

STATE OF MICHIGAN  
COURT OF APPEALS

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THOMAS KING II,

Plaintiff-Appellant,

v

ALLSTATE INSURANCE COMPANY,

Defendant-Appellee,

and

NORTH POINTE INSURANCE COMPANY,

Defendant.

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UNPUBLISHED

April 3, 2007

No. 266071

Wayne Circuit Court

LC No. 02-214890-NF

Before: Cavanagh, P.J., and Murphy and Meter, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order denying plaintiff's motion to reinstate his lawsuit and an order denying plaintiff's motion to disqualify the trial judge. We reverse and reassign.

Plaintiff argues that the trial court abused its discretion by failing to reinstate his case on the trial docket. We agree. A trial court's decision whether to reinstate an action is reviewed for an abuse of discretion. *Wickings v Arctic Enterprises, Inc*, 244 Mich App 125, 138; 624 NW2d 197 (2000); *Bolster v Monroe Co Bd of Rd Comm'rs*, 192 Mich App 394, 399; 482 NW2d 184 (1991). The abuse of discretion standard acknowledges that there may be circumstances in which there is no one correct outcome. *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006). An appellate court should defer, to a certain extent, to the trial court's judgment, and if the trial court's decision results in an outcome within the range of principled outcomes, it has not abused its discretion. *Id.*; *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

MCR 2.502(C) provides:

**Reinstatement of Dismissed Action.** On motion for good cause, the court may reinstate an action dismissed for lack of progress on terms the court

deems just. On reinstating an action, the court shall enter orders to facilitate the prompt and just disposition of the action.

In determining whether good cause exists to reinstate an action, a court may consider (1) whether the dismissal for lack of progress was based on a technical or procedural error, (2) the plaintiff's diligence before dismissal, (3) the justification for the plaintiff's failure to make progress before dismissal, (4) the plaintiff's diligence in attempting to settle or reinstate the case, and (5) the potential prejudice to the defendant if the action were to be reinstated. *Wickings, supra* at 142. This list of factors is not exhaustive and not all the factors will be relevant in every case. *Id.* at 142 n 28.

Here, plaintiff's motion to reinstate was filed and denied after a notice of intent to dismiss was filed, but before the action was actually dismissed. Therefore, plaintiff's argument does not technically challenge the trial court's decision with regard to the reinstatement of a dismissed action. However, because of the similarity of issues and because the action *was* ultimately dismissed, we find it appropriate to analyze this issue under the standards presented above.

As noted, evaluating the reinstatement decision necessarily involves evaluating the reason for the dismissal (or, in this case, the pending dismissal). MCR 2.502(A) provides that a court may, *sua sponte*,

order that an action in which no steps or proceedings appear to have been taken within 91 days be dismissed for lack of progress unless the parties show that progress is being made or that the lack of progress is not attributable to the party seeking affirmative relief.

"A court, in its discretion, may dismiss a case with prejudice or enter a default judgment when a party or counsel fails to appear at a duly scheduled trial." *Vicencio v Jaime Ramirez, MD, PC*, 211 Mich App 501, 506; 536 NW2d 280 (1995). Dismissal is a drastic step that should be taken cautiously. *North v Department of Mental Health*, 427 Mich 659, 662; 397 NW2d 793 (1986). Before imposing dismissal as a sanction, the trial court must "carefully evaluate all available options on the record and conclude that the sanction of dismissal is just and proper." *Vicencio, supra* at 506. Disposition of litigation on the merits is favored, and in deciding whether to impose dismissal as a sanction, the court should consider:

(1) whether the violation was wilful or accidental; (2) the party's history of refusing to comply with previous court orders; (3) the prejudice to the opposing party; (4) whether there exists a history of deliberate delay; (5) the degree of compliance with other parts of the court's orders; (6) attempts to cure the defect; and (7) whether a lesser sanction would better serve the interests of justice. [*Id.* at 507.]

In this case, both parties failed to appear at the scheduled trial because the parties had an apparent arbitration agreement. Plaintiff claimed that the court was advised about this agreement

by defendant's<sup>1</sup> counsel on August 19, 2005, four days before August 23, 2005, the trial date, but no copy of the agreement or a stipulation or order to dismiss was entered with the court. A few days after the trial date passed, plaintiff's counsel realized that there was no meeting of the minds regarding a key provision of the arbitration agreement and sought to have the matter reinstated on the trial court's docket. Plaintiff's counsel stated that plaintiff had not ratified the arbitration agreement.

