

STATE OF MICHIGAN
COURT OF APPEALS

ROBERT L. SHIPP,

Plaintiff-Appellant,

v

MARGARET E. PLEASANT and LOYST
FLETCHER, JR,

Defendants-Appellees.

UNPUBLISHED
October 18, 1996

No. 186750
LC No. 93 022874 CZ

Before: Markman, P.J., and McDonald and M. J. Matuzak*, JJ.

PER CURIAM.

Plaintiff appeals by right the June 13, 1995, trial court order dismissing his complaint for failure to appear in court. We vacate the order and remand for further proceedings.

Plaintiff, an heir to his uncle's estate, brought this action in propria persona. Plaintiff claimed that defendants' mismanagement of the estate caused a seven-month delay in the settlement and distribution of the estate. Plaintiff sought both compensatory and punitive damages arising from defendants' alleged misdeeds in handling the estate.

The trial court ordered plaintiff to appear in court for the trial. Because he is incarcerated in a state prison, plaintiff moved for a writ of habeas corpus for purpose of testifying pursuant to MCR 3.304. The trial court never ruled on this motion, but dismissed the complaint when plaintiff failed to appear in court. On appeal, plaintiff claims that the trial court was obligated to issue the writ because the court ordered him to appear.

A "court of record may issue a writ of habeas corpus directing that a prisoner in a jail or prison in Michigan be brought to testify" on the ex parte motion of a party in an action. MCR 3.304(A)(2). Although a prisoner has a right to bring a civil action in the courts, this right does not include the right to testify in person or by deposition. *Hall v Hall*, 128 Mich App 757; 341 NW2d 206 (1983). However, fundamental fairness may require that a prisoner be given some opportunity to present his

* Circuit judge, sitting on the Court of Appeals by assignment.

testimony. *Id.* at 761. Whether fairness requires the court to allow the plaintiff such an opportunity depends on the particular facts of the case. *Id.* The court should decide, according to its sound discretion, whether the plaintiff's interests in presenting his testimony outweigh the state's relevant interests in withholding from him the means necessary for such a presentation. *Id.* The trial court should consider whether the prisoner's presence would substantially further the resolution of the case, the security risks posed by securing the prisoner's presence, the cost of transporting the prisoner to court, and whether the suit could be stayed without prejudice until the prisoner's release. *Id.* at 762.

In the instant case, the trial court ignored plaintiff's motion and dismissed the case when plaintiff failed to appear. This course of action compromised plaintiff's right of access to the courts. *Hall, supra.* We vacate the order of dismissal and remand to the trial court for consideration of the factors listed in *Hall.* In determining whether resolution of this case can be substantially furthered by plaintiff's presence, the trial court may consider whether plaintiff's claims are insufficient as a matter of law, thereby rendering his testimony futile.

Plaintiff also raises claims that the trial court should not have dismissed the complaint before he received the answers to interrogatories he served on defendants, and that defendant Fletcher violated court rules by preparing answers for defendant Pleasant. The former claim has no relevance to the dismissal; the latter was not raised in the trial court and not preserved for appeal.

Reversed and remanded. The trial court is instructed to decide plaintiff's motion for a writ of habeas corpus in accordance with *Hall, supra.* We do not retain jurisdiction. No costs to either party.

/s/ Stephen J. Markman
/s/ Gary R. McDonald
/s/ Michael J. Matuzak