STATE OF MICHIGAN

COURT OF APPEALS

JOHNSON CARPET, INC., d/b/a GRAND SALES,

Plaintiff-Appellant,

v

REX D. HEADAPOHL,

Defendant,

and

MICHIGAN MUTUAL INSURANCE CO. and RHONDA HEADAPOHL,

Garnishee Defendants-Appellees,

and

JAMESTOWN INSURANCE CO.,

Garnishee Defendant.

UNPUBLISHED
January 28, 2000

No. 204120
Kent Circuit Court
LC No. 93-083306-CK

JOHNSON CARPET, INC., d/b/a GRAND SALES,

Plaintiff-Appellant,

v

REX D. HEADAPOHL,

Defendant,

and

No. 211320
Kent Circuit Court
LC No. 93-083306-CK

CAREY & ASSOCIATES, P.C.,

Garnishee Defendant-Appellee,

and

MICHIGAN MUTUAL INSURANCE CO.,

Garnishee Defendant.

Before: Fitzgerald, P.J., and Bandstra and Hoekstra, JJ.

PER CURIAM.

Plaintiff Johnson Carpet, Inc., appeals as of right from two orders quashing writs of garnishments it requested. We reverse in Docket No. 204120 with respect to the writ of garnishment served on Rhonda Headapohl, but affirm in all other respects. We affirm in Docket No. 211320.

These appeals arise from plaintiff's attempt to collect on a judgment against defendant Rex Headapohl. Plaintiff contracted to provide goods to Grayling Floorcovering, and defendant, the owner of Grayling Floorcovering, was guarantor for payment. When Grayling Floorcovering did not pay for the goods, plaintiff filed suit. On December 10, 1993, a default judgment was entered against defendant for $22,002.53.

At some point, defendant's son, Robert, died in Kalkaska County and a wrongful death suit was filed there. On June 5, 1995, a settlement was reached in which defendant, his wife and his daughters would receive jointly over ten years a total of $87,500; of that amount, $50,000 was to be paid immediately, with garnishee defendant Rhonda Headapohl responsible for paying $12,500 jointly to defendant, his wife and his daughters.

Plaintiff filed requests for and received writs of garnishment against defendant, Rhonda Headapohl (personal representative of Robert's estate), and garnishee defendant Michigan Mutual Insurance Company.[1] Each of the garnishee defendants responded that they had no money belonging to defendant. Plaintiff served interrogatories and requests for production on the garnishee defendants.

The insurance companies for defendants in the Kalkaska County case would not release the funds discussed in the June 5, 1995 settlement because of the pending garnishment actions. Accordingly, on August 16, 1995, the trial court in the present underlying action entered a stipulated order authorizing all but the $87,500 in dispute to be paid out to the parties entitled to receive the proceeds. On September 14, 1995, the court conducted a hearing to determine whether the writs of garnishments against Michigan Mutual and Rhonda Headapohl should be discharged. The court ordered the garnishments discharged, concluding that the Kalkaska County court was the only court

that could determine what defendant's individual share of the proceeds from the wrongful death settlement should be. On October 13, 1995, the court entered an order discharging the garnishments and vacating the August 16, 1995 stipulation.

On November 3, 1995, plaintiff requested a writ of garnishment against garnishee defendant Carey & Associates, who had represented the Headapohls in the Kalkaska County wrongful death litigation. Carey & Associates filed a garnishee disclosure stating that it had no funds owing to defendant. On February 19, 1998, the court held a hearing on Carey & Associates' motion to quash garnishment. Carey & Associates' office manager, Denise Caverly, testified that on September 8, 1995 and October 18, 1995, two checks had been received totaling $50,000. All of this money had been paid out on October 19, 1995; approximately half went to the Headapohls, while the remainder had gone to Carey & Associates and the attorneys who participated directly in the litigation. Plaintiff objected to the testimony as to the checks paid to the attorneys on the grounds that (1) Carey & Associates had originally declined to provide information on these checks on the basis of attorney-client privilege and (2) the evidence concerning the checks to the attorneys contradicted their garnishee disclosure form. The court overruled both objections and allowed the evidence to be admitted. On cross-examination, plaintiff attempted to inquire as to the fee agreement between the Headapohls and Carey & Associates. Counsel for Carey & Associates objected on relevancy grounds and the court sustained the objection. Following the hearing, the court ordered the writ of garnishment quashed.