From the record, it appears to us that the failure to appear at trial was accidental, because plaintiff's counsel realized that there was no meeting of the minds only after the trial date passed. In an attempt to cure the error, plaintiff called the court to notify it of the mistake. During a conference call, the court advised plaintiff to file a motion to reinstate. A notice of intent to dismiss was sent to the parties on September 7, 2005. On September 9, 2005, seventeen days after the trial date and thirty-eight days before the order dismissing the case was entered, plaintiff filed a motion to reinstate as previously advised by the court. The court held a hearing on plaintiff's motion to reinstate on September 16, 2005, and it denied the motion, stating that because it "was told that [the case] was going to arbitration . . . that's where to resolve it." The court entered an order denying plaintiff's motion to reinstate on September 30, 2005, and on October 17, 2005, it dismissed the action with prejudice.

The record demonstrates to us that the parties' failure to appear was essentially accidental. Moreover, there was no history of disobedience with court orders; on the contrary, plaintiff followed the court's advice to file a motion to reinstate. Defendant was not unduly prejudiced by plaintiff's absence because defendant itself failed to appear at trial. There was also no history of deliberate delay; on the contrary, plaintiff filed a motion to reinstate before an order dismissing the case was even entered. There was no record evidence that plaintiff failed to comply with other parts of the court's orders, and plaintiff attempted to cure the error by immediately filing the motion to reinstate. Although the parties failed to appear before the court on the day scheduled for trial, they did so for a good reason, and plaintiff moved for reinstatement, which does not indicate a lack of progress.<sup>2</sup>

Moreover, unlike the situation in *Wickings, supra* at 144-146, where the Court found that there was no good reason for over a one-year delay, here, there was no delay between the dismissal and the motion to reinstate because plaintiff filed the motion and the motion was denied before an order dismissing the case was even entered. Plaintiff was very diligent before dismissal by trying to submit the case to arbitration and quickly trying to remedy his failure to appear at trial by filing a motion to reinstate only seventeen days after the trial date. The

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<sup>1</sup> Our references to the "defendant" in this opinion are to defendant-appellant Allstate Insurance Company.

<sup>2</sup> In fact, in its appeal brief, defendant takes no position concerning the merits of the motion for reinstatement, claiming only that this court lacks jurisdiction because the order appealed from was not final. We reject defendant's claim, inasmuch as plaintiff filed its claim of appeal four days after entry of the order dismissing the case. A clerk in this Court requested that plaintiff submit a copy of this order, along with a copy of the register of actions showing its entry, and plaintiff complied with this request.

justification for plaintiff's failure to appear was reasonable because, once the parties had an arbitration agreement, they were not required to appear and litigate the case. Moreover, aside from further litigation expenses, defendant would not have been prejudiced by the reinstatement of the case because it was facing potential liability regardless of the forum. Thus, there was good cause to reinstate the action. In fact, there was no good reason to deny the motion for reinstatement. Thus, the court abused its discretion when it denied the motion for reinstatement.

Plaintiff also argues that the trial judge should have been disqualified because he was personally prejudiced against plaintiff and that the case should be remanded to a different judge. We agree. The findings of fact made by a trial court pertaining to a motion to disqualify a judge are reviewed for an abuse of discretion, but the application of the facts to the law is reviewed de novo. *Olson v Olson*, 256 Mich App 619, 637-638; 671 NW2d 64 (2003)

