

STATE OF MICHIGAN  
COURT OF APPEALS

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JUSTINE MALDONADO,

Plaintiff-Appellant,

v

FORD MOTOR COMPANY and DANIEL P.  
BENNETT,

Defendants-Appellees.

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UNPUBLISHED

April 22, 2004

No. 243763

Wayne Circuit Court

LC No. 00-018619-NO

Before: Borrello, P.J., and White and Smolenski, JJ.

PER CURIAM.

Plaintiff Justine Maldonado appeals as of right from the August 21, 2002 order of the Wayne Circuit Court granting defendants Ford Motor Company and Daniel Bennett's joint motion to dismiss her complaint on the ground that she and her attorneys engaged in prejudicial pretrial publicity. Plaintiff also appeals the trial judge's denial of her motion for recusal, which she filed on the basis that a member of defendant Ford Motor Company's law firm was the chair of the judge's re-election committee. Plaintiff also raises the issue whether the trial court abused its discretion in excluding evidence of Bennett's expunged conviction and the testimony of other female employees of Ford Motor Company. We affirm the decision of the trial court to exclude Bennett's conviction into evidence, and affirm the trial court on the issue of recusal. We reverse the trial court's ruling on the admissibility of testimony of other Ford employees. While we also reverse the trial court's dismissal of plaintiff's case, we remand the matter back to the trial court to conduct an evidentiary hearing to determine if plaintiff and her counsel tainted the jury pool.

I. Factual Background

In June 2000, plaintiff filed a lawsuit against defendants, alleging sexual harassment under the Michigan Civil Rights Act (CRA), MCL 37.2101 *et seq.* Specifically, plaintiff claims that defendant Bennett sexually harassed her in January and February 1998. Plaintiff testified in her deposition that on one evening, Bennett instructed her to take a production vehicle and drive it to a repair building some distance away. After dropping off the car, plaintiff got into Bennett's car. According to plaintiff, Bennett exposed his penis to her, demanding that she "suck it," and attempted to fondle her breasts and crotch. Plaintiff refused and got out of the car. Plaintiff further testified that a few days later, Bennett exposed himself again to her, using force to hold

her hand to his exposed penis. Plaintiff again said no, pulled away from his grasp, and left the area. At the time, plaintiff did not tell anyone at the plant about these incidents. Shortly thereafter, plaintiff was transferred out of Bennett's department and was laid off. In June 1998, plaintiff was called back to work in a different section of the plant. Plaintiff testified that when she left work one evening, she saw Bennett following her as she left I-275 on her way home from work. Plaintiff contends that Bennett got out of his car, walked up to plaintiff's car, reached in to tug at the chest area of her blouse, and asked her to have sex with him in the nearby bushes. When plaintiff refused, Bennett returned to his car. As plaintiff drove away, she looked back to see Bennett sitting in his car, masturbating. According to plaintiff, from June 1998 through August 1999, Bennett continued to harass her at the plant, grabbing his crotch, and making obscene gestures with his tongue. Plaintiff contends that several other employees were similarly harassed by Bennett.

Plaintiff also contends that she became aware of an incident where Bennett exposed himself to young girls. According to plaintiff, Bennett began following three high-school girls in a van driving next to their van and exposed himself as both vehicles drove down the expressway. Following a bench trial in district court in November 1995, Bennett was convicted of indecent exposure. After his conviction, Bennett continued to work as a superintendent at Ford's Wixom plant. His arrest and conviction were later expunged. Plaintiff sought to have Bennett's conviction introduced into evidence at trial thereby prompting Judge MacDonald to enter an order granting defendants' joint motion in limine to exclude evidence of Bennett's conviction for indecent exposure.

Shortly after the court entered the order excluding the conviction, plaintiff's attorneys circulated a press release announcing that they intended to file a motion to disqualify Judge MacDonald. They also provided details of Bennett's conviction for indecent exposure, which were subsequently disseminated in a series of news broadcasts and print stories. Plaintiff subsequently moved to disqualify Judge MacDonald, who stayed further proceedings, including trial. Judge MacDonald denied plaintiff's disqualification motion. Plaintiff then appealed Judge MacDonald's decision to the Chief Judge of the Wayne Circuit Court, who denied the appeal. Plaintiff thereafter sought leave of the trial court's decision to exclude the evidence, which had been denied by this Court and our Supreme Court. In February 2002, when Judge MacDonald was assigned to the Family Division of the Wayne Circuit Court, the case was reassigned to Judge Giovan.