In Docket No. 204120, plaintiff contends that the court erred in concluding that it could not determine the share of the disputed $87,500 to which defendant was entitled. We agree. MCL 600.4011(1)(a); MSA 27A.4011(1)(a) confers on trial courts the power to satisfy a claim, evidenced by a judgment, with property owned by the defendant but possessed by a third party. MCR 3.101 provides the procedure for pursuing postjudgment garnishments. Because this issue involves interpretation of statutes and court rules, and does not involve discretionary rulings or fact issues, we review it de novo. *Waatti & Sons Electric Co v Dehko*, 230 Mich App 582, 585; 584 NW2d 372 (1998). It appears in this case that the court concluded it could not determine plaintiff's share of the proceeds from the Kalkaska County action because of its interpretation of MCL 600.2922(6)(d); MSA 27A.2922(6)(d), which provides that the court in which a wrongful death suit was filed shall enter an order distributing the proceeds to the parties entitled to recover. Nothing in these provisions requires that the court give individual distributions to the parties. The Kalkaska County court did all it was required to do under the statute. In addition, Michigan recognizes a presumption that when a non-debtor holds an account with a debtor, the debtor holds a share equal to that of the non-debtor. See *Danielson v Lazoski*, 209 Mich App 623, 625; 531 NW2d 799 (1995). The money that was the subject of the garnishment action, $87,500, appears capable of division. The court erred in concluding otherwise, and reversal is required.

Even though reversal is required, we will not reverse as to Michigan Mutual's interest. Plaintiff has admitted in its reply brief that Michigan Mutual's obligations have been discharged. Therefore, plaintiff may not recover from Michigan Mutual. The garnishment action against it is moot. Thus, while we reverse and remand in order that the court can determine what has happened to the disputed money, and if still available, what portion rightfully belongs to defendant, we affirm as to Michigan Mutual.

Plaintiff contends that the court abused its discretion in vacating the August 16, 1995 stipulated order and quashing all garnishments. We disagree. Because the October 13, 1995 order disposed of all issues between the garnishee defendants in Docket No. 204120, it is the equivalent of a judgment. See *Toy ex rel Ketcham v Lapeer Farmers Mutual Fire Ins Ass'n*, 297 Mich 188, 191-192; 297 NW 230 (1941) (A party's right to appeal is determined not by the form of the order or decree, but by the effect of such). Under MCR 2.601(A), a judgment may grant all the relief to which the prevailing party is entitled, even if the party has not demanded that relief in his or her pleadings. In this case, the only amount in controversy was $87,500. Had the court simply quashed the garnishments, the $87,500 would have remained in limbo. Thus, the court's order of October 13, 1995 would have been rendered meaningless. Circuit courts have jurisdiction and power to make any order proper to fully effectuate their jurisdiction and judgments. MCL 600.611; MSA 27A.611. Plaintiff argues that it was denied due process, but does not explain how or cite any authority in support of its argument. It is not our function to search for authority favorable to plaintiff's position. *Great Lakes Division of Nat'l Steel Corp v Ecorse*, 227 Mich App 379, 425; 576 NW2d 667 (1998). However, we also note that the underlying issue, whether the garnishments and the holdup of the wrongful death proceeds could stand, was litigated. Due process requires notice and an opportunity to be heard by an impartial decisionmaker. *Cummings v Wayne Co*, 210 Mich App 249, 253; 533 NW2d 13 (1995). It does not require that the court grant only the relief requested. No due process violation occurred here, and no abuse of discretion is shown.

In Docket No. 211320, plaintiff raises three evidentiary issues concerning the hearing on Carey & Associates' motion to quash the writ of garnishment. We review evidentiary rulings for abuse of discretion. *Szymanski v Brown*, 221 Mich App 423, 435; 562 NW2d 212 (1997). An abuse of discretion will be found only if an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification for the ruling. *Franzel v Kerr Mfg Co*, 234 Mich App 600, 620; 600 NW2d 66 (1999). Plaintiff first contends that the court erred in excluding testimony about the fee agreement between Carey & Associates and the Headapohls. We disagree. The trial court told counsel that while he was entitled to ask about what had been paid out, the fee agreement was not relevant to the garnishment action. Only relevant evidence is admissible in a proceeding. MRE 402. A garnishment action should be tried on the issues framed by the writ of garnishment, by the garnishee disclosure, by responses to interrogatories and by depositions. MCR 3.101(M)(2). At no point during the discovery process did plaintiff request anything relating to a fee agreement between Carey & Associates and the Headapohls. Even if it had been requested, however, plaintiff could not make an issue of the fee agreement. The purpose of the garnishment hearing is to determine the liability of the garnishee and whether the garnishee actually possesses any property belonging to the principal defendant, not whether an attorney fee was reasonable. Plaintiff seems to be arguing that, unless there is evidence of a fee agreement, Carey & Associates was not entitled to collect a fee. In support of this claim, plaintiff cites MCR 8.121(F), which requires a written agreement in cases involving contingent fees, and MRPC 1.5, which governs the charging of fees in all other situations. While violation of these provisions may give rise to a grievance, we question plaintiff's standing to raise this issue in the garnishment proceeding because plaintiff was not a party to the Kalkaska County action. We see no abuse of discretion in the court's exclusion of this evidence.

