

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

---

MARY ANN EYDE,

Plaintiff-Appellee/Cross-Appellant,

v

MICHAEL EYDE,

Defendant-Appellant/Cross-  
Appellee.

---

UNPUBLISHED

June 17, 2004

No. 243670

Eaton Circuit Court

LC No. 98-000153-CB

Before: Sawyer, P.J., and Bandstra and Smolenski, JJ.

PER CURIAM.

This suit arose as the result of a partnership dissolution. Michael (defendant) and Patrick Eyde, who were brothers, had a successful partnership that was involved in real estate development. Among its holdings were Eyde Brothers Development, Michigan Farms, and Westbay Management. This litigation also involves the PMS Company, a partnership between defendant, Patrick and Sam, another Eyde brother. In 1992, Patrick died and his interest in the partnership was transferred to the Patrick Eyde Trust. Michael became the trustee of Patrick's trust and the partnership continued with the consent of Patrick's widow, plaintiff Mary Ann Eyde.

In 1996, the partnership was dissolved and reformed between defendant and the Mary Ann Eyde Trust. In 1997, plaintiff decided to dissolve this partnership as well. She filed a complaint in February 1998, seeking a winding up of the partnership. An agreement (the "Settlement Agreement") was reached which divided most of the partnership's assets and liabilities, and plaintiff agreed to pay defendant \$2,660,000. This agreement was placed on the record December 23, 1998, and was signed by the parties in March 1999. All unresolved issues were submitted to the court. The parties agreed that the partnership would be wound up by March 31, 1999. What followed was over three years of litigation, resulting in this appeal. Defendant appeals as of right and plaintiff filed a cross-appeal, each dissatisfied with certain court rulings. We affirm in part, reverse in part and remand.

## I. Judicial Disqualification

### A. Standard of Review

Defendant's first argument is that the court erred in denying its motions to recuse the trial judge, Judge Calvin Osterhaven. Defendant appealed only two of his motions for recusal to the chief judge, Judge Eveland. MCR 2.003(C)(3). Therefore, these are the only two motions properly before this Court. *In re Forfeiture of \$1,159,420*, 194 Mich App 134, 151; 486 NW2d 326 (1992). Generally, a trial court's findings of fact regarding a motion to disqualify the judge are reviewed for an abuse of discretion and the determination of the applicability of the facts to relevant law is reviewed de novo. *Cain v Dep't of Corrections*, 451 Mich 470, 503 n 38; 548 NW2d 210 (1996); *Armstrong v Ypsilanti Twp*, 248 Mich App 573, 596; 640 NW2d 321 (2001). But defendant's motions did not follow the procedures delineated in MCR 2.003. Defendant failed to file his motions within fourteen days after discovering the grounds for disqualification and did not include an affidavit. Failure to comply with the procedural requirements of MCR 2.003, such as timely filing of the motion and the inclusion of its supporting affidavit, render the motions defective, and thus, the issue is not preserved for appellate review. *People v Bettistea*, 173 Mich App 106, 123; 434 NW2d 138 (1988). Accordingly, review is for plain error only affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

### B. Recusal Based on MCR 2.003 and Due Process Principles

MCR 2.003(B) provides:

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.
- (2) The judge has personal knowledge of disputed evidentiary facts concerning the proceeding.

\* \* \*

- (5) The judge knows that he . . . 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.

MCR 2.003(B)(1) requires a showing of *actual* bias for a judge to be disqualified pursuant to this section. *Cain, supra* at 495; emphasis in original. It also requires "personal bias." *Id.* "Thus, the challenged bias must have its origin in events or sources of information gleaned outside the judicial proceeding" or the favorable or unfavorable predisposition must spring from "facts or events occurring in the current proceeding [that] may deserve to be characterized as 'bias' or 'prejudice.'" *Id.* at 495-496. However, these opinions will not constitute a basis for disqualification "unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." *Id.* at 496 (emphasis in original; citations omitted in original), quoting *Likety v United States*, 510 US 540, 555; 114 S Ct 1147; 127 L Ed 2d 474 (1994).

Additionally, defendant must overcome a heavy presumption of judicial impartiality. *Cain, supra* at 497.

Defendant also argues that his due process rights were violated in so far as it was improper for Judge Osterhaven to preside over the proceedings based on the appearance of bias or prejudice. In *Cain, supra* at 498, quoting *Crampton v Dep't of State*, 395 Mich 347, 351; 235 NW2d 352 (1975), the Court stated,

The United States Supreme Court has disqualified judges and decisionmakers without a showing of actual bias in situations where “*experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.*” Among the situations identified by the Court as presenting that risk are where the judge or decisionmaker

(1) has a pecuniary interest in the outcome;

(2) “has been the target of personal abuse or criticism from the party before him”;

(3) is “enmeshed in [other] matters involving petitioner . . .”; or

(4) might have prejudged the case because of prior participation as an accuser, investigator, fact finder or initial decisionmaker. [Emphasis in original; citations omitted in original.]