Thereafter, defendants filed another joint motion in limine, seeking to exclude testimony about Bennett's treatment of women other than plaintiff. Following the hearing, the trial judge met with the parties' attorneys in chambers to discuss the public comments of plaintiff's attorney.

Subsequently, plaintiff and plaintiff's counsel were interviewed by television and newspaper reporters regarding Bennett's conviction. On May 28, 2002, plaintiff was asked to speak about her case at a town hall meeting. According to defendants, plaintiff and her counsel mentioned Bennett's conviction at the town hall meeting. An article about sexual harassment at Ford's Wixom plant also appeared as the cover story of the *Metro Times* on June 12, 2002, in which plaintiff's counsel provided information about Bennett's conviction.

Following Judge Giovan's assignment of the case, plaintiff brought a motion to dissolve the order excluding evidence of Bennett's conviction. Following the hearing, the trial court denied plaintiff's motion to dissolve Judge MacDonald's order excluding evidence of Bennett's prior conviction and granted defendants' motion in limine to exclude testimony of other women about Bennett's sexual harassment. During the hearing on June 21, 2002, Bennett's counsel raised concerns about plaintiff and her counsel providing information of the excluded evidence of Bennett's conviction to the *Metro Times*, especially since the case was approaching trial. In response to such allegations, the trial Court stated:

THE COURT: I'm not making any decisions about this, but I'm going to tell you one thing. If I ever reach the conclusion that somebody is violating that ethical obligation and causing some difficulty in our getting a fair jury, I will dismiss the case with prejudice, or, and I should say, on the other side, grant a default judgment. I just want everyone to know that. And then whatever counsel is involved can answer to their client.

Shortly thereafter, plaintiff gave deposition testimony in which she indicated that she intended to continue publicizing information about Bennett's expunged conviction. A few days later, on June 26, 2002, plaintiff and her counsel appeared with the "Justice for Justine Committee" at a press conference held in front of Ford's world headquarters in Dearborn. Leaflets containing information about Bennett's conviction were handed out during the press conference.

On July 1, 2003, plaintiff filed an emergency motion to disqualify Judge Giovan. After a hearing on July 3, 2002, Judge Giovan denied the motion. The basis of plaintiff's disqualification motion was that a chairman of Judge Giovan's re-election campaign, Kelvin Scott, was a lawyer with the firm defending Ford in the present case.

At the close of arguments, Judge Giovan denied the disqualification motion. Afterward, one of plaintiff's counsel, Miranda Massie, while being interviewed by Channel 4, WDIV, said on television:

Metro Detroit has a company town feeling, and it's hard to get a fair hearing from any of these judges when you're going against the Ford Motor Company. They'll stop at nothing to maintain the culture of abuse that exists in those plants, and we've found it hard to get unbiased rulings in these cases.

Defendants then brought a joint motion for dismissal, predicated on plaintiff and her counsel engaging in improper pre-trial statements. Thereafter, the trial court issued an opinion and order granting defendants' joint motion to dismiss. The trial court based that its dismissal on its "inherent power to impose sanctions on the basis of the misconduct of a party or an attorney." The trial court held that in "[t]he case at bar . . . (1) the pretrial publicity here has been instigated by the plaintiff and her counsel, and (2) the publicity *does* contain repeated references to evidence ruled inadmissible at trial" (emphasis in original). Thus, Judge Giovan concluded that he had the authority to dismiss plaintiff's case for misconduct on the basis that "[plaintiff] and her attorneys [had] premeditatedly threaten[ed] the integrity of the judicial process." In addition to citing the inherent power of the court, Judge Giovan, citing MCR 2.504 and MCR

2.313, also concluded that “there is sufficient authority in the court rules themselves for the grant of a dismissal or a default in appropriate cases.”

