STATE OF MICHIGAN

COURT OF APPEALS

LACY HARTER and MIKE McCLELLAND, individually and in their capacity as co-personal representatives of the ESTATE OF KEGAN McCLELLAND,

Plaintiffs-Appellees,

v

GRAND AERIE FRATERNAL ORDER OF EAGLES,

Defendant-Appellant,

and

HOWELL AERIE #3607 FRATERNAL ORDER OF EAGLES,

Defendant-Appellee,

and

MICHIGAN STATE AERIE FRATERNAL ORDER OF EAGLES, INEZ D. BARTON TRUST, HARRIS SEPTIC CLEANING AND ALWAYS CLEAN PORTABLE TOILETS, INC., DALE HARRIS, D & J GRAVEL CO., INC., and AMERICAN CONCRETE PRODUCTS, INC.,

Defendants.

UNPUBLISHED
April 22, 2004

No. 244689
Livingston Circuit Court
LC No. 00-017892-NO

Before: Cooper, P.J., and O'Connell and Fort Hood, JJ.

O'CONNELL, J. (*concurring in part and dissenting in part*)

Because of the trial court's and the majority's antic disposition, the Grand Aerie must pay plaintiffs $8,362,483.82 without any factual or legal justification for holding it liable for Kegan McClelland's death.[1] This immense sum serves only as a discovery sanction in a case where the timely production of the requested documents could not have provided any conceivable assistance to plaintiffs' case. This is one of the largest discovery sanctions in the history of Michigan's jurisprudence.

Plaintiffs argue that knowledge of the relevant insurance companies would have brought them into settlement negotiations. The argument fails because all the relevant companies did eventually arrive to negotiate, and the negotiations did not move forward at all. Plaintiffs argue that had they known of the excess carrier earlier, the carrier would not have asserted a "lack of notice" defense. Given the fact that the discovery order was entered more than two years after the fatal accident, more than one year after suit began, but only three months before the entry of default, this argument amounts to speculation at best. While I concur that the Grand Aerie's part in the negotiation fiasco warrants some sanction, the trial court's use of default in this case more closely resembles an improper attempt to force settlement[2] than an attempt to remedy prejudice from plaintiffs' lack of information.[3]

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[1] This is a premises liability case with other peripheral tort theories included in the complaint. Therefore, the primary question is who owned and controlled the land. Ancillary issues include the propriety of holding the Grand Aerie vicariously liable for the local chapter's negligence or finding it directly responsible for its failure to supervise the local chapter. The majority fails to address any of these substantive issues. All of them favor the Grand Aerie. Michigan has always favored resolving cases on the merits. *Rogers v JB Hunt Transport, Inc*, 466 Mich 645, 654; 649 NW2d 23 (2002).

The Grand Aerie does not have any premises liability, because, like most national fraternal organizations, it lacks ownership and control of the local chapter's premises. *Kratze v Order of Oddfellows*, 190 Mich App 38, 44-45; 475 NW2d 405 (1991), aff'd in part, rev'd in part on other grounds 442 Mich 136 (1993), 18-348 Appleman on Insurance Law & Practice § 10173; *Modern Woodmen of America v Lyons*, 76 Ind App 641, 654-655; 128 NE 651 (1920). It does not have any vicarious liability because it had no control over the local chapter's maintenance decisions. *Kaminski v Great Camp KOTMM*, 146 Mich 16, 18; 109 NW 33 (1906). Finally, the Grand Aerie had no legal duty to supervise the local chapter's day-to-day operations, so it had no direct liability for the child's death. *Colangelo v Tau Kappa Epsilon*, 205 Mich App 129, 134-136; 517 NW2d 289 (1994). Interestingly, the trial court judge sat on the *Colangelo* panel as a visitor, so a total of three appellate jurists who should be familiar with this binding precedent have chosen to ignore it.

The cases cited represent a century of different courts in different jurisdictions applying a uniform legal approach to national fraternal organizations. With such a large award falling out of the legal blue, one can only wonder at the effect that this case might have on an otherwise stable area of law and the benevolent organizations it once protected.

[2] It bears noting that the court rule regarding settlement conferences that was in force at the time of the proceedings did not expressly permit the default of an insured party as a sanction for the failure of its insurance company to appear at a settlement conference. MCR 2.401(G)(1)(amended effective May 1, 2003). Furthermore, the trial court failed to comply with

(continued…)

I would reverse but remand for a sanction that approximates the severity of the offense.

/s/ Peter D. O'Connell

(…continued)

the record and discernment requirements outlined in cases interpreting MCR 2.313. *Bass v Combs*, 238 Mich App 16, 26; 604 NW2d 727 (1999). Nevertheless, the trial court relied on MCR 2.313 to default the Grand Aerie. It is interesting to note that the majority stalwartly reviews this emotionally charged comedy of errors and almost reflexively finds no fault with the trial court or plaintiffs' counsel. While I will not deny the Grand Aerie's missteps, the majority's resolution falls well short of even-handed justice.

[3] The trial court's primary justification for entering the default was the difficulty plaintiffs now face with finding a source of recovery given that the Grand Aerie failed to notify its excess insurer of the case right away. While the Grand Aerie's immediate compliance with the order would not have altered this unfortunate situation, the trial court's entry of default made certain that a long road to any possible recovery lies ahead.