This list is not exclusive, but the examples given are to be construed narrowly. *Cain, supra* at 500 n 36. Judicial disqualification for bias or prejudice based on due process principles is found only in the most extreme cases. *Id.* at 498.

Defendant contends that Judge Osterhaven should have been disqualified from presiding over this case because of (1) his involvement in the settlement negotiations, the subject matter of which was before the court; (2) his direct competitive pecuniary interest, by virtue of a piece of property that he and his wife owned, in a piece of defendant’s property that was at issue in the litigation; and (3) his prejudice against defendant and his first attorney.

In regards to Judge Osterhaven’s participation in any settlement negotiations on December 23, 1998, the day the Settlement Agreement was placed on the record, we find that there is insufficient evidence on the record to conclude that Judge Osterhaven acted as more than a “messenger boy,” as the court termed it. Judge Osterhaven specifically denied that there were discussions regarding the PMS debt. And the only evidence to the contrary was the testimony of defendant and defense counsel, who both asserted that Judge Osterhaven was “deeply” and “intimately” involved in the negotiations by making offers and suggesting counter-offers.

However, this testimony is suspect given that defendant initially testified that there were “no face to face negotiations with the other side,” rather the “shuttle man was Judge Osterhaven.” Defendant continued and stated that the negotiations were “conducted by an offer from one side to the other side carried by Judge Osterhaven.” Even defense counsel initially stated that he didn’t “think that the court had a specific discussion about PMS,” and that offers

were tendered by plaintiff “through Judge Osterhaven.” Importantly, defendant did not raise this basis for recusal until the court was on record addressing the issue of the PMS debt, five months after the settlement negotiations. And then, its oral motion was contingent on whether the court decided to take extrinsic evidence, including evidence from the settlement negotiations, on the issue. Accordingly, defendant has not shown plain error affecting his substantial rights.

With respect to the court’s competitive pecuniary interest, Chief Judge Eveland concluded, “Any potential rivalry with the defendant as competitors in bidding with the Drain Commission is at best speculation on a highly unlikely scenario.” The only evidence that the Drain Commission was considering defendant’s property for its project was defendant’s own statement, which was presented to the court through defense counsel during oral argument on the motion for recusal. Judge Osterhaven revisited this issue whenever it was raised, and, at all points, had no affirmative information that there was any “competition.” Defendant never provided the court with an affidavit or testimony from the Drain Commissioner to confirm his statements. Thus, without more than defendant’s self-serving statement, it cannot be said that Judge Osterhaven was “enmeshed” in a matter with defendant, *Cain, supra* at 498, and there is no basis on which to conclude that Judge Eveland’s ruling constituted plain error.

Lastly, we address whether Chief Judge Eveland erred in determining that there was no “actual bias” or “appearance of bias” sufficient to warrant Judge Osterhaven’s recusal. From all accounts, the proceedings were fraught with disrespect shown by and to both parties’ counsel and the court. Inappropriate language was used and discourteous behavior was shown. However, the court’s opinions only constitute a basis for disqualification under MCR 2.003(B)(1) if the comments display a “deep-seated antagonism” towards defendant, and violate defendant’s due process rights only if the appearance of bias is “too high to be constitutionally tolerable.”

It is clear that most of the court’s less than temperate expressions were the result of defense counsel’s poor courtroom behavior. Among other conduct, defense counsel continually interrupted opposing counsel and the court, called opposing counsel a “liar” and declared “Jesus Christ” in response to a statement by opposing counsel, as well as filed a consistent stream of motions which the court viewed as a delaying or harassing tactic. However, we do note that defense counsel was the focal point of several unprofessional diatribes by Judge Osterhaven as well.

This case is strikingly similar to *In re Forfeiture of \$1,159,420, supra* at 153-154, in which this Court concluded:

After carefully reviewing the entire record in this case, we conclude that reversal is not warranted on this basis. It appears that throughout the trial the atmosphere was rather tense as a result of the bickering between counsel and between claimants’ counsel and the trial court. It appears to us that claimants’ counsel provoked the trial court with their comments and conduct in general. In addition to being disrespectful to the court in many instances, claimants’ counsel resorted to attacking a prosecutor by apparently stating that her conduct “typified the basest kind of projection as described in psychiatric literature.” This type of conduct was uncalled for. The trial judge also appeared to be agitated by the tactics of claimants’ counsel, such as what appeared in the judge’s eyes to be

attempts to create appellate parachutes and reliance on what clearly appears to be a fraudulent lawsuit as an explanation for some of claimants' extensive assets. As a result, the judge was apparently becoming frustrated and was losing his patience. Although the judge may not have displayed the utmost courtesy, being courteous is the ideal, not the requirement. What is required is that the parties receive a fair trial. Here, claimants have failed to show that the judge's views controlled his decision-making process.

Likewise, here, while we do not condone Judge Osterhaven's comments, under the circumstances, they are understandable. Chief Judge Eveland did not err in concluding that defendant could not show that the court's comments displayed a "deep-seated antagonism," or that any of the court's adverse rulings were controlled by an apparent bias. Accordingly, defendant has failed to show plain error affecting his substantial rights.