## II. Dismissal of the Matter

Plaintiff contends that the trial court’s dismissal of her case violated her right to free speech and freedom from discrimination. Plaintiff states there was no legal or factual support for the trial court’s sanction against plaintiff’s attorneys, absent a hearing to conclude whether the jury pool had been tainted by plaintiff’s pre-trial publicity. Another argument of plaintiff is that she and her attorneys have a protected First Amendment right to speak out against sexual harassment at the Ford Wixom plant by publicizing the fact of Bennett’s conviction. Conversely, defendants assert that plaintiff and her attorneys repeatedly refused to abide by the rulings of the trial court, despite the fact that they were warned by the trial court that any further attempt to taint the jury pool would result in dismissal. In particular, defendants point to the fact that plaintiff admitted she publicized Bennett’s expunged conviction at her deposition, during a television interview, and at a demonstration at the Ford Wixom plant.

In *Persichini v Beaumont Hospital*, 238 Mich App 626, 639; 607 NW2d 100 (1999), this Court noted that it has “repeatedly recognized that a trial court has inherent authority to impose sanctions on the basis of the misconduct of a party or an attorney.” At issue in *Persichini*, *supra*, was the trial court’s ability to impose sanctions for defendant’s attorney fees, lost income and travel expenses of witnesses. Our Court stated that the question whether the trial court has the authority to impose such awards as a sanction is a question of law, subject to review de novo, whereas an exercise of the court’s inherent power may be disturbed only upon a finding that there has been a clear abuse of discretion. *Id.* at 637, 642. In *Cummings v Wayne County*, 210 Mich App 249; 533 NW2d 13 (1995), witnesses experienced incidents of vandalism and received numerous telephone calls and threats that they would be killed if they testified. Acting upon these reports from witnesses, the trial court held an evidentiary hearing, during which extensive testimony was elicited and affidavits received from the witnesses regarding the threats and vandalism. These incidents were attributed to plaintiff. Defendant subsequently moved for dismissal with prejudice on the basis of witness tampering. The trial court granted the motion. In affirming the decision of the trial court, our Court held:

The authority to dismiss a lawsuit for litigant misconduct is a creature of the “clean hands doctrine” and, despite its origins, is applicable to both equitable and legal damages claims. *Buchanan Home & Auto Supply Co v Firestone Tire & Rubber Co*, 544 F. Supp. 242, 244-245 (D SC, 1981). The authority is rooted in a court’s fundamental interest in protecting its own integrity and that of the judicial process. *Id.* See also *Mas v Coca-Cola Co*, 163 F.2d 505, 507 (CA 4, 1947). While this Court has recognized that substantive distinctions between law and equity survived the procedural merger of law and equity, see *Clarke v Brunswick Corp*, 48 Mich App 667, 669; 211 NW2d 101 (1973), we do not believe that the distinction prevents a court of law from invoking the “clean hands doctrine” when litigant misconduct constitutes an abuse of the judicial process itself and not just a matter of inequity between the parties. The “clean hands doctrine” applies not only for the protection of the parties but also for the protection of the court. *Buchanan Home*, *supra* at 244. “Tampering with the administration of justice . . . is a wrong against the institutions set up to protect and safeguard the public,

institutions in which fraud cannot complacently be tolerated consistently with the good order of society.” *Hazel-Atlas Glass Co v Hartford-Empire Co*, 322 US 238, 246; 64 S Ct 997; 88 L Ed 1250 (1944). See also *Precision Instrument Mfg Co v Automotive Maintenance Machinery Co*, 324 US 806, 814-815; 65 S Ct 993; 89 L Ed 1381 (1945). *Id.* at 252.

In this case, the first issue is whether the trial court possessed the legal authority to dismiss plaintiff’s complaint with prejudice on the basis that plaintiff and her attorneys intentionally and repeatedly disclosed excluded evidence through the public media for the purpose of tainting the jury pool so as to deny defendants a fair trial. In dismissing plaintiff’s complaint, the trial court relied upon its inherent powers under the court rules, which it found in MCR 2.504 and MCR 2.313. MCR 2.504(B)(1) states that a defendant may move for dismissal of an action or a claim against the plaintiff if the plaintiff fails to comply with “these rules or a court order.” While the trial court never issued a written order precluding plaintiff or her counsel from engaging in pre-trial publicity, it did warn the parties on the record, stating, “If I ever reach the conclusion that somebody is violating that ethical obligation and causing some difficulty in our getting a fair jury, I will dismiss the case with prejudice, or, and I should say, on the other side, grant a default judgment.” Consequently, the trial court opined that plaintiff and her counsel, despite warning from the court, had attempted to taint the jury pool by continuing to disseminate excluded evidence.<sup>1</sup>

