STATE OF MICHIGAN

COURT OF APPEALS

DANIEL I. PASSMAN,

Plaintiff-Appellee,

V

FORD MOTOR COMPANY, BRIGHTON FORD-MERCURY INC, TOM HOLZER FORD INC and FORD MOTOR CREDIT COMPANY,

Defendant-Appellants.

UNPUBLISHED
April 10, 2008

Nos. 270088; 272490
Wayne Circuit Court
LC No. 05-512945-NZ

Before: Zahra, P.J., and White and O'Connell, JJ

PER CURIAM.

Defendants appeal as of right a March 24, 2006, order entered in the Wayne County Circuit Court, awarding plaintiff $17,588 in attorneys' fees and costs. This appeal arises from a vehicle warranty suit. The parties eventually agreed to settle the matter by replacing plaintiff's leased vehicle with a new vehicle, and allowing the court to assess attorneys' fees and statutory costs. The central issue on appeal is the amount of attorneys' fees awarded. We vacate the award of attorney fees and remand for consideration of the attorney fee issue before a different trial judge.

Facts and Procedure

On June 6, 2003, plaintiff leased a new 2003 Ford Mustang from defendant Brighton Ford-Mercury Inc. He began experiencing problems with the car and brought it to several authorized Ford dealerships for repair. Plaintiff claimed the car was never successfully repaired, and on April 29, 2005, filed a complaint alleging breach of warranties and revocation of acceptance under the Michigan Uniform Commercial Code (MUCC) (MCL 440.2103, *et seq.*) liability under Magnuson-Moss Warranty Act (MMWA) (15 USC 2301, *et, seq.*), violation under Michigan Consumer Protection Act (MCPA) (MCL 445.901 *et. seq.*) and violation of Michigan Vehicle Service and Repair Act (MVSRA) (MCL 257.1301 *et seq.*).

Defendants answered the complaint on May 27, 2005. On June 10, 2005, defendants filed a motion to disqualify plaintiff counsel, or alternatively, to screen attorney Scott Mussin from the case. Defendants asserted that Mussin had been employed as a paralegal for five years at Ford before gaining admission to the Michigan State Bar in November 2004. Defendants claim that Mussin continued his employment with Ford until beginning his employment with

plaintiff counsel on February 28, 2005. Defendants claim that Mussin should be screened because he "had access to privileged, confidential, and highly sensitive information during his five years at Ford." Plaintiff eventually agreed to screen Mussin from this litigation.

The parties commenced the discovery process in June of 2005 and defendants maintain that the parties for all intents and purposes reached a settlement on October 31, 2005. Defendants aver that proof of the settlement date is a November 17, 2005 e-mail that indicates that plaintiff had selected a replacement vehicle. Plaintiff, however, maintains that the parties reached a settlement on January 19, 2006. Plaintiff relies on the itemized billing statement that indicates an offer was made on October 31, 2005, but settlement was reached only after the exchange of over 50 e-mails and several drafts of proposed releases.

On March 7, 2006, plaintiff filed a motion to "assess statutory attorney fees and costs pursuant to settlement agreement." Plaintiff sought statutory fees under the MMWA, Michigan Lemon Law (MCL 257.1401, *et seq*.) and the MUCC. In the motion, plaintiff counsel Dani Liblang, claimed she "is recognized as one of only a handful of attorneys in this state who specializes in consumer litigation." Liblang relied on record statements of trial courts indicating her expertise in the field, and attached an itemized billing. She claimed a $350 hourly rate for herself, and specifically noted that three different courts had awarded her an hourly rate of $250, and that in 2004, she was awarded an hourly rate of $275. She also claimed an hourly rate of $250 for her associates. She requested $20,078 in attorneys' fees and $543.90 in costs.

Defendants responded by noting that no depositions were taken, no experts were retained, no motions were heard and no trial or arbitration took place. Defendants challenged cumulative fees including "4.4 hours of inter-office memos and e-mails, 4.2 hours for enclosure letters, 7.9 hours for phone calls, 3.3 hours for filing documents, 3.7 hours for serving documents, and 19.5 hours for preparing documents." Further, defendants claim that 75% of the bill arose after defendants' October 31, 2005 offer to buy back plaintiff's vehicle. Defendants also claimed that plaintiff improperly billed $5,635 to research defendants' motion to disqualify Mussin. Specifically, defendants claim they should not be required to pay plaintiff counsel to comply with the Michigan Rules of Professional Responsibility, particularly where plaintiff did not challenge the motion to disqualify Mussin and agreed to screen him from the case.

The parties appeared before the trial judge on March 24, 2006. The trial judge did not address defendants' challenges to the amount of time allegedly expended in prosecuting this case. The trial judge also did not address the hourly rate for Liblang's associates, which remained at $250 an hour. Likewise, the trial judge did not address the propriety of plaintiff's counsel charging fees to determine whether attorney Mussin should be precluded from working on this case. The trial judge did, however, reduce attorney Liblang's hourly fee from $350 per hour to $275 per hour. An order was entered awarding plaintiff $17,558 in attorney fees and $543.90 for costs. Defendants filed a motion for reconsideration on April 7, 2006, which was denied on April 10, 2006.