## II. PMS Debt

Defendant contends that the trial court erred in finding a latent ambiguity and taking parol evidence regarding the parties' intent to divide the PMS debt, thereby ignoring the clear terms of the Settlement Agreement. A settlement agreement is a contract governed by general contract legal principles. *Mikonczyk v Detroit Newspapers, Inc*, 238 Mich App 347, 349; 605 NW2d 360 (1999). Questions of contract interpretation are reviewed de novo by this Court. *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 369; 666 NW2d 251 (2003).

The primary purpose in interpreting a contract is to determine the parties' intent. *Id.* at 375. Generally, a contract that is clear on its face must be enforced as written. *Id.* An unambiguous contract is reflective of the parties' intent as a matter of law. *Id.* But "where a latent ambiguity exists in a contract, extrinsic evidence is admissible to indicate the actual intent of the parties as an aid to the construction of the contract. A latent ambiguity is one 'where the language employed is clear and intelligible and suggests but a single meaning, but some extrinsic fact or extraneous evidence creates a necessity for interpretation or a choice among 2 or more possible meanings.'" *Scholz v Montgomery Ward & Co, Inc*, 437 Mich 83, 103; 468 NW2d 845 (1991) (Levin, J.; concurring in part, dissenting in part), quoting *Black's Law Dictionary* (4th ed), p 105. It is on this basis that the trial court decided to allow extrinsic evidence as to the parties' intent regarding the PMS debt, taking into account plaintiff's position that she never intended to assume any of this debt and no negotiations on the subject had been held.

The Settlement Agreement contained a "Re:" line on its first page that identified the parties and the subject matter. It read as follows:

Re: Mary Ann Eyde/Michael G. Eyde

Dissolution or Resolution of Eyde Brothers Development and Related Companies, Michigan Farms, Westbay Management Company, and PMS Company (collectively, the "Company")

The Settlement Agreement further provided that the parties would "split equally any other debts of the Company, including, but not limited to" the Michigan National Bank debt, which

indisputably included the PMS debt. Thus, defendant argues that the Settlement Agreement unambiguously provides that the PMS debt was to be equally divided and should have been enforced as written.

The Settlement Agreement also specifically stated:

The parties acknowledge that this Letter Agreement reflects the Phase I Settlement of the Parties, as stated in their agreement placed upon the record in open Court. The parties agree to abide by the terms of this Letter Agreement. Execution of this Letter Agreement by Mr. Eyde and Mrs. Eyde constitutes ratification of the Phase I Settlement as placed on the record in open Court and acceptance of the terms of this Letter Agreement. The Parties acknowledge that a binding settlement agreement has already been reached and that this Letter Agreement merely constitutes written confirmation of the Agreement.

Both parties signed the Settlement Agreement, and by doing so agreed to its terms. The record does not reflect any mention of the PMS debt at the hearing where the agreement was placed on the record, and, therefore, no indication of the parties' intent can be derived from it.

After reviewing the record and the terms of the Settlement Agreement, we find that the trial court erred in allowing parol evidence regarding the parties' intent to split the PMS debt. The contract was clear on its face. PMS was specifically included in the "Company" definition and the Settlement Agreement provided for the Company's debt to be divided equally. We recognize that parol evidence indicated defendant was aware of the fact that plaintiff did not appreciate the significance of these Settlement Agreement terms regarding the PMS debt; however, plaintiff reviewed the Settlement Agreement with her attorney and ultimately signed the document. By doing so, plaintiff agreed that the draft embodied by the March 2, 1999 letter accurately represented the terms of the Settlement Agreement.

Plaintiff's counsel testified that to the extent he noted the PMS reference in the "Re:" line, he believed it referred only to the provision providing for the one-third PMS interest transfer to defendant. Regardless, plaintiff, through her counsel, was obliged to review the document in its entirety and is charged with the effect of the terms *as explicitly written*, particularly given that the final Settlement Agreement was written on plaintiff's counsel's stationery. While this may be an inequitable result, such is often the case where the only evidence indicating a contrary intent from that clearly expressed in the written document is a party's own statement of belief.

Plaintiff asserts that this provision cannot be enforced because PMS was not a party to this lawsuit, and thus, the trial court did not have jurisdiction over PMS. However, parties are free to enter into any contract at will. While plaintiff could not purport to give away any rights in PMS, because she had none, she could certainly contract with defendant, who by virtue of his two-thirds interest in PMS had the ability to enter into binding contracts on PMS' behalf, and agree to pay a portion of its debt.