Our trial courts possess the legal authority to sanction litigants and their counsel, including the right to dismiss an action. This legal authority is not governed so much by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases. See *Chambers v NASCO, Inc*, 501 US 32, 43; 111 S Ct 2123; 115 L Ed 2d 27 (1991). Having found that the trial court possessed the legal authority to dismiss this action, we next turn our analysis to whether the trial court’s dismissal of the case constituted an abuse of discretion.

On appeal, plaintiff maintains that the trial court had no legal or factual basis to sanction plaintiff or her attorneys for their conduct in this case. Plaintiff and her counsel contend that she and her attorneys have a protected First Amendment right to speak out against sexual harassment at the Ford Wixom plant by publicizing the fact of Bennett’s conviction.

In *Davis v Dow Corning Corp*, 209 Mich App 287, 294; 530 NW2d 178 (1995), this Court, citing *Gentile v State Bar of Nevada*, 501 US 1030, 1072-1073; 111 St Ct 2720; 115 L Ed2d 888 (1991) and *Seattle Times Co v Rhinehart*, 467 US 20, 32; 104 S Ct 2199; 81 L Ed 2d 17 (1984), stated that “it is not a violation of the First Amendment to impose certain restrictions on attorney speech in the context of litigation and in order to remedy ethical violations.” This Court further noted in *Davis, supra* at 295-296, that, in *Gentile*, the United States Supreme Court “recognized that membership in the bar is a privilege that comes with conditions” and that “obedience to ethical precepts may require abstention from what, in other circumstances, would

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<sup>1</sup> We find that the trial court’s reliance on MCR 2.313 was misplaced because the rule pertains to discovery sanctions.

be constitutionally protected speech.” Additionally, our Court stated that “an attorney may not, by speech or by other conduct, resist a ruling of the trial court beyond the point necessary to preserve a claim for appeal.” *Id.* at 204, quoting *Gentile, supra* at 1071.<sup>2</sup>

However, as the Supreme Court noted in *Gentile, supra* at 1075, limitations on attorney speech must be “narrow and necessary.” In *Gentile*, the Supreme Court addressed the standard governing the state’s ability to discipline an attorney, under an ethical rule that is identical in all relevant respects to MRPC 3.6, regarding speech about parties or proceedings in which the attorney was involved. In *Gentile*, the United States Supreme Court, rejecting the attorney’s claim that he should be subject to a “clear and present danger” standard applicable to the press, concluded that the “substantial likelihood of material prejudice” standard was constitutional as applied to the attorney:

The “substantial likelihood” test . . . is constitutional . . . for it is designed to protect the integrity and fairness of a state’s judicial system and it imposes only narrow and necessary limitations on lawyers’ speech. The limitations are aimed at two principal evils: (1) comments that are likely to influence the actual outcome of trial, and (2) comments that are likely to prejudice the jury venire, even if an untainted panel can ultimately be found. [*Id.*]

Unlike the trial court in *Cummings, supra*, in this case the trial court did not conduct an extensive evidentiary hearing to specifically determine whether the conduct of plaintiff and her attorneys caused any prejudice to the defendants’ right to a fair trial. Therefore, it cannot be determined by the record before us whether the public dissemination of Bennett’s conviction by plaintiff and her attorneys prevented defendants from receiving a fair trial on the ground that the jury pool was tainted. In the absence of an extensive evidentiary hearing, it is not clear whether the trial court dismissed plaintiff’s complaint on the basis of an assumption that the pretrial publicity jeopardized the defendants’ right to a fair trial. Also, unlike *Cummings*, where dismissal with prejudice on the basis of witness tampering was the only reasonable remedy in view of the numerous incidents of vandalism and death threats, it appears that dismissal here was the only sanction considered by the trial court. Although we hold that a trial court has the inherent authority to dismiss a case for egregious misconduct, the question presented here is whether dismissal was the proper sanction where other less drastic remedies were available to ensure that defendants received a fair trial. Because it appears that the trial court based its decision in large measure on presumption, we conclude that the trial court abused its discretion by dismissing plaintiff’s complaint without conducting a full evidentiary hearing.<sup>3</sup>

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<sup>2</sup> We note that while such constraints may be placed on legal counsel (See MRPC 3.6), they do not apply to plaintiff.

