# STATE OF MICHIGAN

# COURT OF APPEALS

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MARK FOX and ANITA FOX,

Plaintiffs-Appellants,

v

SHERWIN-WILLIAMS COMPANY,

Defendant-Appellee.

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UNPUBLISHED
January 7, 2010

No. 287999
Ingham Circuit Court
LC No. 07-001630-AV

Before: Talbot, P.J., and O'Connell and Davis, JJ.

O'CONNELL, J. (*concurring in part and dissenting in part*).

I concur with the lead opinion in this case in all respects save one. I agree that the trial court's failure to apply a correct legal standard to plaintiffs' breach of warranty claims necessitates reversal of the applicable portion of the trial court's order, and remand on this ground is appropriate. Further, I agree that the case evaluation award and associated sanctions should be vacated. However, I disagree with the lead opinion's conclusion that the violation of MCR 2.403(N)(4) that occurred in this case does not constitute reversible error. Instead, I conclude that the violation of MCR 2.403(N)(4), compounded by indications that the district court judge was unable to remain impartial in this matter, necessitate vacation of these proceedings and reassignment of this case to a new judge.

MCR 2.403 concerns procedures surrounding the submission of a civil action to case evaluation. When the case evaluation award has been rejected, as occurred in this case, MCR 2.403(N)(4) specifically provides,

> The ADR clerk shall place a copy of the case evaluation and the parties' acceptances and rejections in a sealed envelope for filing with the clerk of the court. In a nonjury action, the envelope may not be opened and the parties may not reveal the amount of the evaluation until the judge has rendered judgment.

After plaintiffs filed a motion to vacate the case evaluation because of an alleged impropriety, defendant's attorney solicited an affidavit from a member of the case evaluation panel that, in fact, revealed the amount of the case evaluation award. This member of the case evaluation panel then submitted the affidavit to the court, in violation of MCR 2.403(N)(4), and defendant attached the affidavit to his pleadings and associated brief. Accordingly, the amount of the evaluation became, strictly speaking, public information, and was accessible to any judge who wished to simply flip through the court file. Plaintiffs blame defendant for the court rule

violation and argue that the trial court must be disqualified and defendant sanctioned as a result of the violation. Defendant argues that no harm resulted from the court rule violation because the district court judge, by her own admission, "purposefully did not read the pleadings in order to remain ignorant of the evaluation amount."

Both parties admit that the affidavit revealed the amount of the case evaluation award. In fact, in an attempt to establish the correctness of their substantive arguments in this case, both parties subsequently filed pleadings in this case that addressed the issue, attaching the "now-famous" affidavit and, in so doing, drawing additional notice to the case evaluation amount. The parties' actions constituted an egregious violation of the court rule. The only remedy for such a violation is disqualification of the trial judge and a new trial for the parties. *Bennett v Medical Evaluation Specialists*, 244 Mich App 227, 233; 624 NW2d 492 (2000).[1]

The result of this action was to instigate what might be one of the longest and most contentious district court proceedings in the history of Michigan's jurisprudence. To conclude that the trial court's opinion was not influenced by such proceedings would be to ignore the obvious.[2]

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[1] In a nod to judicial efficiency, the partial concurring/dissenting opinion attempts to salvage the district court proceedings, declaring that this case is distinguishable from *Bennett* because in this case the trial court "purposefully did not read the pleadings in order to remain ignorant of the evaluation amount." In my opinion this logic creates a catch-22 by precluding the judge from properly deciding a case. The trial court judge was placed in a situation in which she would be automatically disqualified if she read the pleadings or motions relevant to an issue that she had to decide, but in which her *failure* to read the relevant information constitutes a failure to perform a fundamental requirement of her job (namely, reading and considering the arguments presented by each side before rendering a judgment).

Placing a judge in such a position constitutes little more than gamesmanship and should not be acceptable to our system of justice. The parties have created this untenable situation and should be held accountable for their actions. Affirming this process in the name of efficiency only extends and perpetrates such conduct, and I do not find that acceptable.

[2] On appeal to the circuit court, the judge described the district court proceedings as follows:

> I have perused the entire file. I note that [defendant's attorney] claims in excess of 130 hours spent on this 4000 or $4500 case. [The district court judge] indicated at one time she expended some 60 hours on it and at another point 80 hours. My review of the entire file took me over two days and all I did was read it.
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> Oh, I should note for the record . . . this file is – just the briefs are nine inches high and the file itself is about three inches high, so that's a total of 12 inches on a $4,000 case. It boggles the mind.

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Considering that this case involves a minor sum of money and was decided in a non-jury trial in a district court proceeding, one may ask why, under the guise of the "efficient administration of justice," this Court should not simply affirm the trial court's decision. The answer is simple: neglect invites and perpetuates error. Here, all parties and the members of this panel agree that MCR 2.403(N)(4) was violated. The effect of this violation of this court rule on the district court judge is unknown and, in fact, the judge may be unable to identify or even notice a subconscious shift in her perception of this case arising from her exposure to the parties' attempts to sway her. One would like to think that all judges are immune from such gamesmanship. However, the record in this case belies the fact that all judges are immune from such gamesmanship.[3] In fact, this record supports the proposition that unlawful gamesmanship has subtle effects on the decision maker.