Yet we do find that a latent ambiguity does exist with regard to the amount of the PMS debt to be divided. It is undisputed that the PMS Company was not a partnership asset. The three Eyde brothers, Pat, Mike, and Sam, owned it in equal shares. Per the Settlement

Agreement, Patrick's children transferred their one-third interest to defendant. Therefore, as defendant concedes in his appellate brief, one-half of the PMS debt subject to the Settlement Agreement would be one-half of the debt associated with defendant's two-thirds interest, or, in other words, one-third of the overall debt. However, the Settlement Agreement also provides that the Michigan National Bank debt, which includes all of the PMS debt, was to be split equally. On its face then, this appears to also include Sam Eyde's debt portion.

Basic contract principles establish that one cannot affect the rights of a person not a party to the contract. Thus, we conclude that the Settlement Agreement must be interpreted as providing for the equal division of two-thirds of the PMS debt. But because of the factually intensive nature of this case, we nonetheless remand this issue for the trial court to determine how our decision impacts the division of the Michigan National Bank debt, if at all.

### III. Security Deposit Liability

The next issue as framed by defendant asks whether the trial court correctly determined that defendant was responsible for one-half of the security deposit liability. We decline to address the merits of this issue because defendant concedes on appeal that the trial court's ruling was correct. Regarding the "inconsistency" of the trial court's rulings, which appears to be the actual crux of defendant's argument, defendant simply announces his position without explaining his argument and cites no authority in support of his argument regarding the relief sought. A party may not simply announce its position and leave it to this Court to discover or rationalize its argument and then search for authority to support or reject it. *Mudge v Macomb Co*, 458 Mich 87, 105; 580 NW2d 845 (1998).

### IV. Accrual of Loan Interest

This issue involves the division of interest accrued on loans held by Michigan National Bank. The Settlement Agreement specifically provided that the Michigan National Bank debt was to be divided equally. The debt was comprised of various loans. The outstanding balance of any loan is equal to the principal balance plus any interest accrued. And testimony established that the bank continued to charge the accrued interest on the loans to the partnership until the loans were paid in full.

At a hearing on September 14, 1999, the trial court ruled that the parties equally shared the blame for the delay in closing.<sup>1</sup> Despite defendant's statements assigning sole blame to plaintiff, defendant does not ask this Court to review the trial court's decision. Enforcing the clear terms of the Settlement Agreement, the trial court was obligated to divide equally not only the principal debt, but also the accrued interest.<sup>2</sup>

---

<sup>1</sup> Plaintiff's reference to the court's "finding" that defendant was solely to blame is misleading. It appears that the court belatedly stated its true belief regarding the situation, but it did not revise any of its rulings nor base future rulings on this belief.

<sup>2</sup> Defendant also alludes to the fact that until the closing, the Company's profits were to be split  
(continued...)

In regards to ¶ 17 of the Settlement Agreement, the benefits of this provision were only available to a “non-breaching party.” Any discussion on the record at the December 23, 1998 hearing regarding the necessity of an unwinding if the settlement was not concluded by March 31, 1999, was subject to the modifier in ¶ 17, but only a “non-breaching” party could enforce the provision. Because the trial court concluded that both parties were responsible for the delay, plaintiff cannot be said to be a “non-breaching party.” Accordingly, the trial court did not err in denying defendant’s motion for disengagement of profits.

#### V. Capital Accounts

Paragraph 1 of the Settlement Agreement indicates that the properties listed under each party’s name in the Settlement Matrix constitute that party’s portfolio. Paragraph 3 provides that the \$2.66 million payment is “to equalize the Parties’ portfolios . . . . Amounts due for capital account differential or any other miscellaneous claims of the Company or either of the Parties not addressed in this Letter Agreement against Mr. Eyde, Mrs. Eyde, or any related entities are not settled by this payment.” Defendant asserts that ¶ 3, when read in conjunction with ¶ 6, clearly indicates that what was being equalized by the \$2.66 million payment was the value of the assets retained by each party, i.e., the value of each party’s “portfolio” under the Settlement Agreement. Paragraph 6 also specifically stated that “other matters not addressed in the Phase I Settlement Matrix, including, but not limited to: (a) capital accounts” were to be “accounted for separately.” We believe that the clear language of the Settlement Agreement indicates that the \$2.66 million payment was not intended to equalize the capital accounts.

However, we do not conclude that the language of the Settlement Agreement definitively entitles defendant to an accounting or to an equalization. As to what the unsettled issues are regarding the capital accounts, those are factual questions for the trial court to resolve. Notably, at the settlement hearing, defendant’s attorney stated, “And—well the only thing I think that’s left below the line is that each party will account for capital accounts and any miscellaneous accounting matters which have not been specifically dealt with above the line.” Plaintiff’s attorney responded, “Correct. And I would note that there are a number of items . . . which have not been dealt with above the line. If they are unable to be resolved we will request that the court resolve them forthwith in a short hearing.” Therefore, a remand is necessary to allow the trial court to determine the outstanding capital account issues and resolve them.

#### VI. Closing Date of the Company’s Books

The Settlement Agreement provided that “the closing of the books date (either 12/31/98 or 1/5/99) is to be resolved by the court.” The company books were to be closed when plaintiff tendered payment of \$2.66 million to defendant. Because defendant would not accept the payment on December 31, 1998, the court ordered defendant to accept the payment on January 5, 1999. Given these circumstances, the court decided to “pick a date in the middle,” choosing a closing date of January 3, 1999, because “there’s money going out and money coming in on Mr.