<sup>3</sup> Because we find that the trial court abused its discretion by dismissal of this action prior to a full evidentiary hearing, we need not fully decide the issues of First Amendment rights raised by plaintiff and amicus curie ACLU except to state that the trial court never issued an explicit order – written or oral stating what speech was limited. Therefore, the trial court dismissed this matter under an unconstitutionally vague standard that conflicts with the due process requirements set  
(continued...)

We therefore reverse the trial court's dismissal and remand the matter to the trial court for a full evidentiary hearing to determine whether under the "substantial likelihood" test in *Gentile, supra*, the conduct of plaintiff and her attorneys generated pretrial publicity that contaminated the jury pool so as to deprive defendants of a fair trial.

### III. Exclusion of Evidence

Plaintiff next contends that the trial court abused its discretion by excluding evidence of Bennett's conviction. We disagree. We adopt the ruling of this Court in *Elezovic v Ford Motor Company*, 259 Mich App 187; 673 NW2d 776 (2003), *special panel denied*, 259 Mich App 801 (2003), which held on this same evidentiary issue:

The trial court did not abuse its discretion in excluding, under MRE 404(b) evidence of Bennett's 1995 conviction of indecent exposure and the facts associated with that conviction . . . . To be admissible under MRE 404(b), evidence generally must satisfy three requirements: (1) it must be offered for a proper purpose, (2) it must be relevant, and (3) its probative value must not be substantially outweighed by its potential for unfair prejudice, MRE 403. *People v Starr*, 457 Mich 490, 496, 498; 577 NW2d 673 (1998); *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), mod 445 Mich 1205 (1994). A proper purpose is one other than establishing the defendant's character to show his propensity to commit the offense. *Id.* at 74. The trial court did not abuse its discretion in excluding evidence of Bennett's conviction. Plaintiff failed to establish that the evidence was offered for a proper purpose. Bennett's act of indecent exposure outside the workplace is not sufficiently similar to sexually harassing an employee in the workplace to establish a common plan, scheme, or system. *People v Sabin (After Remand)*, 463 Mich 43, 63-66; 614 NW2d 888 (2000). Unlike in *Sabin, Id.* at 64-65, here, there was not a sufficiently strong showing that evidence of Bennett's conviction shared a "concurrence of common features" with his alleged sexual harassment of plaintiff. Further, even if the evidence was admitted for a proper purpose, we would find no abuse of discretion in the court's exclusion of the evidence otherwise under MRE 404(b). . . . We also reject plaintiff's claim that Bennett's conviction was admissible against Ford because it was essential evidence of notice to Ford of Bennett's conduct, which was necessary to proving respondeat superior. *Chambers, supra* at 312. As plaintiff correctly notes, the Michigan Supreme Court has taken a "sliding scale" approach to the MRE 403 analysis. See *People v Mills*, 450 Mich 61, 75-76; 537 NW2d 909 (1995), mod 450 Mich 1212 (1995). "The idea of prejudice denotes a situation in which there exists a danger that marginally probative evidence will be given undue or pre-emptive weight by the jury." *Mills, supra* at 75, quoting

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(...continued)

forth in *Gentile, supra*. Having found that the trial court never issued a direct order pertaining to which speech was prohibited we need not decide the issues of constitutionality of such orders raised by amicus curie ACLU. We do however recommend that on remand of this matter, the trial court issue a constitutionally valid order restraining the parties and their counsel from engaging in impermissible pretrial publicity.

