

STATE OF MICHIGAN
COURT OF APPEALS

NARTRON CORPORATION,

Plaintiff-Appellant,

v

GENERAL MOTORS CORPORATION,

Defendant-Appellee.

UNPUBLISHED

April 29, 2003

No. 232085

Wayne Circuit Court

LC No. 94-421075-CK

Before: Griffin, P.J., and Neff and Gage, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's grant of defendant's motion for summary disposition of plaintiff's breach of contract claim and the dismissal with prejudice of plaintiff's remaining claims as a sanction for discovery abuses. We affirm.

I

This case stems from an after-the-fact dispute over amounts due to plaintiff for research and development costs associated with a linear position sensor (LPS), an electronic wheel sensor,¹ that plaintiff produced for defendant's Delco division. Sometime in 1987, defendant selected plaintiff as the exclusive source for the sensor, and plaintiff began development of the required part for defendant, which became known as the Delco LPS project.

Plaintiff manufactured and sold sensors to defendant for three model years: 7,348 for model year (MY) 1992 ½, 150,708 for MY 1993, and 449,715 for MY 1994, pursuant to pricing indicated in a series of purchase orders and other paperwork and correspondence between the parties. In January 1993, defendant notified plaintiff that it would be discontinuing use of the LPS after the 1994 MY.

¹ According to plaintiff, this wheel position sensor instantaneously measures and corrects changes in the vertical displacement of each wheel, so as to constantly keep all wheels in contact with the road.

Plaintiff filed this action in July 1994, alleging that defendant prematurely discontinued use of the sensor, which plaintiff developed based on defendant's projections of large volume purchases of the sensor over an eight to ten year period. Consequently, plaintiff was unable to recoup its research and development costs. Plaintiff sought damages on several theories, including breach of contract, misrepresentation and failure to disclose, promissory estoppel, obsolescence damages, breach of sourcing agreement, and unjust enrichment.

Defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(7), C(8), and C(10). The trial court granted defendant's motion with respect to plaintiff's breach of contract, promissory estoppel and unjust enrichment claims and granted in part summary dismissal of plaintiff's misrepresentation and failure to disclose claim. Subsequently, on January 5, 2001, the court granted defendant's motion for dismissal of plaintiff's remaining claims as a sanction for plaintiff's violation of discovery orders. The court found that plaintiff intentionally destroyed significant evidence after it was ordered to be produced in this litigation.

II

Plaintiff claims that the trial court erred in dismissing plaintiff's action as a sanction for discovery abuses.² Plaintiff argues that the dismissal was based on numerous findings that were clearly erroneous. We find no error requiring reversal.

A

This Court reviews a trial court's imposition of discovery sanctions for an abuse of discretion. *Bass v Combs*, 238 Mich App 16, 26; 604 NW2d 727 (1999). Whether a trial court has the authority to impose particular sanctions is a question of law subject to review de novo. *Persichini v William Beaumont Hosp*, 238 Mich App 626, 637; 607 NW2d 100 (1999). This Court reviews a trial court's findings of fact for clear error. MCR 2.613(C), *Traxler v Ford Motor Co*, 227 Mich App 276, 282; 576 NW2d 398 (1998). Regard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it. MCR 2.613(C). A finding is clearly erroneous if the reviewing court is left with the definite and firm conviction that a mistake has been made. *Traxler, supra* at 282.

B

The key dispute between the parties was the amount of damages with respect to plaintiff's indirect costs for the LPS, particularly plaintiff's research and development (R & D) costs. Consequently, evidence of plaintiff's R & D payroll was a primary focus of discovery.

² Plaintiff raises a number of specific issues related to the sanction of dismissal. However, plaintiff's argument in its brief does not correlate to the issues raised, and plaintiff has failed to appropriately argue the merits of various issues raised. As discussed *infra*, these issues are deemed abandoned. We therefore address the overall issue of the sanction of dismissal.

Plaintiff's damage claim of \$5,800,367 was based on the quantification of damages by the accounting firm Cummings and Faber, P.C., plaintiff's economic experts, whom plaintiff retained to calculate plaintiff's R & D costs for the Delco LPS for purposes of this litigation. Cummings and Faber essentially derived its R & D cost by calculating the cost of employee wages associated with the Delco LPS project from hard copy timesheets where available, and otherwise by wage projections, and then adding a percentage of overhead costs.