Under MCR 2.003(B)(1), a judge may be disqualified on a showing of actual personal bias or prejudice. *Cain v Dep't of Corrections*, 451 Mich 470, 494-495; 548 NW2d 210 (1996). Disqualification is warranted only when "the bias or prejudice is both personal *and* extrajudicial." *Cain, supra* at 495 (emphasis added). An extrajudicial bias *generally* has its "origin in events or sources of information gleaned outside the judicial proceeding." *Id.* at 495. A party who seeks to disqualify a judge on the basis of bias must overcome a heavy presumption of judicial impartiality. *FMB-First Nat'l Bank v Bailey*, 232 Mich App 711, 728; 591 NW2d 676 (1998). Judicial remarks made during the course of a trial that are critical of, disapproving of, or hostile to counsel, parties, or their cases *ordinarily* do not establish bias or prejudice. See *People v Wells*, 238 Mich App 383, 391; 605 NW2d 374 (1999). Judicial rulings *alone*, even if erroneous, or opinions formed by a judge on the basis of facts introduced or events occurring in the course of the proceedings, or of prior proceedings, do not constitute a basis for establishing bias or prejudice *unless* they display a profound favoritism or antagonism that would make fair judgment impossible. *Cain, supra* at 496; *Gates v Gates*, 256 Mich App 420, 440; 664 NW2d 231 (2003); *Armstrong v Twp of Ypsilanti*, 248 Mich App 573, 598; 640 NW2d 321 (2001). On remand, a case should be assigned to a different judge if it would be unreasonable to expect the original judge to be able to set aside previously expressed findings without difficulty, if reassignment is necessary to preserve the appearance of justice, and if reassignment would not entail excessive waste or duplication. *Byati v Byati*, 264 Mich App 595, 602-603; 691 NW2d 812 (2004). "The general concern when deciding whether to remand to a different judge is whether the appearance of justice will be better served if another judge presides over the case." *Id.* at 602. A party seeking reassignment must demonstrate that a judge's past comments or expressed views indicate that the judge would have difficulty in putting aside those views and findings and ruling fairly on remand. *Id.* at 603.

Plaintiff filed two motions to disqualify the trial judge, and both were denied. During the hearing regarding the second motion to disqualify, plaintiff claimed that the judge showed a pattern of actual prejudice against him. Plaintiff's counsel stated that in a related third-party case, the judge opened the envelope containing the case evaluation and became irritated because the case was evaluated for only \$6,000. Counsel also noted that, when plaintiff took the stand in the related case and testified that he believed the defendant/driver had been intoxicated, the judge encouraged the defendant to move for a mistrial because, as the judge stated during the motion hearing, "[plaintiff] knew the other person wasn't intoxicated." During the hearing, the following exchange occurred between plaintiff's counsel and the judge:

*MR. RASOR:* . . . I think that you prejudged this case, because you told me after that -- after my client posted the bond that you ordered [in the third party case]. You told me that you thought my client was a liar; that you thought he was a cheat, and you thought he was manufacturing this accident to live off the system.

And the Court has never denied that the Court said any of those things. You said that you hoped that he couldn't post an additional bond so that he could be barred from the courthouse on the third party case. But in any event, Judge --

*THE COURT:* Well that sounds pretty extreme. I do vaguely have a recollection of it. The problem is he did lie under oath in front of me and a jury.

The judge stated that plaintiff lied because plaintiff knew that the defendant in the third-party case was not intoxicated; the judge stated that "subsequent developments made [plaintiff] aware that [the defendant] was not intoxicated." Plaintiff's counsel responded that the court did not allow any subsequent development regarding the issue because it granted a mistrial before plaintiff could call any other witnesses. The judge then speculated that if the defendant in the third-party case had been intoxicated, he would not have gone to the police station to complain about what happened because the police "would have arrested him on the spot." Plaintiff's counsel responded that speculation regarding what the police would have done was not appropriate. Counsel then claimed that the judge denied plaintiff's motion to reinstate and his right to a trial by jury because of the judge's bias against plaintiff. The judge stated that he gave plaintiff the right to a jury trial when he set the trial for August 23, 2005, but the parties failed to appear. He also stated that he could "be fair to [plaintiff] if it ever comes to trial" but indicated that he "relied on the lawyer's good word that it was going to arbitration, and they, not me [sic], missed the trial." Counsel also claimed that by refusing to recuse himself, the judge continued with his pattern of bias against plaintiff.

Given that the trial judge did not flatly deny calling plaintiff a liar and a cheat or stating that he hoped plaintiff could not post his bond amount, and given that the comments were based, in part, on speculation, we conclude that there existed a serious antagonism here that could reasonably be characterized as extrajudicial and that would interfere with fair judgment. See, generally, *Cain, supra* at 496. Given the apparent strength of the judge's feelings, it would likely be difficult for him to set them aside on remand. We conclude that a remand to a different judge would better serve the appearance of justice in this case and would not cause excessive waste or duplication. See *Byati, supra* at 602-603.

Reversed and remanded to the trial court for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Mark J. Cavanagh  
/s/ William B. Murphy  
/s/ Patrick M. Meter