHETHER THIS COURT SHOULD REVIEW THE TRIAL COURT'S DENIAL OF DEFENDANT'S MOTION FOR SUMMARY DISPOSITION IN LIGHT OF THE DISPOSITIVE DEPOSITION TESTIMONY OF THE PLAINTIFF THAT HE WAS NEVER PROMISED THAT HE WOULD BE PAID COMMISSIONS BY THE DEFENDANTS AND THAT THE AGREED-UPON COMPENSATION WAS SALARY WHICH WAS PAID IN FULL?

On the basis of this Question Presented, this Court expected to find dispositive deposition testimony from plaintiff that defendants promised him a salary and that he would not be paid commissions. Instead, plaintiff's deposition testimony was not dispositive on this question; moreover, plaintiff did not testify that "he was never promised that he would be paid commissions by the defendants." The record reflected myriad questions of fact as to the parties' various employment and commissions agreements. Moreover, as illustrated *infra*, defendants not only failed to present or acknowledge pertinent evidence in their application, but also willfully distorted the record evidence in attempt to hinder this Court's accurate review of their appeal.

Defendants' failure to acknowledge evidence contrary to their position included the deliberate quotation of deposition testimony out of context, in a manner that could only be construed as an attempt to deceive this Court. On three occasions in their application and once in their reply brief, defendants cited the following passage from plaintiff's deposition to support their assertion that plaintiff admitted that he was not promised a commission:

> Q. Are you relying on whatever was said about a draw as a basis for entitlement to a commission?
>
> A. No.

But defendants thrice omitted the rest of plaintiff's answer to that question. The full and accurate quotation is as follows:

> *Q*. Are you relying on whatever was said about a draw as a basis for entitlement to a commission?
>
> *A*. No. I am basing my entitlement to commission on having the new agreement – well, having the old agreement terminated, I guess I should say.
>
> *Q*. In July 2002; correct?

A. Yes, and being replaced with this proposal by Mr. Armstrong.

The Michigan Court Rules provide notice that the failure to fairly present issues on appeal may result in sanctions. Indeed, this Court has held that a party's failure to indicate that significant intervening text has been omitted could lead to sanctions:

> We are also disturbed that defendant's argument is premised upon an incomplete and misleading quotation of the trial court's statement of findings. At pages 4-5 of his appeal brief, defendant quotes only the second and third paragraphs of the trial court's bench opinion, followed by only the first sentence of the sixth and final paragraph, without any indication that significant intervening text has been omitted. Although we do not impose sanctions here, arguably, this constitutes the kind of 'gross disregard of the requirements of a fair presentation of the issues' which this Court may sanction under MCR 7.216(C)(1)(b). [*People v Irvin*, unpublished per curiam opinion of the Court of Appeals, Docket No. 206353 (issued 09/17/99), slip op at 2, n1.][1]

We reject defendants' attempt to minimize the deceptive effect of this repeated omission given that the truncated quote was repeated several times and was an essential component of defendants' argument that they were entitled to summary disposition. Defendants explain that they attached the entire deposition transcript and thus "it was presented in that manner to the Court of Appeals for the entire relevant portion to be read." In the ordinary course of business, the fact that this Court was required to read the entire portion of the transcript or defendants' failure to include a portion of a deponent's answer, standing alone, would not render the application vexatious or necessarily merit sanctions.

Rather, defendants' emphatic, repeated, and false assertions about the record evidence made their application vexatious. Contrary to defendants' assertions, plaintiff did testify regarding commissions as related to his initial draw and the subsequent commissions schedule, and the omitted passage plainly shows that plaintiff believed he was promised commissions by Armstrong in July of 2002, when Armstrong presented him with a proposed commissions schedule. Defendants' reliance on their deceptively pruned quotation throughout their application to flatly contend that plaintiff had testified that he was never promised commissions was and is false, and could not be overlooked by this Court.

