STATE OF MICHIGAN

COURT OF APPEALS

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA and UNITED BROADCASTING NETWORK, INC.,

Plaintiffs/Counterdefendants-Appellees,

v

HELEN DORSEY, PAT CHOATE, and EDWARD A. MILLER,

Defendants/Counterplaintiffs/Third-Party Plaintiffs-Appellants,

and

KAY CASEY,

Third-Party Plaintiff-Appellant,

and

DANIEL SHERRICK, ROY WYSE, and JOYCE FRANK,

Third-Party Defendants-Appellees.

FOR PUBLICATION
October 4, 2005
9:00 a.m.

No. 248412
Washtenaw Circuit Court
LC No. 97-008442-CB

Official Reported Version

Before: Meter, P.J. and Kelly and Schuette, JJ.

KELLY, J. *(concurring in part and dissenting in part).*

I respectfully dissent from the majority's conclusion that the trial court erred in denying defendants' motion for a new trial. Under the circumstances presented in this case, I do not

believe that the divorce transcripts used by plaintiffs to impeach the testimony of Edward A. Miller were part of a sealed record. In all other respects, I concur.

During Miller's divorce proceedings, Judge Ross Campbell issued an "Amended Opinion and Order Sealing Court File and Records," stating in relevant part:

> NOW, THEREFORE, for the reasons stated, IT IS HEREBY ORDERED, that all of the files and records of this cause, including but not limited to the files and records of the Friend of the Court, shall be and the same hereby are sealed . . . .

Five years after the amended order was issued, further hearings were conducted regarding alimony and child support. During these hearings, Miller testified before newly assigned Judge Kurtis T. Wilder on a number of issues relating to his finances. In the present case, Miller admitted that he lied under oath before Judge Wilder about his financial situation, his departure from the job he held before he worked at United Broadcasting Network, his relationship with Helen Dorsey, and his knowledge of Dorsey's income.

Defendants contend on appeal that they are entitled to a new trial because the transcripts of Miller's prior testimony should not have been used to impeach his testimony in the present case since they were part of a sealed record. In contrast to the majority opinion, I agree with plaintiffs that this issue was not preserved and should not be reviewed. As noted by the majority, unpreserved errors will not be reviewed by this Court unless lack of review would result in manifest injustice. *Napier v Jacobs*, 429 Mich 222, 233-234; 414 NW2d 862 (1987). To preserve an evidentiary error for appellate review, a party must object on the same ground that it presents on appeal. *Klapp v United Ins Group Agency, Inc (On Remand)*, 259 Mich App 467, 475; 674 NW2d 736 (2003); MRE 103(a)(1). In the trial court, defendants did not object to admission of the transcripts[1] on the basis that they were part of a sealed record; rather, they contended that the transcripts were not admissible for the purpose of impeachment because they did not impeach Miller's testimony in this case. Because defendants did not object at trial on the same ground that they present on appeal, the issue is not preserved.

The majority excuses the preservation requirement because *defense counsel* did not know that the record in Miller's divorce case was sealed. They surmise that, because defense counsel was "surprised," it was not possible for counsel to preserve this issue by properly objecting. This may be true, but, in my opinion, it is irrelevant whether defense counsel knew of the order sealing the record or Miller's prior untruthful testimony. Defense counsel is not a party to this action; Miller is. As a party, Miller either was or should have been fully aware of his prior untruthful testimony and the order sealing the file. Whether by plan or negligence, he failed to inform his trial counsel in the present case.

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[1] The transcripts were not admitted as a whole. Plaintiffs' counsel read portions of the transcripts into the record during cross-examination of Miller.

While a less than candid client places an attorney in a difficult position during trial, the negative consequences the party suffers as a result of his own lack of candor does not form the basis for an error requiring reversal. There is no rule of law that requires a client to disclose damaging information to his attorney. The client can choose whether to disclose this information, though it would be universally agreed that a client's choice to conceal information from his attorney is not a good one. Nonetheless, when counsel's hope for the client's full disclosure is disappointed, it is not grounds for a new trial. See *Rubenstein v Purcell*, 276 Mich 433, 438-439; 267 NW 646 (1936) (no surprise when one's own witness causes the surprise by changing testimony). As defense counsel candidly concedes, "He didn't tell us and we didn't know." Any "surprise" on the part of defense counsel was caused by his client, not opposing counsel. This is particularly true when all parties were on notice in the earliest stages of discovery that the Miller divorce was an important issue. In short, Miller himself caused his counsel to be surprised because he (1) lied under oath in a prior case about a matter relevant in this case and (2) failed to inform his attorney about his prior lies. Because error to which the aggrieved party contributed by plan or negligence cannot be error requiring reversal, *Farm Credit Services of Michigan's Heartland, PCA v Weldon*, 232 Mich App 662, 683-684; 591 NW2d 438 (1998), I would decline to address this unpreserved issue.

