

STATE OF MICHIGAN  
COURT OF APPEALS

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CATHERINE NICOLE DONKERS and BRAD  
LEE BARNHILL,

Plaintiffs-Appellants,

v

TIMOTHY KOVACH,

Defendant-Appellee.

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FOR PUBLICATION  
December 18, 2007  
9:00 a.m.

No. 270311  
Washtenaw Circuit Court  
LC No. 05-000994-NM

Advance Sheets Version

Before: Jansen, P.J., and Fitzgerald and Markey, JJ.

JANSEN, P.J.

Plaintiffs Catherine N. Donkers and Brad L. Barnhill appeal by right the trial court's dismissal of their lawsuit. We reverse and remand for reinstatement of plaintiffs' claims.

I

Plaintiffs sued defendant Timothy Kovach, their former attorney, for alleged legal malpractice in his handling of a previous civil matter.<sup>1</sup> During the course of discovery in the present case, defendant sought to depose plaintiff Donkers. At the time of the deposition, Donkers refused to raise her right hand and to be sworn under oath. She claimed that raising her right hand would violate her religious beliefs. At a subsequent motion hearing before the trial court, Donkers again refused to raise her right hand and to be sworn under oath. She indicated that she would affirm to tell the truth, but stated that she was still unwilling to raise her right hand for religious reasons. When Donkers refused to raise her hand as part of her affirmation to testify truthfully, the trial court dismissed plaintiffs' case with prejudice:

*The Court:* Are you going to raise your right [hand] or not?

*Donkers:* No ma'am. It's writ—

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<sup>1</sup> In addition to legal malpractice, plaintiffs' complaint set forth several other claims.

*The Court:* Okay if not then I dismiss your case and you may take it up on appeal.

*Donkers:* Ma'am—

*The Court:* Your case is dismissed.

*Kovach:* Thank you, Your Honor.

*Donkers:* Ma'am I haven't [been] given an opportunity. The same thing . . . happened at the deposition.

*The Court:* That's right, your case is dismissed.

*Donkers:* I didn't have an opportunity to state what my substitute oath would be.

*The Court:* If you'll—if you'll submit an order—

*Kovach:* Your honor, could I have seven days to submit this order?

*The Court:* You may.

*Kovach:* Thank you very much, Judge Morris.

*Donkers:* Ma'am, I'm going to object. I haven't been given an opportunity to say what my sub—

*The Court:* You know what you do when you object, you appeal. You appeal to the Court of Appeals and explain to them why it is you will not affirm that you will tell the truth on a deposition. There is nothing religious about that. There is no basis for any religious objection. The case is dismissed.

*Donkers:* I had offered to tell the truth . . . this [is] exactly what I offered to say at the deposition as a substitute for an oath. I've had no problem in any other court in Michigan. I've had no problem in Nevada.

*The Court:* The record is turned off, so you're talking to the wind here.

## II

A trial court's decision to dismiss an action is reviewed for an abuse of discretion. *Vicencio v Jaime Ramirez, MD, PC*, 211 Mich App 501, 506; 536 NW2d 280 (1995). "An error of law may lead a trial court to abuse its discretion . . ." *Gawlik v Rengachary*, 270 Mich App 1, 8-9; 714 NW2d 386 (2006). We review de novo questions concerning the proper interpretation and application of statutes, court rules, and rules of evidence. *Eggelston v Bio-Medical Applications of Detroit, Inc*, 468 Mich 29, 32; 658 NW2d 139 (2003); *Waknin v Chamberlain*, 467 Mich 329, 332; 653 NW2d 176 (2002); *Peters v Gunnell, Inc*, 253 Mich App 211, 225; 655 NW2d 582 (2002).

### III

Plaintiffs argue that the trial court erred in concluding that Donkers was required to raise her right hand in order to affirm that she would testify truthfully at her deposition and in open court. Therefore, plaintiffs assert that the trial court abused its discretion by dismissing their case. We agree with plaintiffs, and conclude that the act of raising one's right hand is not required when affirming to testify truthfully.

"Dismissal is the harshest sanction that the court may impose on a plaintiff." *Schell v Baker Furniture Co*, 232 Mich App 470, 475; 591 NW2d 349 (1998). As a result, a trial judge must follow the procedures set forth in our court rules before ordering an involuntary dismissal. See *id.* at 478-479; see also *Henry v Prusak*, 229 Mich App 162, 168; 582 NW2d 193 (1998). We acknowledge that a trial court is authorized to consider "dismissing the action or proceeding" as a sanction when a party refuses to testify at a deposition. See MCR 2.313(B)(1); MCR 2.313(B)(2)(c). However, in the instant case, Donkers did not refuse to testify. Instead, she merely refused to raise her right hand.