Defendants were similarly deceptive concerning the July 2002 commissions schedule when they cited only to excerpts of a letter written by plaintiff to create the impression that plaintiff had rejected the commissions schedule. Viewing the record in its entirety, however, this Court discovered that plaintiff testified that he agreed with defendants that the commissions schedule was lucrative and because the commissions were lucrative, he continued to work for defendants after July of 2002 without a salary, fully intending to collect the commissions he

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[1] We acknowledge that unpublished opinions are not binding precedent on this Court. MCR 7.215(C); *Genesis Center PLC v BCBSM*, 243 Mich App 692, 695; 625 NW2d 37 (2000). Nevertheless, we find persuasive the reasoning of the unpublished opinions cited herein.

believed he was owed. Defendants also failed to discuss or acknowledge the evidence presented by plaintiff to rebut their motion for summary disposition. As just one example, defendants made no effort to address any of the eight customer affidavits on which plaintiff relied in opposing summary disposition.

Additionally, defendants' arguments in the alternative did not fairly reflect the issues before this Court. For example, defendants discussed plaintiff's expectation of a commission on the RHM account, noting that plaintiff had said at one point: "As far as RHM is concerned, I couldn't care less." Defendants opted not to mention that plaintiff testified in deposition that RHM's purchase of the RAM filters allegedly arose only because DCX had recommended that RHM do so and he expected a commission with regard to DCX. The parties' differing positions on this point illustrate yet another question of fact precluding summary disposition here.

Defendants argue in their supplemental brief on remand that plaintiff has acknowledged that he is basing his claim on an "unpled" theory. The court rule regarding general pleadings requires in part that a party respond to "each allegation on which the adverse party relies." MCR 2.111(C). It thus follows that a defendant need not respond to an allegation that a plaintiff has not made. But the flaw in defendants' argument is that plaintiff's entire complaint involves his unpaid commissions. Indeed, in their Supplemental Brief, defendants themselves describe plaintiff's complaint as one "to recover alleged unpaid commissions." Plaintiff's complaint included the following allegations: breach of contract; unjust enrichment; violation of the sales representatives' commission act, MCL 600.2961; fraud, negligence and misrepresentation; accounting; breach of fiduciary duty and promissory estoppel. Throughout his complaint, plaintiff alleges that defendants were liable to him for "[l]ost profits and commissions." It is undisputed that plaintiff worked for defendants from April of 2001 through November of 2003, and plaintiff alleges that defendants promised him commissions during that timeframe. Thus, defendants may not assert that plaintiff never pleaded his alleged entitlement to commissions based on events in July of 2002. Yet defendants repeated that assertion throughout their application, thereby unfairly distorting the issues and hindering this Court's accurate analysis of their arguments.

Defendants also contend that plaintiff is limited to proving his claim for commissions based on two agreements on April 1, 2001, and January 2003, both referenced in the complaint. But defendants ignore the fact that plaintiff's complaint states that defendants ceased paying plaintiff commissions in July of 2002. Given the complaint's reference to July of 2002, we decline defendants' invitation to rule that plaintiff could not argue that defendants' actions in July of 2002 entitled him to commissions. To adopt defendants' argument here would require plaintiffs to file intricate complaints including every factual detail that otherwise would be addressed in the discovery process. Where plaintiff clearly alleged that he was entitled to commissions based on his employment with defendants, he is entitled to argue, particularly in opposing summary disposition, that defendants' actions in July of 2002, during his term of employment, form the basis of his claim.