It was defendant's position that the hard copy timesheets were unreliable and that there was evidence that they were backdated. Defendant moved to exclude all testimony, evidence and relief based on the timesheets. Further, it was defendant's theory that plaintiff decided to use the fabricated timesheets and then systematically either hid, altered, or destroyed any corroborating or contradictory evidence such as the computer data, engineering logs and budgets. Thus, defendant sought dismissal on the basis of the alleged discovery abuses.

During February and March 1999, the trial court conducted a four-day evidentiary hearing on the alleged discovery abuses. The allegations centered on three versions of the database produced by plaintiff during discovery, a printout, a diskette, and a backup tape, which defendant argued established that the data in the FoxPro system had been deliberately altered or removed. Defendant also complained that plaintiff had failed to comply with discovery requests for the "original" FoxPro backup tape. At the conclusion of the hearing on March 8, 1999, which concluded the presentation of evidence, the court left open the question of the consequences for plaintiff's failure to produce the original backup tape, which plaintiff's counsel indicated could not be located.

On March 15, 1999, the court heard oral argument on the motion for summary disposition and for dismissal for discovery abuses. During the hearing, plaintiff produced a supposed³ original backup tape. Based on the parties' stipulation, the court ordered an independent examination of the two tapes produced during discovery to determine their authenticity in light of the questions concerning evidence tampering.

After hearing the evidence and argument of the parties and receiving expert reports concerning ink-dating of the timesheets as well as an independent opinion from a court-appointed expert concerning the computer backup tape, the court issued its opinion detailing its findings and concluding that the sanction of dismissal was warranted.

Plaintiff's allegations of error fall under three main headings: 1) the court's findings regarding production of the FoxPro database are unsupported by the record, 2) the court's findings regarding the APD (advanced product development) database deletions are clearly erroneous, and 3) the court's finding regarding the alleged MFE (manufacturing) database deletion was clearly erroneous. We find the allegations of error without merit.

³ Plaintiff's counsel was unsure whether the backup tape previously produced was in fact the original and the latter version a copy or vice versa.

Plaintiff contends that the court did not understand the limitations of the FoxPro system, which the court mischaracterized in its decision. Specifically, plaintiff argues that the trial court clearly erred in characterizing FoxPro as some sort of magic, easy solution to accurately define LPS R & D time, and that the court's misperception was at the heart of the court's decision.

The first two days of the evidentiary hearing consisted of testimony and an in-court computer demonstration from defendant's accounting and computer expert, Peter Prychodko, a partner in the accounting firm of Doeren Mayhew. Over the course of the three days, Prychodko provided a detailed in-court demonstration and analysis of plaintiff's FoxPro system to show how the system was designed to function and its reporting capabilities with regard to employee time and project cost accounting. The demonstration and testimony focused on three points: 1) that the computer data did not match the timesheets, 2) that the data had been intentionally altered or removed from the backup tape, and 3) that the missing data and/or alteration could not be attributed to computer crashes.

In its opinion, the trial court stated that the FoxPro system could easily have sorted the hours of both APD and MFE employees on this project, and could have done so on August 22, 1996, when corrupted copies of the database were being made. This finding is not clearly erroneous given Prychodko's un rebutted testimony and the evidence. In demonstrating how the FoxPro system functioned, Prychodko testified that the advantage of the system was "that it's easy to review and analyze data quickly" and that it was a well-engineered system. Even if the finding was erroneous or overstated the capabilities of the FoxPro system, it was not at the heart of the court's decision. Any error was harmless. MCR 2.613(A).

Plaintiff argues that the court's findings regarding production of the FoxPro database, and that plaintiff engaged in chronic and continuous discovery violations, were unsupported by the record. We disagree. Considering plaintiff's delays in responding to discovery requests, and the circumstances surrounding the attenuated and piecemeal production of the FoxPro database, including the court's findings that the database as produced contained alterations and/or deletions, we find no error.

Plaintiff complains that the court erred in finding that plaintiff denied the existence of the FoxPro database in interrogatory answers. In fact, the court found that plaintiff "failed to disclose in answers to interrogatories the existence of a database software program into which secretaries entered information from the time sheets," a finding that is not clearly erroneous. Although the court's reference to interrogatories may have been too specific because defendant argued, and the record appears to support, that the database was more appropriately covered in defendant's requests for documents, the distinction is inconsequential. The record supports a finding that plaintiff generally failed to timely disclose the existence of the database in response to discovery requests, and this finding is merely one of numerous findings that support the court's sanction. MCR 2.613(A).