Also on April 10, 2006, defendants filed a motion to disqualify the trial judge pursuant to MCR 2.003. In their motion, defendants claimed that three days after the motion hearing on plaintiff's request for attorneys' fees, defense counsel discovered, through another attorney, that plaintiff's counsel had represented the trial judge in a case similar to the instant case and that the case in which the judge was a litigant had been resolved in early 2005, around the same time the

present case was filed. Because neither plaintiff counsel nor the trial judge disclosed this relationship to defendants, defendants requested that the trial judge disqualify himself under MCR 2.003(B)(1), which refers to personal bias or prejudice for or against a party or attorney.

The motion was noticed for April 28, 2006, and then for May 5, 2006. In the meantime, on May 1, 2006, defendants filed in this Court a claim of appeal from the March 24, 2006, order awarding attorney fees.

At the hearing on the motion to disqualify, the following exchange occurred:

> JUDGE: Okay. Plaintiff's attorney, Dani Liblang, represented me regarding a defective General Motors engine. There was never a lawsuit filed. The case was settled, the matter, I should say was settled without a lawsuit ever being filed amicably between the parties. And her representation of me ended in, I believe, March of 2005.
>
> DEFENSE COUNSEL: One month prior to this case being filed before your Honor, Judge.
>
> JUDGE: Yeah, but you've got to look at where we are today. And this is Ford Motor Company, not General Motors. Perhaps if it was a GM. I don't see a legal basis. I'll deny it, but you can go to the Chief judge and reargue it.

The trial court entered a praecipe order denying the motion on May 5, 2006.

On June 19, 2006, defendants filed with the chief judge of the Wayne County Circuit Court a motion for disqualification of the trial judge. In responding to the motion, plaintiff claimed that the circuit court no longer had jurisdiction, pursuant to MCR 7.203(A), because the motion was filed after the filing of a claim of appeal, and in any event the trial judge correctly denied the motion since the court rule does not require disqualification of a judge when he or she was previously represented by an attorney.

The parties appeared before the chief judge on June 29, 2006, at which time the chief judge stated her concern that the representation was not disclosed to defendants, which, in her opinion, should have been disclosed. Nonetheless, the chief judge concluded that she lacked jurisdiction to address the motion to disqualify because defendant already filed a claim of appeal before this Court. Thereafter, defendant filed an application for leave to appeal to this Court to address the disqualification issue. This Court granted defendants' application for leave to appeal and consolidated Docket No. 272490 (the disqualification appeal) with Docket No. 270088 (the appeal by right of the attorney fees imposed by the trial court).[1]

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[1] The only question presented in Docket No. 272490 concerns the disqualification of the trial judge, which is also addressed in the earlier filed brief on appeal in Docket No. 270088 at Issue VII. Accordingly, Docket No. 272490 and Issue VII of Docket No. 270088 will be addressed together.

(continued…)

Analysis

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 Charter Township*, 248 Mich App 573, 596; 640 NW2d 321 (2001).

Defendants argue that the trial judge should have been disqualified because an appearance of impropriety arose from plaintiff counsel's representation of the judge in an automobile warranty case that ended only two months before the instant case was filed.

MCR 2.003(B)(1) provides that "[a] judge is disqualified when the judge cannot impartially hear a case, including but not limited to instances in which . . . [t]he judge is personally biased or prejudiced for or against a party or attorney." In *Cain v Dep't of Corrections*, 451 Mich 470, 503; 548 NW2d 210 (1996), the Michigan Supreme Court stated that "[i]n order for disqualification pursuant to MCR 2.003(B)(1) to be proper, the judge must have shown actual bias against a party or a party's attorney." Apart from MCR 2.003(B)(1), it is the general rule in Michigan that a trial judge is not disqualified absent a showing of actual bias or prejudice.[2] We agree with plaintiff and the trial judge that defendant failed to show actual bias or prejudice in this case.

Nonetheless, the requirement to show actual bias is a general rule, to which our Supreme Court has recognized exceptions. Our Supreme Court has "acknowledge[d that] there may be situations in which the appearance of impropriety on the part of a judge . . . is so strong as to rise to the level of a due process violation." *Cain, supra* at 512, n. 48. Indeed, a showing of actual bias is not necessary where "experience teaches that the probability of actual bias ... is too high to be constitutionally tolerable." *Crampton v Dep't of State*, 395 Mich 347, 351; 235 NW2d 352 (1975). Such a situation exists when a judge is enmeshed in matters involving the petitioner before that judge. *Id*., at 351.

We recognize that from time to time judges are in need of counsel and that both judges and lawyers would be placed in awkward situations if, in every instance of representation, the judge will be indefinitely disqualified from having that lawyer appear before him or her, or if the facts and circumstances of every representation, no matter how old or how personal, were required to be disclosed. We conclude, however, that because plaintiff counsel recently represented the trial judge in a matter similar to the present case, and because the trial judge was being called upon to determine the appropriate compensation for, or value of, the attorney's representation in a similar matter, the trial judge was required to either disclose this relationship to defense counsel, or recuse himself.

(…continued)

[2] Bias or prejudice has been defined as "an attitude or state of mind that belies an aversion or hostility of a kind or degree that a fair-minded person could not entirely set aside when judging certain persons or causes." *Cain v Michigan Dept of Corrections*, 451 Mich 470, 495, n 29; 548 NW2d 210 (1996), quoting *United States v Conforte*, 624 F2d 869, 881 (CA 9, 1980).

Under these circumstances, we conclude the award of attorney fees must be vacated and this matter remanded for further proceedings before a different trial judge.

Vacated and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Brian K. Zahra
/s/ Helene N. White
/s/ Peter D. O'Connell