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Frankly, a movie could be made out of the contentious proceedings in this case. Yet although delineating the specifics of this case would fuel the "blame game" and provide the bench and bar with excellent lunchroom gossip, I find no real purpose in detailing the petty animosities that have developed among the judge, parties, and attorneys in this case.

[3] In fact, any honest judge (myself included) must admit that he or she cannot always completely immunize himself or herself from such bias. Many years ago, when I was a district court judge, I pondered the question of bias that jurors might develop in cases in which there is excessive pretrial publicity, stating,

> Bias and prejudice are attitudes. They are not something you can see, feel, or touch. They are discovered through the use of wisdom, knowledge, and an understanding of human nature. In this regard, they are similar to the concepts of truth, beauty, goodness, and justice. The senses cannot experience these notions. Only the mind can capture these concepts because they are incapable of absolute definition. They exist in degrees. The best we can do is to define the characteristics of bias and prejudice and search for a methodology that will facilitate discovery of these characteristics.
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> There are two perspectives on prejudice. The first is expressed by Tyron Edwards, who said: "He that is possessed with a prejudice is possessed with a devil, and one of the worst kinds of devils, for it shuts out the truth and often leads to ruinous error."
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> The second view is by Charles Curtis, who stated: "There are two ways to be quite unprejudiced and impartial. One is to be completely ignorant. The other is to be completely indifferent. Bias and prejudice are attitudes to be kept in hand, not attitudes to be avoided." [O'Connell, *Pretrial Publicity, Change of Venue, Public Opinion Polls: A Theory of Procedural Justice*, 65 U Det L Rev 169, 181-182 (1988).]

Sometimes, though, we judges are reluctant to admit that just as jurors sometimes cannot be fully fair when they have been exposed early on to information about a case or to an unflattering

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The other opinions in this case imply that no harm or prejudice occurred as a result of defendant revealing the amount of the case evaluation award to the court, and that no harm resulted from the failed disqualification proceedings that followed. Yet harm did result: there was necessarily a loss of credibility and increased mistrust in the objectivity of these proceedings. Without credibility and trust, the court ceases to function as a legitimate means of dispute resolution.

Unfortunately, the record indicates that such error harmed the dispute-resolution process. The judge's subsequent actions led to the appearance that she might have become subconsciously biased as a result of the violation of the court rule and plaintiffs' subsequent motions for sanctions and disqualification. A very contentious and uncivil proceeding existed from the beginning, soon after plaintiffs filed motions challenging the case evaluation and moving for the judge to disqualify herself. Although the judge refused to recuse herself, she candidly admitted that she took the motion to disqualify herself personally and acknowledged her "personal" displeasure in plaintiffs' refusal to travel to her courtroom in Brighton for trial in this matter.[4] The proceedings that followed are replete with instances of conduct that defy explanation and establish that "an attitude" dominated the proceedings. In her 17-page opinion in this case, she indicated that she did not find any of plaintiffs' witnesses credible. At the end of the proceedings, the trial judge sanctioned plaintiffs $25,275.00, which amount was in addition to a prior sanction of plaintiffs, all in a case where the prayer for relief was approximately $4,800. The issuance of a 17-page opinion and an award of over $25,000 in sanctions are unusual in a case concerning $4,800 in damages to a backyard deck, and considering the contentiousness of these proceedings, the unusual outcome in this case places the district court judge in a bind. Perhaps plaintiffs' witnesses are not credible and over $25,000 in sanctions is warranted in this case. However, considering that the district court was exposed to the aforementioned gamesmanship and admitted that she was personally affected by plaintiffs' attempt to disqualify her from this case, she has placed herself in a situation in which her highly unusual holdings in this case might indicate a decision based more on a dislike of the plaintiffs than on the merits of the case.

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initial characterization of a person involved in a case, we also face such struggles. Sometimes it can be difficult for a judge to look past the gamesmanship of attorneys and rule on the merits of a case, especially when attorneys resort to deceptive maneuvers, overacting, exaggeration, and bravado in an attempt to obfuscate the merits, or lack thereof, of their case and, instead, to demonize the other side, all in hopes of "winning" a big payout. Attempting to rule objectively on the merits of the case can be a tough, lonely battle in the face of such an onslaught.

[4] In this matter, the district court judge, whose chambers and courtroom were in Brighton, asked plaintiffs to conduct all hearings in Brighton. Plaintiffs' attorney unabashedly informed the judge that she was required to drive to Lansing because the venue of the case was in Lansing. Interestingly, for the non-jury trial, the judge drove to Lansing. However, when it came time to sanction plaintiffs, the judge conducted the sanction hearing in Brighton to an empty plaintiffs' seat. Remarkably, at the sanction hearing, the district court judge sanctioned plaintiff over $25,000, including a $3,150 award for defendant to compensate for "windshield time" that defendant's attorney incurred and $787.50 to compensate for time that defendant's attorney spent reading his e-mail. This "venue war" raises another issue that I would recommend that the SCAO resolve on remand, namely, where the proceedings in this case should be held.

The violation of MCR 2.403(N)(4) sparked a fire, and the misconduct and gamesmanship that followed fueled what quickly became a blaze that could no longer be contained. Sending this case to a new judge is the only way to extinguish it.

Although I concur with the lead opinion, I would vacate all the lower court proceedings, remand this case, and order the assignment of a new judge to this case.

/s/ Peter D. O'Connell