*Sclafani v Peter S Cusimano, Inc.*, 130 Mich App 728, 735-736; 344 NW2d 347 (1983). Plaintiff contends that Bennett's conviction was highly probative evidence and should have been admitted because it was "absolutely essential background fact" in considering the totality of the circumstances with regard to notice. *Sheridan, supra* at 622. Plaintiff maintains that knowledge of the indecent exposure conviction would lead a reasonable employer to conclude that plaintiff's general complaints about Bennett were indicative of sexual harassment. Plaintiff asserts that such essential evidence can never be excluded under MRE 403. We find plaintiff's argument unconvincing. Plaintiff had previously made a specific complaint of sexual harassment against her union committeeman at Ford and, on the contrary, voiced only nonsexual complaints against Bennett. Under these circumstances, we cannot agree with plaintiff's contention that the evidence was essentially conclusively probative of notice. Plaintiff has otherwise failed to show any link between Ford's knowledge of Bennett's indecent exposure conviction and Ford's receipt or investigation of plaintiff's work complaints. The court did not abuse its discretion in excluding the conviction evidence on the basis that its probative value was substantially outweighed by the danger of unfair prejudice. At most, the evidentiary issue presented a close question. There can ordinarily be no abuse of discretion in a trial court's decision regarding a close evidentiary question. *Sabin, supra* at 67. *Elezovic, supra* at 206-208.

We therefore conclude that the trial court did not abuse its discretion in denying plaintiff the right to introduce Bennett's conviction for indecent exposure.

Plaintiff next argues that the trial court abused its discretion by excluding testimony of other female Ford employees and Milissa McClements. We agree.

Unlike the evidentiary issue presented relative to Bennett's conviction, the testimony of these other female employees and McClements does not present a close question regarding its admissibility. The testimony of other Ford employees as well as that of McClements is admissible to allow plaintiff to prove the existence of a hostile work environment. In *Radtke v Everett*, 442 Mich 368, 395 n 41; 501 NW2d 155 (1993), the Court held that an employer may be liable for a sexually hostile work environment created by its agent only if "the employer had actual or constructive knowledge of the existence of a sexually hostile working environment and took no prompt and adequate remedial action." In *Radtke, supra*, 442 Mich at 398, the Michigan Supreme Court noted:

A hostile work environment claim is actionable only when, in the totality of the circumstances, the work environment is so tainted by harassment that a reasonable person would have understood that the defendant's conduct or communication had either the purpose or effect of substantially interfering with the plaintiff's employment, or subjecting the plaintiff to an intimidating, hostile, or offensive work environment. [*Id.* see also *Chambers v Trettco, Inc.*, 463 Mich 297, 316; 614 NW2d 910 (2000) (holding that an employer can be vicariously liable for a hostile work environment only if it "failed to take prompt and adequate remedial action upon reasonable notice of the creation of a hostile work environment")].



In this case, plaintiff sought to introduce the testimony of other female Ford employees and Milissa McClements to establish that she was subjected to a hostile work environment at the Ford Wixom plant. Evidence that women other than plaintiff were subjected to a hostile work environment at the Ford Wixom plant is highly relevant under MRE 401 to show plaintiff's hostile environment claim. Moreover, the probative value of this evidence is not substantially outweighed by the danger of unfair prejudice to defendants or confusion of the issues. Specifically, evidence of the other acts of harassment is highly probative about whether defendant Ford should have known that Bennett was sexually harassing plaintiff. See generally, *Jackson v Quanex*, 191 F3d 647 (CA 6, 1999); *Hicks v Gates Rubber Co*, 833 F2d 1406 (CA 10, 1987).

We reject defendant Ford's contention that plaintiff sought to use the testimony of these other women for the purpose of proving that Bennett acted consistent with his character in sexually harassing plaintiff. Rather, we find that plaintiff sought to introduce the testimony of these other women to demonstrate Ford's liability under the doctrine of respondeat superior. In this regard, such testimony was clearly relevant to plaintiff's sexual harassment claim because plaintiff must show that Ford had notice of Bennett's sexual harassment under the "totality of the circumstances" known to Ford. See *Jackson, supra*, 191 F3d at 647. Even though we are not persuaded with defendant Ford's argument that the evidence is being submitted for the improper purpose of demonstrating Bennett's character under MRE 404(a), in the event plaintiff does make use of the evidence in such an improper manner, Ford can request that the trial court provide a limiting instruction regarding the testimony of these other women. We therefore reverse the decision of the trial court and hold that the testimony of the enumerated Ford employees and McClements is admissible for the reasons set forth in this opinion.