Defendants also contend that plaintiff's complaint does not comply with MCR 2.111. MCR 2.111 provides in pertinent part that the statement of facts in the complaint must contain "specific allegations necessary reasonably to inform the adverse party of the nature of the claims the adverse party is called on to defend." MCR 2.111(B)(1). As noted, the complaint reasonably informed defendants that plaintiff sought commissions during his employment. Defendants'

argument in seeking summary disposition, that plaintiff could not rely on the commissions schedule that defendants themselves provided to him during that very timeframe, is disingenuous. See *Iron County v Sundberg, Carlson & Assoc, Inc*, 222 Mich App 120; 564 NW2d 78 (1997), where this Court ruled that the plaintiff could rely on evidence of the fire code violation, obtained through discovery, to support its previously-pleaded claims. Moreover, this Court ruled that the defendant could have moved for a more definite statement under MCR 2.115(A). *Id*. at 124-125. Likewise, plaintiff may rely on evidence, received from defendants in July of 2002, to support his commissions claims.

Defendants argue that they should not be required to anticipate exactly what must be presented to an appellate court, again contending that plaintiff had not pleaded certain allegations. Had defendants fairly acknowledged the facts and issues relied on by plaintiff in opposing summary disposition, sanctions could have been avoided. But defendants did not do this, even in their supplemental brief. Instead, defendants continue to falsely assert that plaintiff categorically admitted that he never discussed commissions prior to starting work in April 2001. While plaintiff did testify that Armstrong did not use the term "commissions," he also testified that the two men discussed a "draw." As discussed further *infra*, plaintiff asserts that the term "draw" means a salary drawn against commissions. Therefore, to state, as defendants did, that plaintiff "categorically admitted" that he never discussed commission and that it was "unequivocal" that commissions were not discussed, is an unfair presentation of the issues. This error in presentation is all the more egregious in the context of a motion pursuant to MCR 2.116(C)(10), where defendants contended that no genuine issue of material fact precluded a summary decision in their favor.

Defendants also asserted that the complaint did not state allegations concerning a July 2002 commissions agreement or an agreement on the basis of the referenced commissions schedule. As noted *supra*, plaintiff's complaint alleged that defendants were liable to him for commissions during his employment from April of 2001 to November of 2003. Also, plaintiff testified in his deposition that, in July of 2002, Armstrong offered him a straight commissions schedule, which reflected that plaintiff could receive over $234,000 from commissions on the DCX Mack account and over $8,000 from the Cenetic Automation account. Defendants proceeded as though the above referenced testimony and the commissions schedule (that defendants themselves provided to plaintiff) did not exist on the basis that plaintiff did not expressly refer to them in his complaint. But plaintiff did refer to them in his deposition and in his answer to the motion for summary disposition. Courts may properly consider deposition testimony and other evidence submitted by the parties when considering a motion pursuant to MCR 2.116(C)(10). *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999). Accordingly, defendants' subsequent and repeated assertion in their application that no genuine issue of material fact existed on this point not only was incorrect, but also was vexatious.

Additionally, defendants contend that this Court improperly sanctioned them on the basis of their failure to discuss the draw issue. Defendants' mere failure to further discuss the draw issue did not subject them to sanctions. Rather, what merited sanctions was defendants' failure to acknowledge that, on summary disposition, they themselves created a genuine issue of material fact by disputing plaintiff's definition of the term "draw." Defendants also had no factual support for their claim that plaintiff offered "not one iota" of support for his contentions regarding the draw, in view of the testimony given by defendants own employee, Lee Mattei,

that supported plaintiff's understanding of the meaning of the term "draw." In addition, testimony from defendant Armstrong likewise supported plaintiff's contention that a genuine issue regarding the term "draw" precluded summary disposition in favor of defendants here.

Further, defendants state that they need not have discussed the term "draw" because plaintiff is not relying on the statement about being paid a draw for his commission claims. But plaintiff is relying on the fact that he initially was paid a draw (i.e., a salary against his commissions) to support his allegation that defendants promised him a commission in July of 2002. Thus, while not relying expressly on the initial draw for his commission claim, plaintiff does rely on the fact that he initially was paid a draw rather than a salary. Contrary to defendants' contention, therefore, the facts related to plaintiff's draw are relevant such that defendants were obliged to fairly present the draw issue in their application to this Court.

