STATE OF MICHIGAN

COURT OF APPEALS

RICHARD DUMAS, LYNN MCBRIDE, and EUGENE PASKO,

Plaintiffs-Appellees,

v

AUTO CLUB INSURANCE ASSOCIATION,

Defendant-Appellant.

UNPUBLISHED
April 14, 2000

No. 208617
LC No. 83-316603-CK

Before: Gage, P.J., and Smolenski and Zahra, JJ.

ZAHRA, J. *(dissenting).*

I respectfully dissent from the majority's conclusion that no final order was entered in this case. The March 5, 1993 order denying plaintiffs' motion to schedule further proceedings constituted a final order. As such, the learned trial judge lacked authority to grant relief pursuant to MCR 2.604(A). Relief, if any, was only available under MCR 2.612(C).

The majority's conclusion appears premised upon the belief that an order cannot be "final" unless it is expressly identified as such within the text or title of the order. While I agree that express identification of orders is a sound practice, at all times relevant to this matter there existed nothing in the court rules or in Michigan case law that imposed such a requirement.[1]

Quoting from MCR 7.202(8)(a)(i), this Court has held that a final order is one "that disposes of all claims and adjudicates the rights and liabilities of the parties." *Baitnger v Brisson,* 230 Mich App 112, 116; ___ NW 2d ___ (1998). Thus, our focus should not be on whether an order identified as "final" was entered but whether any order was entered that disposed of any remaining claims and adjudicated the rights and liabilities of the litigants. The trial court ruled that plaintiffs' case was over when it denied by written order dated March 5, 1993, plaintiffs' motion to schedule further proceedings. The effect of this order was that plaintiffs were barred from pursuing their quota/age discrimination claims and, absent reversal or modification by a higher court, defendant was free from liability on these claims. This result satisfies the definition of a final order. *Id.*

Even plaintiffs believed that their claims had been finally adjudicated, albeit erroneously, as evidenced by the fact that they filed an *appeal as of right* from the March 5, 1993 order. And although this Court's May 7, 1993 order dismissed plaintiffs' claim of appeal "for lack of jurisdiction

because the order entered March 5, 1993 is a post-judgment order," I agree with the majority that by vacating the order for peremptory reversal in *Dumas IV* and remanding to us for plenary consideration, the Supreme Court has sent us a clear message to reconsider conclusions previously reached by this Court. With the benefit of hindsight, I conclude that this Court erroneously characterized the March 5, 1993 order as a post-judgment order. Following this Court's improvident dismissal of plaintiffs' appeal, plaintiffs only remaining avenue for relief from the March 5, 1993 order was to appeal to the Supreme Court. Plaintiffs sought leave to appeal with the Supreme Court and, significantly the Supreme Court did not turn a deaf ear to plaintiffs' claim.

The Supreme Court, in lieu of granting leave to appeal, remanded the matter to the trial court and instructed the trial court to consider, among other things, whether plaintiffs abandoned their quota/age discrimination claims. The trial court conducted its evidentiary hearing as instructed and found in pertinent part that plaintiffs had indeed abandoned their quota/age discrimination claims. As a result, the Supreme Court denied leave by order dated May 12, 1995. Upon denial of leave, the case was finally adjudicated and all possible appellate remedies were exhausted.

A final order having been entered in this case on March 5, 1993, the subsequent trial judge's authority to modify that order was limited to the remedies provided in MCR 2.612(C). The subsequent trial judge set aside the original trial judge's order because he believed the original trial judge's ruling was erroneous. Nothing in MCR 2.612(C) allows a trial judge to exercise appellate review of a final order from an equal court. Relief from a final order pursuant to MCR 2.612(C) on the grounds that it was erroneously granted is particularly inappropriate where, as here, the litigants fully and completely exhausted appellate review of the order in question.

For these reasons, I would reverse the order of the trial court.

/s/ Brian K. Zahra

[1] Effective December 1, 1998, MCR 2.602(A) was amended to require that any order that closes a case include immediately preceding the judges signature a statement that all pending claims are resolved and the case is closed upon entry of the order. Prior to this amendment to MCR 2.602(A), the requirement that an order be identified as "final" was not the product of case law, statute or court rule but rather a requirement created by court clerks charged with the responsibility of maintaining the court's docket entries. However, court clerks do not have the power or authority to promulgate court rules.