STATE OF MICHIGAN

COURT OF APPEALS

JAMES R. SHAWL and MARY B. SHAWL,

Plaintiffs-Appellees,

v

SPENCE BROTHERS, INC.,

Defendant-Appellant,

and

J. RANCK ELECTRIC, INC.,

Defendant.

FOR PUBLICATION
August 19, 2008

No. 275271
Saginaw Circuit Court
LC No. 06-060834-NO

Advance Sheets Version

Before: Wilder, P.J., and O'Connell and Whitbeck, JJ.

O'CONNELL, J. (*concurring*).

I concur with the majority opinion that the trial court, when deciding whether to grant or deny a motion to set aside a default judgment, must examine the *totality of the circumstances*. I also join in the majority's conclusion to reverse the trial court's decision. I write separately to advocate the totality of the circumstances test and to emphasize that the Michigan Court Rules are not "a procedural tightrope upon which a litigant must balance carefully and perfectly" or be thrown out of court. *Gering v Anderson Villas, LLC*, unpublished opinion per curiam of the Court of Appeals, issued May 13, 2008 (Docket No. 275940), at 3.

At the outset, I stress that this opinion is not intended as an analysis or criticism of either the trial court or the majority's methodology in resolving this case, but as an opportunity to address and reduce the gamesmanship that creates hostile attitudes and friction among litigants, lawyers, and the bench. Some attorneys maintain that gamesmanship is a fundamental and ingrained aspect of the legal process, and that attempts to compete with or outdo their opponents are not only appropriate but also required for zealous advocacy. I contend, however, that this gamesmanship attitude, which is all too prevalent in today's law practice, is more destructive than helpful, because it brings disrespect upon the law, the litigants, and our shared concept of justice. Although I have no illusions that the game theory of law practice will be eliminated, I remain hopeful that this gamesmanship can be reduced through the application of the totality of

the circumstances test to the process of administering justice. Indeed, one purpose of this opinion is to ignite discussion on the topic.

I begin with the proposition that the litigation process is best described as "conflict within a set of rules." Stated another way, lawsuits generally involve a disagreement between conflicting parties, and the Michigan Court Rules provide a set of rules designed to help resolve this conflict. Consequently, a judge's role is to resolve the conflict within the strictures of the Michigan Court Rules. These rules are designed to create consistency and a level playing field for all participants in the dispute resolution process.

The law favors the determination of claims on their merits. *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 229; 600 NW2d 638 (1999). Dismissals and defaults are the system's mechanism for sanctioning those whose conduct does not fall within the confines of the rules. See MCR 2.504(B)(1); MCR 2.313(B)(2)(c); *Mink v Masters*, 204 Mich App 242, 243-245; 514 NW2d 235 (1994). Litigants who purposefully and repeatedly act outside the scope of, or fail to follow clear and concise, rules deserve special and prompt attention from the court. However, if a timely meritorious claim or defense is alleged and the conflict of the parties reasonably falls within the set of rules at issue, the law favors a lesser sanction than default or dismissal. See MCR 2.603(D)(1). But not all cases are meritorious and not all defenses are worth pursuing, particularly if the costs of litigation exceed the benefits or burdens to the parties. That is why, in my opinion, the best manner in which to balance these issues and reach a fair and just decision is to weigh the totality of the circumstances.

Every case is different, with factual nuances that must be identified, evaluated, and balanced to reach a proper result. Only an experienced judge with common sense, wisdom, and a sense of justice is empowered by our constitution to make the correct decision. It is the judge who also exercises patience that generally uses the correct process. However, a judge who focuses solely on a *single* process, to the exclusion of all else, sometimes experiences methodological tunnel vision.[1] The process then becomes perfunctory and often results in unjust, illogical, and incongruous outcomes.

I find this occurs most often where, as in this case, "procedure is substance." The merits of the case are left in the wake created by the procedural rules. In such cases, the manner in which the procedural rules are implemented can be more important than the substance of the case. The journey becomes more important that the destination. The totality of the circumstances test is an attempt to distinguish those occasions when the bright-line application of

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[1] The reader may interpret this statement as a criticism of textualism. It is not. In my opinion, all good judges begin the resolution of a controversy with the text of the statute or court rule. A principled decision with a principled outcome is the goal of any decision-making process. I use this language only in the sense that the practical constraints involved in drafting court rules impose what may occasionally resemble methodological tunnel vision. Good judges will have the common sense and wisdom to integrate, where necessary, the rules, the comments to the rules, and caselaw into a fully articulated and intellectual framework.

the rules is appropriate (such as dismissal for failure to file within the statute of limitations) with situations where the rules themselves involve abstract concepts of justice (as with the use of the term "good cause" in the default judgment context). In the latter case, the art of judging cannot become a mechanical or computer-like process.

Indeed, both this Court and our Supreme Court have dismissed the notion of judging as a mechanical process. "'[Rules of practice and procedure] must be followed but they must also be thought of as guides and standards to the means of achieving justice, not the end of justice itself.'" *Higgins v Henry Ford Hosp*, 384 Mich 633, 637; 186 NW2d 336 (1971),[2] cited with approval in *People v Grove*, 455 Mich 439, 469-470 n 36; 566 NW2d 547 (1997). "Judging is an art," and the role of a judge is not that of a computer plugging facts into a formula and spitting out results. *Nippa v Botsford Gen Hosp* (*On Remand*), 257 Mich App 387, 393-394 n 5; 668 NW2d 628 (2003). Indeed, the very nature of the rules confirms that "[n]o computer will ever be able to replace the role of judge in our society, and no computer or mechanical device can function at the level of a judge." *Id.* at 393 n 5. MCR 1.105 provides that a trial court should construe the rules "to secure the just, speedy, and economical determination of every action and to avoid the consequences of error that does not affect the substantial rights of the parties." Computers input data and spit out results. They cannot comprehend, let alone administer, something as non-formulaic as justice.

Accordingly, I conclude that a decision to set aside a default judgment must be based on the totality of the circumstances and an individualized assessment of the facts and conditions of the specific case. Because the majority opinion takes this position into account and, because under the totality of the circumstances test the trial court erred in failing to set aside the default judgment, I concur in the result reached by the majority opinion.

/s/ Peter D. O'Connell

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[2] The quotation comes from the official committee comment to GCR 1963, 13 (replaced in 1985 with MCR 1.105) and reads in full:

> "Rules of practice and procedure are exactly that. They should create no rights and should be thought of as indicating the way in which justice should be administered. They should give direction to the process of administering justice *but their application should not become a fetish to the extent that justice in an individual case is not done*. There is a need for guides and standards. They must be followed but they must always be thought of as *guides and standards to the means of achieving justice, not the end of justice itself*." [*Higgins, supra.*]