Even if this issue had been properly preserved, I would further agree with plaintiffs that the trial court did not err in ruling that the transcripts from the Miller divorce were not covered by the sealing order. MCR 8.119(F) provides guidelines on sealed records and, therefore, is the correct rule[2] to apply in resolving this issue. MCR 8.119(F)(4) explicitly defines what comprises a court record:

> For purposes of this rule, "court records" includes all documents and records of any nature that are *filed with the clerk in connection with the action*. Nothing in this rule is intended to limit the court's authority to issue protective orders pursuant to MCR 2.302(C). [Emphasis added.]

When interpreting a court rule, this Court applies the same legal principles that govern statutory interpretation. *In re KH*, 469 Mich 621, 628; 677 NW2d 800 (2004).

> When interpreting statutory language, our obligation is to ascertain the legislative intent that may reasonably be inferred from the words expressed in the statute. When the Legislature has unambiguously conveyed its intent in a statute, the statute speaks for itself, and judicial construction is not permitted. Because the proper role of the judiciary is to interpret and not write the law, courts simply lack authority to venture beyond the unambiguous text of a statute. [*Koontz v Ameritech Services, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002) (citations omitted).]

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[2] The majority concedes that it is the "most relevant" rule. *Ante* at ___.

Applying these principles to the plain language of MCR 8.119(F)(4), it is clear that, in order for something to be part of the court record, three criteria must be met. The contested item must be (1) a document or record of any nature (2) filed with the clerk (3) in connection with the action. According to the unambiguous terms of MCR 8.119(F)(4), the transcript at issue is simply not part of Miller's divorce record because it was never "filed with the clerk in connection with the action." *Id.* The majority opines that the rule is ambiguous because "reasonable minds could differ concerning whether transcripts are included within MCR 8.119(F) as part of a sealed record[.]" *Ante* at ___. I disagree. Although it is true, as the majority states, that "[t]he language of this rule is very broad, including the words 'all' and 'of any nature,'" *ante* at ___, the term "court records" remains defined as only those "documents and records of any nature" that are actually "filed with the clerk in connection with the action." The transcripts at issue are not records from Miller's divorce case because they were never filed with the court clerk in the divorce or postjudgment proceedings.

Additionally, the majority's reliance on MCR 8.119(D)(4) is misplaced. That rule sets forth the duties of the court clerk, and provides:

> The clerk shall keep in such form as may be prescribed by the court, other papers, documents, materials, and things *filed with or handled by the court* including but not limited to wills for safekeeping, exhibits and other discovery materials, requests for search warrants, marriage records, and administrative activities. [Emphasis added.]

Again, the transcripts at issue were never "filed with or handled by the court . . . ." While I agree with the majority that "[a] transcript *could* be considered a 'thing filed with . . . the court' for purposes of this rule," *ante* at ___ (emphasis added), the transcripts in this case were not a "things filed with or handled by the court . . . ." MCR 8.119(D)(4) does not encompass a thing that merely has the *potential* to be filed. There is a crucial distinction between what could theoretically be considered part of a record, and what actually *is* part of the record. MCR 8.119(D)(4) does not support defendants' position that the transcripts were part of the sealed file.

The majority also erroneously relies on MCR 8.108(F)(1), which states:

> *On order of the trial court*, the court reporter or recorder shall make and file in the clerk's office a transcript of his or her records, in legible English, of any civil or criminal case (or any part thereof) without expense to either party; the transcript is a part of the records in the case. [Emphasis added.]

The plain language in this rule clearly provides that a transcript becomes part of the record when the trial court orders the court reporter to "make and file" the transcript in the court clerk's office. Here, the trial court never ordered the court reporter to "make and file" the transcripts in the court clerk's office. Rather, plaintiffs' counsel contacted the court reporter and requested a copy

of the transcripts.[3] Therefore, MCR 8.108(F)(1) also does not support defendants' position that the transcripts were part of the sealed file.

The majority also erroneously states that "MCR 8.108(D) states that a court reporter's records are part of the record of each case." *Ante* at ___. The scope of MCR 8.108 is stated in MCR 8.108(A), which provides: "This rule prescribes the duties of the court reporters and recorders, the procedure for certifying them, the effect of noncertification, objections to certification, and display requirements." MCR 8.108(D) specifically provides:

> If the court reporter or recorder dies, resigns, is removed from office, or leaves the state, his or her records in each case must be transferred to the clerk of the court in which the case was tried. The clerk shall safely keep the records subject to the direction of the court. The records are part of the record of each case and are subject to inspection in the same manner as other records. *On order of the court, a transcript may be made from the records and filed as part of the record in the case.* [Emphasis added.]

On the basis of this plain language, it is clear that a transcript may be filed as part of the record only on order of the court. In this case, the trial court in the divorce case never ordered that the transcripts be filed as part of the record. Therefore, this rule does not support defendants' position.

I disagree with the majority's reasoning and conclusion on this issue. In the face of unambiguous court rules, the majority misapplies the rules of statutory interpretation to reverse the trial court's order denying defendants' motion for a new trial. The result is that Miller, an admitted liar under oath, will get yet another opportunity to obscure the truth, albeit this time his attorney will not be "surprised" when the transcripts are used to impeach him.

/s/ Kirsten Frank Kelly

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[3] I disagree with defendants' argument that the method by which plaintiffs obtained the transcripts was improper. It is common practice across the courts of this state for a party to order transcripts from a court reporter.