Plaintiff complains that the court erred in finding that the WordPro printout was sorted or formatted in such way that it could not be compared to the timesheets because defendant admitted that it could be compared. We disagree. Defendant also stated that the WordPro report

could not be manipulated as a database to easily provide information, and it was in an awkward format that would not permit defendant to easily compare information in the database with that on the timesheets. The court's finding is not erroneous merely because defendant found a way to interpret the WordPro report to permit a comparison.

Plaintiff argues that the court's findings regarding the backup tape are clearly erroneous and that the court erred in refusing to consider the affidavit of John Washeleski, plaintiff's vice-president, explaining that he copied the operating system and application onto the original backup tape. Contrary to plaintiff's assertion, it was not impossible for Washeleski's affidavit to contradict his deposition testimony, and the court did not err in so finding. The court could reasonably conclude that Washeleski's explanation contradicted his earlier deposition testimony because the original backup tape already had the operating system and the application. The explanation was also contrary to the court-appointed expert's opinion. It was for the trial court to determine whether Washeleski's explanation was credible.

Plaintiff argues that even without Washeleski's affidavit, dismissal was unwarranted because, at most, where there is destruction of evidence, it merely creates a rebuttable presumption for the jury, and, accordingly, warrants an instruction, that the original records, if available, would have been unfavorable to plaintiff. This argument is without merit. The trial court's dismissal was based on a number of factors, not merely the failure to produce the original backup. It is within the trial court's discretion to impose the sanction of dismissal. *Bass, supra* at 26. Further, because the findings concerning APD deletions were not clearly erroneous, as discussed *infra*, plaintiff's argument that even a jury instruction concerning a presumption would be improper also fails.

Plaintiff failed to produce the FoxPro information despite repeated discovery requests and a court order and directives from the bench to do so. Accordingly, the court's finding was not clearly erroneous. Further, the court's finding that when the FoxPro information was finally produced, it was not intact was supported by the testimony and the evidence.

2

Plaintiff claims that the court clearly erred in finding that the customer and name fields were removed from the APD database and that the APD database deletions finding is inconsistent with defendant's expert's testimony. Plaintiff also asserts that the court erred in finding that the alleged deletions were material, i.e., made it impossible to compare the data in the database to the timesheets. We find these challenges without merit.⁴

⁴ Plaintiff argues that the court's finding regarding the deletions is clearly erroneous because defendant had the burden of providing by clear and convincing evidence that there were genuine issues of material fact, which defendant failed to meet. Plaintiff cites no authority or explanation for applying this standard. See *Traxler, supra* at 288-289.

The court's finding that the names and customer data were deleted from the APD database was not clearly erroneous. Prychodko's detailed in-court demonstration, his testimony throughout, and his conclusions, supported the court's finding. Prychodko demonstrated and testified that the customer names and project names were missing from the database and had been deliberately deleted. Prychodko found portions of the missing data in a mislabeled file in the MFE database. Further, the APD at one time had references to project and task numbers, otherwise the 26,000 transactions posting hours could not have occurred. Although he initially stated that the data had either been removed or deleted, he later stated the data could only have been deleted.

Plaintiff had ample opportunity to rebut Prychodko's testimony and conclusions at the evidentiary hearing, but did not do so. Plaintiff called no witnesses to provide a legitimate explanation for missing project name and customer data. Further, plaintiff's claims of the evidentiary merits of Washeleski's affidavit are inaccurate. The affidavit does not clarify Washeleski's deposition testimony such that it undermines Prychodko's conclusion that data was removed from the system.

The missing customer and project names were material to the case because there were allegations that the hard copy timesheets were altered and many were missing or did not allocate time to specific projects. The database was a contemporaneous record of time associated with the Delco LPS project; however, the data could not be retrieved because of the deletion of customer and project names. Other contemporaneous records of time spent on R & D were also missing, such as engineering logs. The database was a means of verifying or checking the timesheet hours allegedly associated with the Delco LPS R & D. Even if the FoxPro database was not all-inclusive of R & D time for the relevant time period, it contained relevant and material data, which was not produced.

