Grievance Administrator,

Petitioner/Appellant,

v

Geoffrey N. Fieger, P 30441

Respondent/Appellee

Case No. 97-93-GA

Decided: December 18, 1998

BOARD OPINION

Count One of the formal complaint alleges that respondent made or caused to be made knowingly false statements in answers to interrogatories served in a Jackson County Circuit Court action. Count Two alleges that respondent made knowingly false statements about the circuit judge presiding over the case involved in Count One. The panel granted summary disposition in favor of respondent. We reverse the panel's order granting summary disposition and remand this matter for a hearing.

I. Count One.

The panel granted summary disposition for respondent with respect to Count One pursuant to MCR 2.116(C)(10).

A. Standard of Review.

In Grievance Administrator v Bruce Sage, No 96-35-GA (ADB 1997), the Board set forth the standard for these motions:

> Summary disposition pursuant to MCR 2.116(C)(10) may be granted when "there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." Summary disposition pursuant to this subrule may not be granted unless it is impossible for a record to be developed which would present a question upon which reasonable minds could differ. Skinner v Square D Co, 445 Mich 153, 162; 516 NW2d 475 (1994); Boumelhelm v Bic Corp, 211 Mich App 175, 178; 535 NW2d 574

> (1995). The nonmoving party is given the benefit of reasonable doubt. Id. If the facts -- even though undisputed -- could support conflicting inferences, summary disposition should not be granted. DiFranco v Pickard, 427 Mich 32, 54; 398 NW2d 896 (1986). And, summary disposition under (C)(10) is not appropriate when the record is too incomplete to permit the court to conclude that the movant is entitled to judgment as a matter of law. See Cloverlanes Bowl, Inc v Gordon, 46 Mich App 518, 526; 208 NW2d 598 (1973).

In Grievance Administrator v Fieger, No 94-186-GA (ADB 1996) ("Fieger I"), the Board addressed the applicability MCR 2.116(C)(10) in these proceedings:

> Hearing panels should be cognizant of the purpose of these proceedings and reach the determination that there exists no genuine issue of material fact only after the most careful consideration. [Fieger I, p 7.]

In explaining the basis for this rule, the Board:

> Discussed the fact that these proceedings are for the protection of the public, not simply for the resolution of a private dispute [Id.];
>
> Stated that panels should not (1) burden nonmovants with responding to nonmeritorious motions, or (2) allow proceedings to be unnecessarily lengthened by summary disposition motions [Id.];
>
> Noted that certain questions may not be appropriate for summary judgment in these proceedings in light of the lack of discovery [Id., pp 7-11.]; and finally,
>
> Noted that because these proceedings are already streamlined, the benefit to be gained by summary disposition is not as great as it is in circuit court, and that it may often be as easy to try the case as it is to determine whether there is an issue of fact. [Id., pp 11-12.]

In a separate opinion, Mr. Bushnell concurred with this part of the majority opinion, and further noted that courts and panels have discretion to deny summary judgment if they believe the better course is to try the case. He added another factor leading him to conclude that summary disposition would, and should, be relatively

rare in these cases: the Court has ultimate responsibility for discipline, and a full record may enable the Board and Court to better perform their respective functions. Fieger I (separate concurrence/dissent), pp 17-18 n 4. Also, the separate opinion suggested that the Administrator be afforded "a certain degree of latitude" if a critical witness refused to provide critical discovery. Id., p 16.

The Board reviews dispositive motions de novo. Sage, supra.

B. Count One's Allegations And The Panel's Ruling.

Count One alleges that respondent made misrepresentations in answers to supplemental interrogatories with regard to the anticipated testimony of two damages experts. Paragraph 6 of the formal complaint quotes a portion of the answer to question 93. Respondent filed a motion for summary disposition accompanied by an affidavit asserting that a more complete quotation of the answer is as follows:

> Mr. Behr is an expert economist who specializes in analyzing claims for lost profits for businesses, specifically livestock operations. Mr. Behr **is expected to testify that** Plaintiff's lost profits alone total in excess of $7,000,000.00. Mr. Behr's conclusions ***are based on*** **his analysis of financial records *from Plaintiffs, [sic] facilities for the years 1986 through 1993.*** Mr. Behr **bases his testimony** on number of hogs sold per year by category (feeder, breeder, boars, etc.), feed costs, annual totals in pounds and dollars, and all other costs. Mr Behr's **calculations are also set forth** in light of profit/loss of comparable units. Mr. Behr has not produced a written report. Should such a report be produced, same will be forwarded to Defendant. Additionally, Plaintiffs provide financial statements and information used to calculate financial profit/loss charts compiled by Plaintiffs herein and already provided to Defendant. [Affidavit of Geoffrey Fieger, ¶4; underlined bold type in original; remaining emphasis added.]

The supplemental answers to interrogatories also contained a similar response with regard to a second expert, Mr. Baulch.

The formal complaint alleges that:

> 7. These representations were false, and were known by Respondent to have been false at the time they were made for the reason that neither Mr. Behr nor Mr. Baulch had begun to review any documents, figures or records or make any calculations as of the date of the Supplemental Answers and had not, therefore, reached any conclusions regarding same. [Formal Complaint, ¶ 7.]

As to Count One, the panel's Opinion and Order granting the motion for summary disposition and dismissing the Formal Complaint states in part:

> With respect to Count One, the panel finds that the Petitioner improperly failed to quote the entire Supplemental Interrogatory Answer prepared by Respondent.
>
> * * *
>
> The full answer prepared by Respondent clearly states that the testimony was that which was expected to be provided. The answer, therefore, demonstrates that the expert had not provided such opinions. We therefore find that the Petitioner's claim that the representations were false . . . cannot be sustained given the undisputed factual record before this [panel]. Further factual elucidation would not shed any further light on whether the interrogatory answers were or were not misleading. The unambiguous wording of the interrogatory answers themselves requires summary dismissal of this claim pursuant to MCR 2.116(C)(10).