---

(...continued)

equally. Defendant appears to argue that the effect of this Settlement Agreement term combined with the court’s ruling regarding the accrued interest unjustly enriched plaintiff. However, defendant does not develop this argument nor support it with authority.

Eyde's part depending on when he gets that check. And the reality of the situation is, he didn't get it until January 5th, rightly or wrongly." Both parties assert on appeal that the court erred in choosing January 3, 1999, as the date of the closing, with plaintiff arguing in favor of December 31, 1998, and defendant arguing in favor of January 5, 1999, as the correct closing date.

It is undisputed that defendant refused to accept the payment on December 31, 1998. But there was much dispute over the circumstances. What is clear from the record is that plaintiff's son tendered payment after business hours—plaintiff stated that she was at the bank until 5:30 p.m.—and that a verbal altercation occurred between defendant and him, perhaps regarding the pending assignment of plaintiff's children's interest in PMS. Given these circumstances, the trial court did not clearly err in not assigning December 31, 1998, as the date of closing for the company books.

The question then becomes whether the court erred in choosing January 3, 1999, over January 5, 1999. As part of the Settlement Agreement, the parties agreed that this issue would be decided by the court and noted that the dispute was whether December 31<sup>st</sup> or January 5<sup>th</sup> should be the closing date. By agreeing to have the court decide this issue, we believe the dates listed in the Settlement Agreement simply constituted the parameters of the issue. The dates aided the court in narrowing the issue, but did not contractually confine the court to choosing only one date or the other. Therefore, it was within the court's equitable powers to choose an intermediate date. Given the circumstances of the tender as noted above, we find that the court's ruling was not clearly inequitable.

## VII. Jurisdiction

Plaintiff's first cross-appeal argument pertains to this Court's jurisdiction to hear this appeal. Plaintiff asserts that the June 28, 2002 order was the final order as defined by MCR 7.202(7)(a)(i) and that the order subsequently entered on August 20, 2002, was not a final order because the "issue" the latter order disposed of had already been decided pursuant to an oral ruling from the bench two years earlier. Thus, plaintiff argues, the claim of appeal filed on September 10, 2002, was untimely filed. We conclude that plaintiff's jurisdictional challenge is without merit.

A party may appeal by right from a final order. MCR 7.203(A)(1). In a civil action, a final order is the first order that disposes of all the claims and adjudicates the rights and liabilities of all the parties. MCR 7.202(7). For two reasons we find that plaintiff's jurisdictional challenge must fail. First, it is a basic legal principle that a court speaks through its written orders and not its oral statements from the bench. *Tiedman v Tiedman*, 400 Mich 571, 576; 255 NW2d 632 (1977). Therefore, even though the trial court may have orally indicated a disposition in 2000, the actual claim was not disposed of until the order was entered on August 20, 2002. The August 20, 2002 order, in conjunction with the other orders, is the order that disposed of all of the claims of all of the parties.<sup>3</sup> It was the final order from which defendant's

---

<sup>3</sup> Plaintiff responds that if this Court relies on the above reasoning, then defendant should be barred from appealing any issues that were not codified in a lower court order. Plaintiff's  
(continued...)

claim of appeal was properly taken. Because defendant's appeal was filed within twenty-one days of the final order's entry, this appeal was timely filed. MCR 7.204(A).

The second reason plaintiff's jurisdictional challenge must fail is that even if the June 28, 2002 order was the final order as defined by MCR 7.202(7)(a)(i), defendant's claim of appeal was still timely filed on September 10, 2002, because defendant filed a motion for clarification on July 18, 2002 (twenty days after the June 28, 2002 order). That motion was not disposed of until entry of the August 20, 2002 order. Under MCR 7.204(A)(1)(b), the July 18, 2002 motion tolled the time period in which to file the claim of appeal until after the disposition of the July 18, 2002 motion.<sup>4</sup> Thus, defendant had twenty-one days after August 20, 2002, to timely file his claim of appeal. Because the claim of appeal was filed within the twenty-one day period, the claim of appeal was timely filed even if the June 28, 2002 order was considered the final order. There is no requirement, and plaintiff does not cite any legal authority stating otherwise, that the claim of appeal must correctly identify which order is the final order as defined by the court rules.

### VIII. Division of Assets

To the extent that the remaining issues involve the trial court's equitable power to divide the partnership assets, we review for clear error a trial court's findings of fact, while its holdings are reviewed de novo.<sup>5</sup> *Slatterly v Madiol*, 257 Mich App 242, 248-249; 668 NW2d 154 (2003).