Contrary to plaintiff's assertion, the court-appointed expert's report supports this conclusion. The expert stated that "[t]he database file PROJECT.DBF seemed to contain the relationship of a project to a Customer and Name, however the APD version of this file had blanks for Name and Customer while the CAS version was corrupted (could not be read as is by FoxPro, no attempt was made to uncorrupt this file)."

Plaintiff claims that the court's finding regarding the alleged MFE database deletion was clearly erroneous. We disagree. The testimony and evidence supported a conclusion that the customer and name data were removed from the MFE database. According to Prychodko's testimony, the customer and name data in the MFE database was incomplete and was discovered in a deliberately mislabeled file. Similarly, the court-appointed expert stated that this file was corrupted and could not be read as is by FoxPro. The court's finding that data in MFE system had been deleted was not clearly erroneous.

In a separate argument, plaintiff contends that the trial court's findings regarding plaintiff's engineering logs and budgets were clearly erroneous. The trial court found that "other possible corroborative documentary evidence related to this claim including budgets, engineering logs and tracking reports testified to by Mr. Washeleski and Marlin Fry, plaintiff's vice-president of sales, were not produced during discovery nor were they offered in response to [the] motions [at issue]." We find no clear error in the court's findings.

Washeleski testified during deposition that he and other employees had kept engineering logs or notes and that Washeleski had given the engineering records concerning LPS to Rautoila approximately a year earlier in response to Rautoila's request. Washeleski subsequently received additional engineering records. During discovery, there was evidence that these records were not produced as they had existed according to the testimony. There was also evidence of budget tracking sheets, as indicated by Marlin, which were not produced.

We decline to address plaintiff's remaining issues related to the sanction of dismissal because they are not properly presented for appeal. To properly present an appeal, an appellant must appropriately argue the merits of the issues identified in his statement of the questions involved. *Ewing v Detroit*, 252 Mich App 149, 169; 651 NW2d 780 (2002); *Richmond Twp v Erbes*, 195 Mich App 210, 220; 489 NW2d 504 (1992), overruled in part on other grounds in *Bechtold v Morris*, 443 Mich 105; 503 NW2d 654 (1993). An appellant may not merely assert an error and leave it to this Court to unravel and elaborate his arguments, or discover and rationalize the basis for his claims, and then search for authority to sustain or reject his position. *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998); *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002). Nor may a party give issues cursory treatment with little or no citation of supporting authority. *Silver Creek Twp v Corso*, 246 Mich App 94, 99; 631 NW2d 346 (2001).

Plaintiff claims that the court erred in dismissing its claims for the sole reason that its proof regarding damages falls somewhat short of perfection. This claim includes an erroneous factual premise. The court did not dismiss plaintiff's case for the sole reason that its proof of damages fell somewhat short of perfection. Further, this issue is abandoned because plaintiff has failed to argue the merits of the issue. *Yee, supra* at 406. Plaintiff presents no factual support or argument concerning this issue, nor does plaintiff cite authority for the legal proposition that proof of damages need not be perfect.

Plaintiff claims that the court dismissed its claims because plaintiff's computer program, in place for less than two of the nearly six years of development work, does not provide a ready source of information to define and quantify the development effort. This issue presupposes that the computer program's inadequacy was the basis for dismissal, a supposition that ignores the court's findings of discovery abuses and evidence tampering. Plaintiff has failed to appropriately argue the merits of the issue presented, and it is abandoned. *Id.*

Plaintiff claims that the court erred in making its findings with no opportunity for factfinding before a jury. Citing *Trupiano v Cully*, 349 Mich 568; 84 NW2d 747 (1957), plaintiff contends that a finding of destruction of evidence does not warrant dismissal of the case; rather, the court may only give a jury instruction that establishes a rebuttable presumption that the original records would favor defendant. We disagree.