C. A Hearing On Count One Is Appropriate.

The Grievance Administrator argues that summary judgment should not have been granted in this case. Essentially, the Administrator disagrees with the panel's conclusion that the answer was so clear that respondent was entitled to judgment as a matter of law at this stage. We must agree.

For purposes of our analysis, we have separated the statements in the interrogatory answer into three categories.

1. "is expected to testify"

This language was not set forth in the formal complaint. Respondent argues that the boldfaced language modifies the entire paragraph. The Administrator argues that it does not. In other words, the Administrator does not quarrel with the statement that plaintiff expected the expert to testify that losses exceed 7 Million Dollars. Rather, the Administrator focuses on the other statements which do not reflect the future tense.

2. "Behr bases his testimony" and "Behr's calculations are also set forth in light of"

These underlined statements are not necessarily false. They might, but do not necessarily, imply that calculations have already been performed. They could be generalized assertions based on familiarity with either Behr's work on other cases or with the way all such experts analyze damages.

3. "Mr. Behr's conclusions *are based on* his analysis of financial records *from Plaintiffs, [sic] facilities for the years 1986 through 1993*"

This statement could lead one to conclude that Behr had done work on this particular case. However, we will not interpret these interrogatory answers in isolation, or suggest to the panel which view of the case it should adopt at this stage. Rather, we simply hold that, although the panel's decision was not unreasonable, summary disposition with respect to Count One is inappropriate. We cannot say that "it is impossible for a record to be developed which would present a question upon which reasonable minds could differ." Fieger I, quoting Skinner, supra.

In remanding this matter, we express no opinion as to the ultimate disposition of this matter and do not preclude the panel from relying on its initial reasoning, if appropriate, after it has fully considered the evidence and arguments presented at the hearing. If the panel concludes, after the hearing, that none of the statements were false, the panel shall also consider all other appropriate matters including the other elements of the Administrator's claim, such as whether the statements were knowingly false as set forth in the complaint and as required by

MRPC 4.1.

Finally, we note that the Administrator has attached the circuit court opinion to its brief on review. Similarly, respondent argues that he did not draft or sign the answers to the interrogatories. We have not considered these matters. Arguments and evidence regarding the existence of a genuine issue of fact or a defense should be submitted to the hearing panel initially.

II. Count Two.

The second count of the formal complaint alleges that respondent made the following statements in violation of MRPC 8.2(a):

> [Respondent] accused Judge Chad Schmucker of conspiring with Governor John Engler to disbar Respondent because of Respondent's work for suicide doctor Jack Kevorkian; [and,]
>
> . . . accused Judge Schmucker of basing the sanctions on the judge's attempt to gain favor with the Governor, saying, "I've found it shocking that a judge would . . . use a political agenda to embarrass me." [Formal Complaint, ¶ 13.]

The panel found the Board's September 2, 1997 opinion in Grievance Administrator v Geoffrey N. Fieger, 94-186-GA (ADB 1997) ("Fieger II") to be dispositive of Count Two. In particular, the panel relied upon pages 33-34 of the Fieger II opinion. There, the Board affirmed the dismissal of certain allegations under MCR 2.116(C)(8), applying the following standard:

> A motion for summary disposition under MCR 2.116(C)(8) may be granted if the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. Simko v Blake, 448 Mich 648; 532 NW2d 842 (1995). All factual allegations contained in the complaint must be accepted as true, together with any legitimate inferences which may be drawn therefrom. Boumelhelm v Bic Corp, 211 Mich App 175, 178; 535 NW2d 574 (1995). [Fieger II, p 24.]

In Fieger II, the Board reviewed a panel's decision to dismiss all three counts of a formal complaint against respondent. Each count alleged a violation of MRPC 8.2(a), and each was dismissed by

the panel pursuant to MCR 2.116(C)(8). On review, the Board vacated the dismissal of two counts and remanded for a hearing and held, among other things, that a hearing was necessary to develop the context surrounding the alleged statements.

The panel in this matter found, in dismissing Count Two, that the statements alleged therein were constitutionally protected. While it may not be improper to reach this conclusion ultimately, we narrowly conclude that a hearing is required with respect to these allegations for the reasons set forth in Fieger II's discussion regarding the two counts there remanded for a hearing.

It is true that a portion of one of the allegations in Count Two appears quite similar to an allegation dismissed by the panel and Board in Fieger II. However, another allegation -- alleging a conspiracy between the Judge and the Governor -- also resembles the counts remanded for hearing in Fieger II at pages 25-31 of that opinion. We cannot say that the allegations here are so clearly deficient as a matter of law that no factual development could lead to a finding of misconduct. A fuller record is necessary to determine whether the alleged statements amount to factual assertions, whether they were made with the requisite intent, and whether they otherwise violate of MRPC 8.2(a) and fall outside the scope of speech protected by the First Amendment.

III. Conclusion.

For the foregoing reasons, we reverse the order dismissing the formal complaint and remand this matter to the panel for a hearing.

Board Members Elizabeth N. Baker, Barbara B. Gattorn, Albert L. Holtz, Michael R. Kramer, Roger E. Winkelman, and Nancy A. Wonch concur in this decision.

Board Members Grant J. Gruel and Kenneth L. Lewis were recused.

Board Member C.H. Dudley, M.D., was absent and did not participate.