Plaintiff also argues that it was denied due process of law. The court indicated at the end of the February 19, 1998 hearing that it would continue the hearing. Plaintiff had indicated that it wanted the principal defendant to testify. However, without taking further testimony, the court issued its opinion on March 10, 1998. Before the final opinion had issued, plaintiff filed a supplemental trial brief to which it had attached selected portions of the principal defendant's deposition testimony; the court noted that it had considered the deposition testimony when it issued the March 24 opinion. Plaintiff gives no indication of what other evidence it could have introduced. We also note that plaintiff did not file a motion to remand in this Court to make a record of what it could have introduced. As previously discussed, due process requires notice and an opportunity to be heard. *Cummings, supra* at 253. From all indications in the record, the court had before it all the evidence that plaintiff intended to introduce. Plaintiff's right to due process was not violated.

In the second evidentiary issue, plaintiff contends that the trial court erred in allowing introduction of the checks paid to the attorneys on the ground that they had asserted attorney-client privilege. We disagree. This Court has made the following observations about pretrial discovery:

> [T]he Supreme Court has repeatedly emphasized that the purpose of discovery is to simplify and clarify issues. *Domako* [*v Rowe*, 438 Mich 347, 353, 360; 475 NW2d 30 (1991)]. Thus, the rules should be construed in an effort to facilitate trial preparation and to further the ends of justice. *Id*.; *Eyde v Eyde*, 172 Mich App 49, 54; 431 NW2d 459 (1988). Moreover, "[the discovery process] should promote the discovery of the facts and circumstances of a controversy, rather than aid in their concealment." *Domako, supra* at 360. Indeed, restricting parties to formal methods of discovery would serve to complicate trial preparation, rather than aid in the search for truth. *Id*. [*Reed Dairy Farm v Consumers Power Co*, 227 Mich App 614, 616; 576 NW2d 709 (1998).]

Plaintiff bases its claim on a portion of MCR 2.306 which pertains to privileges asserted during a deposition. The general policy behind denying a party the use of evidence that it withheld because of a privilege is clear; a party should not be able to surprise opposing counsel by introducing evidence that it earlier withheld. The reason for limiting the prohibition on the use of evidence protected by a privilege which is asserted in a depositions is equally clear; when one asserts a privilege ad hoc in a deposition, there is little chance to resolve the issue of whether a privilege actually exists. When asserted in other contexts, such as interrogatories, the issue can be resolved in the court.

In the present case, Carey & Associates originally claimed attorney-client privilege. Its claim of privilege was denied. From all indications in the record, it disclosed the evidence that it had earlier withheld on the basis of attorney-client privilege. There was no surprise to counsel by the use of this evidence and no error in its admission in the face of plaintiff's objection.

Plaintiff also contends that the aforementioned evidence should not have been admitted because it contradicted Carey & Associates' disclosure. Again, we disagree. Under MCR 3.101(M)(5), the garnishee defendant may offer evidence not contradicting the disclosure or, in the discretion of the court, may show error or mistakes in the disclosure. Plaintiff's interrogatories requested information

specifically about Chemical Bank & Trust account no. 114-359-7. However, interrogatory no. 2, which dealt with the distribution of money, contained no reference to account numbers. Carey & Associates provided information about all the money that had gone directly to clients, but did not include information about the checks to attorneys. The checks were paid out of a different Chemical Bank & Trust account. The court noted in its March 24, 1998 opinion that the responses to interrogatories could reasonably have been read to refer only to account no. 114-359-7. We cannot conclude, based on the record before us, that there was no basis for making this conclusion. *Franzel, supra* at 620. We further note that, although not included in the initial responses to interrogatories, the information about the checks to the attorneys was later provided to counsel for plaintiff. No abuse of discretion is shown in allowing this evidence to be admitted.

Plaintiff contends that this appeal should be remanded because Carey & Associates will receive payments which are not yet due, and as a result, the trial court should have held the writ of garnishment to cover the future payments. This issue was neither presented to nor ruled upon by the trial court. It is not properly before this Court for review. *Herald Co, Inc v Ann Arbor Public Schools*, 224 Mich App 266, 278; 568 NW2d 411 (1997).

In summary, the trial court's ruling at issue in Docket No. 204120 is reversed with respect to the quashing of the writ of garnishment against Rhonda Headapohl. In all other respects, the October 13, 1995 order is affirmed. The orders and rulings at issue in Docket No. 211320 are affirmed. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ Richard A. Bandstra
/s/ Joel P. Hoekstra

[1] At various points during the attempts to collect, plaintiff requested and received writs of garnishment against all the defendants in the Kalkaska County action and their insurance companies. Plaintiff does not raise any issues with respect to any of the garnishee defendants except Rhonda Headapohl, Michigan Mutual, and Carey & Associates.