#### A. Fire-Loss Insurance Proceeds

Defendant argues that the trial court erred in not dividing the insurance proceeds equally on an accrual accounting basis.<sup>6</sup> We initially note that the Settlement Agreement specifically states that this issue was reserved for the court to decide, and thus, the agreement's provision for

---

(...continued)

assertion has arguable technical merit. Nevertheless, because defendant's claim of appeal was timely filed even if the June 28, 2002 order is considered the final order, this argument is irrelevant.

<sup>4</sup> Plaintiff counters that defendant's motion to clarify should not be deemed a motion for "other postjudgment relief" under MCR 7.204(A)(1)(b) because no "relief" was sought, only a clarification. In this context, we believe that "relief" must be construed in its general sense, referring to the assistance sought from the court regarding the disposition of issues that affect the parties' rights. *Black's Law Dictionary* (6th ed), p 1292.

<sup>5</sup> The Uniform Partnership Act provides that cases, which are not specifically covered under the act, are governed by the rules of law and equity. MCL 449.5.

<sup>6</sup> Pursuant to a March 29, 1999 order, the parties agreed that all partnership accounting on unresolved matters would be done according to an accrual method. The accrual method is "[a] method of keeping accounts which shows expenses incurred and income earned for a given period, although such expenses and income may not have been actually paid or received." *Black's Law Dictionary* (6th ed), p. 19. Under this method, the right to receive mandates its inclusion in gross income, not the actual receipt. *Id.* Thus, when the account receivable amount becomes fixed, the right accrues. *Id.*

equally splitting assets does not apply. And, based on defendant's appellate argument, this Court is left with many questions pertaining to the accounting method and its applicability to the insurance proceeds, mainly as to the basis for defendant's assertion that an accrual method of accounting equates to an equal division of the insurance proceeds. But this Court's task is not to unravel or decipher a party's argument and then search for authority to either support or reject it. *Mudge, supra* at 105. Therefore, we decline to further address the merits of this issue because defendant failed to explain his argument and support it with authoritative law.

Next, we turn to plaintiff's cross-appeal argument regarding this issue—that the trial court erred in awarding defendant any portion of the insurance proceeds for personal property stored at Ramblewood Apartments, but not used for the Ramblewood complex, because the clear terms of the insurance policy stated that it only covered personal property used to maintain or service Ramblewood's clubhouse. In support of her argument, plaintiff cites to the record and references the insurance policy. However, a transcript of the May 17, 2000 proceedings was not part of the appellate record, nor was the insurance policy. Therefore, while plaintiff's argument may have merit, this Court does not have sufficient sources from which to decide the merits of this issue. Consequently, for differing reasons, both parties have waived appellate review of this issue. Accordingly, we find that the court did not clearly err in awarding defendant \$7,500 of the insurance proceeds.

#### B. Equipment Proceeds/Litigation Settlement

Under the Settlement Agreement matrix, all equipment of the partnership, except equipment owned by Westbay Management ("Westbay") and two other non-disputed pieces of equipment, was assigned to defendant. The agreement did not contain any specifics. In the lower court, defendant argued that it was understood that the "Equipment" assigned to defendant pursuant to the Settlement Agreement was worth \$484,000. Plaintiff countered that there was no such understanding and no evidence of such an agreement. Plaintiff asserted that the only equipment defendant was to receive, save for those items specifically excepted out, was all the equipment owned by the partnership at the time of dissolution.

From the last proposals exchanged by the parties, it appears that both parties contemplated defendant taking the tractor/chainsaw and Komatsu excavator. Plaintiff knew before she submitted her November 1998 proposal that the Komatsu litigation had been settled and that the tractor/chainsaw had been sold, yet still attached a dollar value of \$484,589.37 to the equipment category. It is possible that at the time of the settlement hearing, plaintiff simply assumed that the "equipment" would include only tangible items in the company's possession at the time of dissolution, however, plaintiff's counsel's comments at an April 2000 hearing tends to belie such an understanding.<sup>7</sup> Because it is just as likely that plaintiff was trying to reap

---

<sup>7</sup> At a hearing regarding two other pieces of equipment, a Hydro-ax and a forklift that defendant was arguing were included in the equipment category of the settlement matrix, plaintiff's counsel stated,

(continued...)

whatever benefits she could from such an argument, we find that the trial court did not commit clear error in determining that the tractor/chainsaw and Komatsu excavator were included in the equipment category of the settlement matrix. Thus, the parties' agreement superceded any right plaintiff had to the sale and litigation proceeds being put back into the partnership's account. Although defendant's actions of disposing of the tractor/chainsaw violated the court's order not to dispose of any assets during the winding up of the partnership,<sup>8</sup> the evidence indicates that defendant would have received this property in the settlement anyway. Accordingly, the court did not clearly err in allowing defendant to keep the sale proceeds totaling \$23,400, and the litigation settlement totaling \$58,000.

### C. Cable Contract Proceeds

Plaintiff contends that the trial court erred in awarding a portion of the cable contract proceeds to Sam Eyde, who held a one-third interest in PMS. Plaintiff correctly points out that the clear terms of the Settlement Agreement provided that the parties were to split equally the cable contract proceeds, even though plaintiff retained ninety percent of the apartment units that the contracts serviced.