Defendants next argue that the facts that arguably were not fairly presented were irrelevant. The pertinent court rule, however, requires that parties to an appeal present a balanced statement of facts, not just facts in their favor. See MCR 7.212(C)(6). Accordingly, to comply with the court rule, defendants were required to fairly state "all material facts," including those facts expressly relied on by plaintiff in opposing summary disposition. Not only did defendants fail to do so in their application in this Court, they made affirmative statements that are *contrary* to the record facts. As a result, this Court's resources were unnecessarily expended in checking (and re-checking) the veracity of those statements. This Court's resources are better spent in resolving appeals rather than verifying facts mischaracterized by an appellant.

Defendants next contend that they properly quoted plaintiff's deposition testimony. This Court disagrees, as noted *supra*. Indeed, defendants' repeated reliance on only a fragment of plaintiff's answer to a key question was one of the bases to grant the motion for sanctions. In light of defendants' repeated omission of facts not in their favor, this Court cannot conclude, as defendants argue, that the inaccurately excerpted quotation was an honest mistake. The totality of the circumstances does not reflect that defendants made an inadvertent error in a complex case. See, e.g., *May v Detroit*, unpublished per curiam opinion of the Court of Appeals, Docket Nos. 233318, 234966 (issued 06/12/03), where this Court rejected the request for sanctions where the defendant had misrepresented that the trial court had awarded expert witness fees and held that "[b]ased on the record and the complexity of this case there is no reason not to believe that defendant inadvertently included the argument regarding expert witness fees." *Id*., slip op at 15. Nothing in the materials before this Court suggests that defendants' misquotation here was in any way "inadvertent."

Defendants finally argue that, when compared to other cases citing MCR 7.216, this case is not so egregious as to merit sanctions. We disagree. Defendants were not sanctioned here for merely making unpersuasive arguments. Rather, defendants deliberately attempted to misrepresent the record evidence to this Court. While any one of the omissions noted above may not have risen to the level of a vexatious appeal pursuant to MCR 7.216(C), we simply cannot ignore defendants' repeated attempts to distort the record. In their application, defendants repeatedly misrepresented significant facts and repeatedly made assertions contrary to plaintiff's testimony. Defendants continued those tactics in their answer to the motion for sanctions. Even defendants' supplemental brief on remand continues the misrepresentation that plaintiff has acknowledged that he is basing his claims on an "unpled" theory. As such, we can only

conclude that defendants have deliberately attempted to avert this Court's fair and accurate review of the trial court's ruling. And this we cannot abide.

Consequently, although this Court rarely imposes sanctions, we conclude that to fail to do so in this case would not be in the best interests of justice. Consider this Court's comments in *Tecorp Entertainment Corp v McElwee*, unpublished per curiam opinion of the Court of Appeals, Docket No. 219296 (issued 01/30/01), where this Court awarded sanctions for a vexatious appeal:

> A proceeding is vexatious when a pleading, motion, argument or brief is grossly lacking in the requirements of propriety, violates court rules, or grossly disregards the fair presentation of the issues to the court. MCR 7.216(C)(1)(b). Plaintiffs filed a nonconforming brief, with little or no legal support to appeal a vexatious lawsuit. *Resteiner v Sturm, Ruger & Co, Inc*, 223 Mich App 374; 566 NW2d 53 (1997). Plaintiffs made misstatements to this Court in order to cast a more favorable light on their case. They did not cite to the record. The appeal was another attempt by plaintiffs to cost defendants more time and resources, as was their meritless underlying claim before the trial court. MCR 7.216(C)(1)(a). [Id., slip op at 2-3.]

Here, defendants have grossly disregarded the requirements of a fair presentation of the issues to the Court by their repeated attempts to distort the record and prevent this Court's accurate review of the trial court's ruling. Therefore, we assessed sanctions pursuant to MCR 7.216(C)(1)(b).

/s/ Kirsten Frank Kelly
/s/ Kurtis T. Wilder