In this case, the court appropriately conducted an evidentiary hearing regarding the alleged discovery abuse. *Traxler, supra* at 288. Plaintiff had ample opportunity to present evidence and argument concerning its failure to comply with discovery requests and orders and to refute defendant's claims. *Id.* Thereafter, the trial court properly issued its findings as the basis for imposing the sanction of dismissal. *Id.* The trial court's conduct of an evidentiary hearing and its rendering of factual findings with regard to plaintiff's alleged discovery abuse was not only proper, it was required under due process standards. *Id.*

6

The court did not abuse its discretion in imposing the sanction of dismissal. *Bass, supra* at 26. MCR 2.313(B)(2) authorizes a trial court to impose sanctions, including dismissing an action, for failure to obey a discovery order. *Bass, supra* at 26. A court may "order such sanctions as are just." MCR 2.313(B)(2). The trial court appropriately considered the circumstances of this case in determining that dismissal was appropriate. *Bass, supra* at 26-27.

Further, a court may also dismiss an action as a sanction for the failure to preserve evidence. *Bloemendaal v Town & Country Sports Ctr, Inc*, ___ Mich App ___; ___ NW2d ___ (Docket No. 234200, released for publication January 24, 2003). "A trial court has the authority, derived from its inherent powers, to sanction a party for failing to preserve evidence that it knows or should know is relevant before litigation is commenced." *Id.* at slip op p 3; see also *Persichini, supra* at 639-640.

III

Plaintiff claims that the court erred in excluding plaintiff's timesheets on the ground that they were not authentic. Plaintiff argues that the court erred because plaintiff made a prima facie showing of authenticity by providing the sworn testimony of eight employees regarding the genuineness of their timesheets, which required that the timesheets be admitted as evidence under MRE 901. Further, the court erred in crediting evidence concerning ink dating to conclude that the timesheets were inauthentic because the evidence merely raised an issue of disputed fact. Consequently, the court's ruling invaded the province of the jury. We disagree.

Whether documents have been properly authenticated is a matter within the trial court's discretion. *Haberkorn v Chrysler Corp*, 210 Mich App 354, 366; 533 NW2d 373 (1995). "The requirement of authentication ... is satisfied by evidence that the matter in question is what its proponent claims." *Forest City Enterprises, Inc v Leemon Oil Co*, 228 Mich App 57, 73; 577 NW2d 150 (1998); see also *Haberkorn, supra*. The court found that the timesheets were not what plaintiff claimed them to be: accurate and contemporaneous recordation of time spent on the project. Prychodko testified and demonstrated that there were numerous discrepancies between hard copy timesheets and the data in the FoxPro database. The court found that plaintiff

proffered no reasonable explanation for the discrepancies between the timesheets, the copies and the FoxPro data. We find no abuse of discretion.⁵

Further, the trial court properly exercised its discretion in excluding the timesheets as a sanction for discovery abuses. A court may “order such sanctions as are just.” MCR 2.313(B)(2). Pursuant to MCR 2.313(B)(2)(b), sanctions may include “prohibiting the party from introducing designated matters into evidence.” The trial concluded alternatively that the ink-dating evidence supported exclusion of the timesheets as evidence, i.e., as a sanction for failing to produce the original timesheets.

IV

Plaintiff claims that the court erred in dismissing plaintiff’s breach of contract claim. We disagree. This Court reviews de novo a trial court’s grant of summary disposition pursuant to MCR 2.116(C)(10). *Spiek v Dep’t of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Summary disposition under MCR 2.116(C)(10) is properly granted when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). The court considers the pleadings, affidavits, depositions, admissions and other documentary evidence in the light most favorable to the nonmoving party. *Id.* The party opposing the motion then has the burden of showing by evidentiary proofs that a genuine issue of material fact exists. *Id.* at 455.

This issue implicates two sections of the Michigan Uniform Commercial Code, MCL 440.2205 (firm offer) and MCL 440.2207 (acceptance stating different terms [“battle of the forms”]). The trial court initially held that a rejection or counteroffer terminated the power of acceptance by an offeree, allowing the offeror to revoke the offer, but on reconsideration found its reasoning erroneous, ruling that defendant’s March 26, 1992 letter to plaintiff did not terminate its power of acceptance of plaintiff’s .40 quote. The court concluded that defendant’s March 31, 1992 purchase order was an acceptance of the firm offer concerning the price of the sensor.

We find no error in the trial court’s conclusion that defendant’s March 26, 1992 letter to plaintiff did not terminate the power of acceptance with respect to the .40 quote. “A counteroffer does not normally operate as a rejection where the offer is irrevocable.” Calamari & Perillo, *Contracts* (4th ed), § 2.25 Option Contracts—Irrevocable Offers, p 115, citing 1 Corbin § 3.38 (Perillo 1993). A firm offer is an irrevocable offer. Calamari & Perillo, pp 113-114, n 10.