In deciding this issue, the court felt that the Settlement Agreement language should control, but also thought "we have to take into consideration Sam Eyde's situation." Thus, the court ordered the portion of the contract proceeds assignable to Whispering Pines to be subtracted from the cable contract payments and divided, one-third going to Sam Eyde and the remaining two-thirds split between the parties per the Settlement Agreement. We hold that there is no legal basis for the court's ruling.

These contracts were between the cable company and Eyde Brothers Development Company. Defendant was fully aware of the contracts' substance when he negotiated the Settlement Agreement, yet never divulged that a portion of those payments were going to PMS. And plaintiff was not provided with copies of the cable contracts at the time of the Settlement Agreement. Although it may have been past practice for the partnership to distribute to PMS a portion of the proceeds attributable to its sole holding Whispering Pines, no written agreement

---

(...continued)

[O]n page nineteen of the settlement agreement that was placed on the record, Your Honor, December 23, 1998, Mr. Tomblin makes specific reference to what was discussed at that time and he refers to the equipment which is already accounted for in the \$484,000 that he is being figured for his equipment. I suggest, Your Honor, that that is the heavy-duty earth moving equipment that was part of the 1996 acquisition by the company *and that's what the parties had discussed.* [Emphasis added.]

Moreover, in arguing on appeal that the court erred in awarding defendant the Hydro-ax and forklift, plaintiff states, "Although not explicitly stated on the record, the 'equipment' discussed at the time of the settlement was heavy earth-moving equipment purchased by the company in 1996."

<sup>8</sup> We note that plaintiff did not petition the court to impose sanctions and the court chose not to do so sua sponte.

was produced. Plaintiff should not be bound to a non-existent contract. If defendant desires to continue to give Sam Eyde one-third of the cable contract proceeds attributable to Whispering Pines, he is free to do so out of his portion of the proceeds. Therefore, the Settlement Agreement should have been enforced as written, and the trial court erred in concluding otherwise. On remand, the court is to determine the proper payment amounts to be allocated to plaintiff and defendant.

#### D. Hydro-ax/Forklift Disposition

Plaintiff argues that the Settlement Agreement contemplated defendant receiving the heavy earth-moving equipment purchased by the company in 1996. Plaintiff asserts that because the hydro-ax and forklift were purchased a few years earlier and were not included in the settlement matrix, the court erred by not equally dividing the value of the equipment between the parties. Defendant counters that he was to receive this equipment under the terms of the Settlement Agreement. We agree with defendant.

The Settlement Agreement matrix listed the category “Equipment.” Under this category, assigned to defendant, was “All equipment, except below (incl Westbay).” On the next line of the matrix, the “D4, Rubber Tire, Kubota & Case Loader (already in Westbay)” were assigned to plaintiff. Paragraph 2 of the agreement provided, “The reference to ‘Equipment’ refers to earth moving equipment, construction, maintenance, and other heavy equipment.” Furthermore, in a November 12, 1998 settlement proposal drafted by plaintiff, the equipment specifically listed as defendant’s included the hydro-ax and forklift. This was in addition to the \$484,589.37 worth of equipment plaintiff proposed defendant take. Plaintiff has not presented sufficient evidence for us to conclude that the trial court clearly erred in finding that the hydro-ax and forklift were given to defendant under the terms of the Settlement Agreement. The court properly awarded these pieces of equipment to defendant.

#### E. Defendant’s 1998 Salary/Award of Interest on the \$100,000 Loan

The preliminary injunction order that was entered in April 1998 provided that no consideration, including salary, was to be paid to either party until further order of the court. The court acknowledged that these payments may have violated its order, but allowed defendant to keep the nearly \$55,000 in salary defendant paid himself in 1998 in order to “wash out” the 1998 salary paid to Robert Kuncaitis, Westbay’s accountant. Plaintiff argues that this ruling completely ignores the fact that the parties agreed to split the expenses of the company until the “above the line” settlement was finalized. Plaintiff asserts that Kuncaitis’ salary was an expense of the company and should have been shared equally by the parties until the books were closed. Defendant argues that the court’s ruling was just given that it found that defendant earned this salary and, therefore, it was also an expense of the company.

We find that the court’s ruling was erroneous. Paragraph 9 of the court’s preliminary injunction order stated, “That during the pendency of this action, there shall be no consideration, including salary, paid to any partner, nor shall there be any draws, withdrawals, or loans by or on behalf of any partner until further order of the Court.” The court, however, inexplicably stated that “if we went through things with a fine tooth comb [defendant’s actions] may have violated a court order.” Clearly, defendant’s monthly draw to himself of \$5,000 for work he allegedly performed for Westbay was a direct violation of the preliminary injunction order.