Chapter 14 of the Revised Judicature Act mandates that witnesses in judicial proceedings swear or affirm that their testimony will be true. MCL 600.1432; MCL 600.1434; *People v Knox*, 115 Mich App 508, 511; 321 NW2d 713 (1982). MCL 600.1432(1) provides for the manner of administering oaths:

The usual mode of administering oaths now practiced in this state, by the person who swears holding up the right hand, shall be observed in all cases in which an oath may be administered by law except as otherwise provided by law. The oath shall commence, "You do solemnly swear or affirm".

Among the exceptions to this general rule, MCL 600.1434 provides that "[e]very person conscientiously opposed to taking an oath may, instead of swearing, solemnly and sincerely affirm, under the pains and penalties of perjury." It is therefore "otherwise provided by law" that in lieu of swearing an oath under MCL 600.1432, a person may "solemnly and sincerely affirm" to testify truthfully. MCL 600.1434; *People v Ramos*, 430 Mich 544, 549 n 8; 424 NW2d 509 (1988) (describing MCL 600.1434 as one of the statutory exceptions to the general rule of MCL 600.1432). What is less clear is whether a witness who elects to affirm to testify truthfully must also raise his or her right hand when doing so.

Our primary task in construing a statute is to discern and give effect to the intent of the Legislature. *Shinholster v Annapolis Hosp*, 471 Mich 540, 548-549; 685 NW2d 275 (2004). "To do so, we begin with the language of the statute, ascertaining the intent that may reasonably be inferred from its language." *Lash v Traverse City*, 479 Mich 180, 187; 735 NW2d 628 (2007). The words contained in the statute provide us with the most reliable evidence of the Legislature's intent. *Shinholster, supra* at 549.

MCL 600.1432 and MCL 600.1434 relate to the same subject matter and share a common purpose. Accordingly, they are *in pari materia*, and must be read together as one law. *Apsey v Mem Hosp*, 477 Mich 120, 129 n 4; 730 NW2d 695 (2007); *State Treasurer v Schuster*, 456 Mich 408, 417; 572 NW2d 628 (1998). When two statutes are *in pari materia* but conflict with

one another on a particular issue, the more specific statute must control over the more general statute. *People v Buehler*, 477 Mich 18, 26; 727 NW2d 127 (2007). Accordingly, MCL 600.1434, which provides a specific exception to the general rule of MCL 600.1432, must control if any conflict exists between the two statutes. *Buehler, supra* at 26.

Despite the fact that MCL 600.1434 provides a specific exception to the general rule requiring oaths, it does not provide for the manner of administering affirmations. Of central importance in this case, MCL 600.1434 does not address whether the upraised right hand—apparently necessary to effectuate an oath under MCL 600.1432—is required when making an affirmation pursuant to MCL 600.1434. The omission of a provision in one statute that is included in another statute should be construed as intentional, and provisions not included by the Legislature may not be included by the courts. *Farrington v Total Petroleum, Inc*, 442 Mich 201, 210; 501 NW2d 76 (1993); *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 103; 693 NW2d 170 (2005). Indeed, "[c]ourts cannot assume that the Legislature inadvertently omitted from one statute the language that it placed in another statute, and then, on the basis of that assumption, apply what is not there." *Farrington, supra* at 210. The Legislature included the requirement of an upraised right hand in the general rule of MCL 600.1432, but omitted any such requirement from the specific exception of MCL 600.1434. Looking to the more specific statute as we must, *Buehler, supra* at 26, and construing the omission of the upraised-hand requirement from MCL 600.1434 as intentional, *Farrington, supra* at 210, we conclude that the act of raising one's right hand is not required to effectuate a valid affirmation under MCL 600.1434. Because Donkers chose to affirm to tell the truth rather than to swear an oath, she was not required to raise her right hand when doing so.<sup>2</sup>

Our conclusion in this regard is further supported by MRE 603, which provides:

Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so.

As the federal courts have observed in interpreting the identical language of FRE 603, no particular form or language is necessary when swearing or affirming to testify truthfully.