⁵ Plaintiff cites *People v Mitchell*, 37 Mich App 351; 194 NW2d 514 (1971), for the proposition that if a prima facie showing of authenticity is made, the evidence must be admitted. However, *Mitchell* does not negate the general rule that the threshold issue is whether the evidence is what the proponent claims it to be. *Id.* at 357. The question of authenticity goes to the genuineness of the evidence. *Id.* at 356. In this case, the court found that the timesheets did not meet the threshold standard.

Plaintiff's breach of contract claim was premised on plaintiff's claim that the parties had an open price contract and no price had been agreed upon for the sensors provided to defendant; thus, plaintiff was entitled to a reasonable price. The parties disputed whether the writings between the parties constituted an agreement on the unit price of the sensors provided to defendant in the 1993 and 1994 model years. It was undisputed that there existed a 1990 three-year purchase order for the sensors and that the March 31, 1992 purchase order, which amended the 1990 purchase order, stated that it covered a three-year period.

Based on the parties' legal and factual positions and their arguments at the February 22, 1999 hearing on defendant's motion for reconsideration, we find no error in the court's conclusion that the March 31, 1992 purchase order was a definite and seasonable acceptance of the .40 quotation that established an agreed upon unit price for the sensors of \$24.41 (front) and \$25.06 (rear). MCL 440.2207. At the hearing, plaintiff's counsel agreed with the court that if the firm offer did not "lose its irrevocable feature" and a contract was formed, the parties' writings matched with regard to the tooling cost (although subsequent disagreement arose) and with regard to the piece price (at certain automation amounts).

The remaining issue is whether the court erred in concluding that the agreed upon unit price covered the sensors for both the 1993 and 1994 model years. Plaintiff argued that the .40 quote identified the unit price for only the 1993 MY. However, defendant argued that the 1993 MY on the .40 quote referenced the particular part, not the time period, and that the purchase order expressly stated that it was "effective 10/01/90 and expires 7/30/94." Defendant's purchase order also stated that if a party commences shipping under the purchase order, it acquiesces to the terms of the purchase order. Moreover, defendant argued that even if the 1994 MY price was not established upon the formation of a contract by the March 31 purchase order, plaintiff's subsequent performance confirmed that the price covered the sensors shipped for 1994 because plaintiff invoiced the sensors at that price and that is the price defendant paid.

The trial court concluded that the period of the contract formed by the acceptance of the firm offer was three years. Additionally, the court found that plaintiff accepted the terms of the March 31 purchase order by performance: "By invoicing at the purchase order price and referencing the purchase order number, [plaintiff] demonstrated its acceptance of the terms of the purchase order."⁶ We find no error in these conclusions.

Plaintiff further claims that the trial court erred in limiting plaintiff's damages for misrepresentation. Plaintiff has failed to argue the merits of this issue, and it is therefore abandoned. *Yee, supra* at 406.

Conversely, plaintiff argues that the trial court erred in dismissing plaintiff's obsolescence claim; however, this issue is not raised in the questions presented. Plaintiff has

⁶ The court noted that the parties agreed that there were subsequent modifications of the contract as to price by mutual consent.

failed to properly present this issue for appeal. MCR 7.212(C)(5), *Grand Rapids Employees Independent Union v Grand Rapids*, 235 Mich App 398, 409-410; 597 NW2d 284 (1999).

V

Plaintiff claims that this case should be remanded before a different judge. In light of our disposition, this issue need not be addressed. Even if a remand were warranted, we find no merit in plaintiff's claim that the case should be heard before a different judge. Contrary to plaintiff's assertion, to justify disqualification of a judge, a party must generally show actual bias, or the likelihood or appearance of bias to the extent that it affects the judge's ability to balance vindicating the interests of the court and the party. MCR 2.003(B)(1); *Cain v Dept of Corrections*, 451 Mich 470, 495; 548 NW2d 210 (1996); *Ireland v Smith*, 214 Mich App 235, 250; 542 NW2d 344 (1995), mod 451 Mich 457 (1996). No such circumstances have been shown in this case.

Affirmed.

/s/ Richard Allen Griffin

/s/ Janet T. Neff

/s/ Hilda R. Gage