Instead of imposing a fine, sanctions, and/or ordering defendant to return the money, the court decided to consider defendant's salary to "wash out" the salary the company paid to Mr. Kuncaitis. However, the court made no findings as to how much work defendant actually performed on behalf of Westbay. The court simply said, "You [defendant] did have some responsibilities there and if I were in your shoes I probably would have maybe felt that I was entitled to compensation too." But from the existing record it appears that during 1998 defendant undertook virtually no business actions regarding Westbay, yet paid himself his full monthly salary of \$5,000 from that company for most of 1998.

The court also made no findings in regards to the amount of work Kuncaitis performed. It is undisputed that his salary was an expense of the company. However, at the beginning of 1998, defendant wanted to fire Kuncaitis, but at plaintiff's request the court ordered that he continue working. There are indications that after this point Kuncaitis may have been partial to plaintiff's interests and the parties disputed how much of his work benefited both parties and Westbay.<sup>9</sup> Yet without making any of these findings, the court concluded that the two salaries cancelled each other out.

Intertwined in this ruling is the court's decision to award defendant repayment of interest he accrued on a loan he made to the company. In November 1997, defendant removed nearly \$800,000 from an escrow account and placed it in his own personal account. As a result, the partnership did not have enough cash on hand to pay expenses at the end of 1997 and defendant loaned the partnership \$100,000 to cover those expenses.<sup>10</sup> Defense counsel suggested, "Since Mr. Kuncaitis' salary and benefits, Your Honor, is a little larger than Mr. Eyde's \$55,000 [1998 salary], it would seem that if we're going to wash out maybe that's a fair way to compensate Mr. Eyde is at least he gets the interest that he paid the bank." The court responded, "That's what I'm going to do." Implicit in the court's ruling was that it found the decision to be "fair." However, the interest calculation had not been done, and the court did not know the amount it represented when it made its ruling. Therefore, we question how "fair" the decision was when no exact numbers were presented regarding the deficiency between defendant's and Kuncaitis'

---

<sup>9</sup> On this point the trial court stated,

Mr. Kuncaitis—he may have been over in the corner with Mary Ann Eyde. But on the other hand he probably did perform some functions that benefited you [defendant] the last ten months.

You'd take issue with that. And of course your position is that he should have been broomed last February [1998] or before and that I shoved you down his throat. To some degree I did. I felt there was some merit to having him continue. Given the expertise and the background and the knowledge he had, particularly while this whole thing was pending here and we were trying to reach a resolution on the greater issues it made sense to me to keep as much of the status quo as possible while all this was being sorted out.

<sup>10</sup> Apparently defendant borrowed the money he loaned to the company because he paid interest to the bank on the loan amount.

salary that the interest award was curing or the interest award amount itself. This error is compounded by our assessment of the court's decision to "wash out" defendant's salary with Kuncaitis'. Such equitable decisions are certainly within the court's power; however, we find that the court did not have sufficient facts before it to make these decisions.

We sympathize with the court's plight in this case. The sheer number of issues presented to the court and the factually intensive nature of them surely would wear on the most patient of judges. But we simply cannot let the court's rulings stand, despite its equitable powers, in the face of no factual basis to support it. Therefore, on remand, we instruct the court to hold a hearing to determine how much work during 1998 defendant performed on behalf of Westbay and award an apportioned amount. Half of the portion of defendant's 1998 salary in excess of this amount, if any, shall be awarded to plaintiff per the terms of the Settlement Agreement. Similarly, the court is to determine to what degree the work performed by Kuncaitis was on behalf of Westbay, bearing in mind that simply because his work may have benefited or been more favorable to plaintiff does not automatically mean Kuncaitis' salary should be considered plaintiff's expense, as opposed to Westbay's. To the extent the court concludes, if at all, that Kuncaitis was acting in 1998 as plaintiff's individual employee, the corresponding salary shall be plaintiff's responsibility alone. The resultant Westbay expenses shall be borne equally by the parties. The court is also to take evidence regarding the amount of interest defendant paid on the \$100,000 loan and make its decision regarding the interest accordingly.

#### IX. Conclusion

We hold that this appeal is properly before us as it was timely filed. In regards to defendant's motions to recuse Judge Osterhaven, we affirm Chief Judge Eveland's rulings denying these motions. We also affirm the court's decisions pertaining to the closing date of the company books and defendant's liability on the interest accrued on the Michigan National Bank debt. As to the other issues challenging certain trial court decisions, we affirm the lower court's rulings with respect to the disposition of the hydro-ax and forklift, and the proceeds from the litigation settlement involving a Komatsu excavator, as well as the proceeds from the sale of a tractor and a chainsaw.

But we reverse the court's decisions pertaining to the PMS debt, the capital accounts, the cable contract proceeds, defendant's 1998 salary, Mr. Kuncaitis' 1998 salary, and the award of interest to defendant on a \$100,000 loan made by him to the company, and remand these issues for further proceedings in accordance with this opinion. Finally, we decline to address the merits of the following issues: the parties' security deposit liability and the division of the fire-loss insurance proceeds.

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

/s/ David H. Sawyer  
/s/ Richard A. Bandstra  
/s/ Michael R. Smolenski