#### IV. Defendant Bennett

All parties agree that pursuant to this Court's ruling in *Jager v Nationwide Truck Brokers, Inc*, 252 Mich App 464; 652 NW2d 503 (2002), defendant Bennett should be dismissed with prejudice from further proceedings in this matter. We thus direct the trial court to enter an order dismissing defendant Bennett with prejudice from this case.

#### V. Recusal

Plaintiff next contends that Judge Giovan should be recused because he had an "ongoing matter or relationship" with Kelvin Scott, an attorney with the firm representing defendant Ford. According to plaintiff, Judge Giovan never informed plaintiff's counsel that Scott was then the chair of his re-election campaign fundraiser that was taking place in the summer of 2002, when this case was set for trial before Judge Giovan. Plaintiff maintains that Judge Giovan's relationship with Scott created at least "the appearance of impropriety" because he has the affirmative duty, pursuant to the Michigan State Bar Ethics Committee, Opinion JI-079 (February 7, 1994) to disclose such a relationship to opposing counsel and all parties. Because we cannot find that an unethical relationship existed between Scott and Judge Giovan, no ethical violations were committed.

"When this Court reviews a motion to disqualify a judge, the trial court's findings of fact are reviewed for an abuse of discretion; however, the applicability of the facts to relevant law is reviewed de novo." *Armstrong v Ypsilanti Twp*, 248 Mich App 573, 596; 40 NW2d 321 (2001).

MCR 2.003(B) states, in relevant part:

(B) Grounds. A judge is disqualified when the judge cannot impartially hear a case, including but not limited to instances in which:

(1) The judge is personally biased or prejudiced for or against a party or attorney.

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(5) The judge knows that he or she, individually or as a fiduciary, or the judge's spouse, parent or child wherever residing, or any other member of the judge's family residing in the judge's household, has an economic interest in the subject matter in controversy or in a party to the proceeding or has any other more than de minimis interest that could be substantially affected by the proceeding.

Our Supreme Court has held that “judicial rulings alone almost never constitute valid basis for a bias or partiality motion. . . . In and of themselves (*i.e.*, apart from surrounding comments or accompanying opinion), they cannot possibly show reliance upon an extrajudicial source; and can only in the rarest circumstances evidence the degree of favoritism or antagonism required . . . when no extrajudicial source is involved . . . . Second, opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible.” [*Cain v Dep’t of Corrections*, 451 Mich 470; 548 NW2d 210 (1996), quoting *Liteky v United States*, 510 US 540; 114 S Ct 1147, 1155, 127 L Ed 2d 474 (1994).]

We note that plaintiff waited to bring her motion for disqualification until Judge Giovan made his ruling on whether Bennett’s conviction could be admitted into evidence. Similarly, plaintiff attempted to disqualify Judge MacDonald shortly after she made the same ruling. Such methodology lends credence to Judge Giovan’s assertion that plaintiff merely awaits the trial court’s ruling then brings a motion for disqualification. Additionally, plaintiff has failed to demonstrate that she brought her motion for disqualification within fourteen days of discovery of the alleged association between Scott and Judge Giovan. See MCR 2.003(C)(1).

Other than to point to rulings not of her liking, plaintiff has failed to point out to this Court any concrete factor of bias or prejudice on the part of the trial judge. The actions of plaintiff and her counsel demonstrate that while they were extremely upset, if not outraged by the rulings of the trial court, the record indicates that Judge Giovan treated this case and the litigants with respect and a great degree of tolerance. Because nothing in the record indicates that Judge Giovan acted with prejudice or impropriety, we are not persuaded that the trial court or the Deputy Chief Trial Judge abused their discretion by not disqualifying Judge Giovan from this matter. Accordingly, we remand this case back to Judge Giovan for rulings consistent with this opinion.

Affirmed in part, reversed in part and reversed and remanded in part. We do not retain jurisdiction.

/s/ Stephen L. Borrello  
/s/ Michael R. Smolenski