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<sup>2</sup> It is true that "[t]he word 'oath' shall be construed to include the word 'affirmation' in all cases where by law an affirmation may be substituted for an oath; and in like cases the word 'sworn' shall be construed to include the word 'affirmed'." MCL 8.3k. However, the rule of construction contained in MCL 8.3k may not be applied if it "would be inconsistent with the manifest intent of the legislature." MCL 8.3. The Legislature clearly intended in Chapter 14 of the Revised Judicature Act to set up a distinction between oaths and affirmations and to treat the two as separate and distinct acts. See MCL 600.1434. Therefore, for the purpose of interpreting MCL 600.1432 and MCL 600.1434, it would be contrary to the intent of the Legislature to view the words "oath" and "affirmation" as interchangeable and synonymous. Pursuant to MCL 8.3, the rule of construction contained in MCL 8.3k does not affect our interpretation of MCL 600.1432 and MCL 600.1434.

*Gordon v Idaho*, 778 F2d 1397, 1400 (CA 9, 1985); see also *United States v Looper*, 419 F2d 1405, 1407 n 3 (CA 4, 1969).<sup>3</sup> Indeed, the *Gordon* court specifically held that pursuant to FR Civ P 30(c) and FR Civ P 43(d), which parallel the general rule of FRE 603 in the context of discovery and trials, witnesses "need not raise their hand" when swearing or affirming to testify truthfully. *Gordon, supra* at 1400-1401. We similarly conclude that it is not necessary for a witness to raise his or her right hand or to engage in any special formalities when swearing or affirming to testify truthfully pursuant to MRE 603. As the plain language of MRE 603 makes clear, no particular ceremonies, observances, or formalities are required of a testifying witness so long as the oath or affirmation "awaken[s]" the witness's conscience and "impress[es]" his or her mind with the duty to testify truthfully.

The authority to promulgate rules governing practice and procedure in Michigan courts rests exclusively with our Supreme Court. Const 1963, art 6, § 5; *McDougall v Schanz*, 461 Mich 15, 26; 597 NW2d 148 (1999). Therefore, when resolving a conflict between a statute and a court rule, the court rule prevails if it governs purely procedural matters. *Staff v Johnson*, 242 Mich App 521, 530-531; 619 NW2d 57 (2000); *People v Strong*, 213 Mich App 107, 112; 539 NW2d 736 (1995). This tenet applies equally to a conflict between a statute and a rule of evidence. See *McDougall, supra* at 24. Therefore, to the extent that any conflict may exist between MRE 603 and the statutes at issue in this case, MRE 603 must control because MCL 600.1432 and MCL 600.1434 govern purely procedural matters. *Staff, supra* at 530-531; *Strong, supra* at 112.

Having determined that a witness need not raise his or her right hand when affirming to testify truthfully pursuant to MCL 600.1434, we need not decide whether there is in fact a conflict between MRE 603 and the particular statutes in question. Regardless of whether the calculus is controlled by MCL 600.1434 or by MRE 603, Donkers was simply not required to raise her right hand before testifying in this case.

#### IV

Neither MCL 600.1434 nor MRE 603 mandates special words or actions before a witness may testify; each requires only a simple affirmation or promise to tell the truth. Thus, as long as Donkers's promise to testify truthfully was minimally sufficient, the trial court was required to allow her testimony. The trial court erred as a matter of law by concluding that Donkers was required to raise her right hand, and this error led the court to abuse its discretion by dismissing plaintiffs' action. See *Gawlik, supra* at 8-9.

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<sup>3</sup> We are fully aware that decisions of lower federal courts are not binding on Michigan state courts. *Abela v Gen Motors Corp*, 469 Mich 603, 607; 677 NW2d 325 (2004). Nonetheless, such decisions may be persuasive. *Cowles v Bank West*, 476 Mich 1, 33-34; 719 NW2d 94 (2006). Federal caselaw is particularly persuasive in this instance because the language of FRE 603 is identical to that of MRE 603. See *People v VanderVliet*, 444 Mich 52, 60 n 7; 508 NW2d 114 (1993).

In light of our resolution of the issues, we need not consider the remaining arguments raised by plaintiffs on appeal.

Reversed and remanded for reinstatement of plaintiffs' claims. We do not retain jurisdiction.

Fitzgerald, J., concurred.

/s/ Kathleen Jansen

/s/ E. Thomas Fitzgerald