STATE OF MICHIGAN

COURT OF APPEALS

SARAH DEMING, Plaintiff-Appellant,	UNPUBLISHED October 15, 2013
v	No. 309989 Oakland Circuit Court
CH NOVI, L.L.C., d/b/a EMAGINE NOVI, and FILMDISTRICT DISTRIBUTION, L.L.C., Defendants-Appellees.	LC No. 2011-122030-CZ

Before: BECKERING, P.J., and O'CONNELL and SHAPIRO, JJ.

PER CURIAM.

Plaintiff appeals by right from the trial court's denial of her disqualification motion and its grant of defendant's motion for summary disposition dismissing plaintiff's claims under the Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq*. We affirm.

First, plaintiff contends that the trial court, Judge Daniel Patrick O'Brien, should have been disqualified because he exhibited bias and prejudice against plaintiff and her attorney.[1] Plaintiff moved for Judge O'Brien's disqualification under MCR 2.003(C)(1)(b), which provides that disqualification of a judge is warranted when:

> The judge, based on objective and reasonable perceptions, has either (*i*) a serious risk of actual bias impacting the due process rights of a party as enunciated in *Caperton v Massey*, [556] US [868]; 129 S Ct 2252; 173 L Ed 2d 1208 (2009), or (*ii*) has failed to adhere to the appearance of impropriety standard set forth in Canon 2 of the Michigan Code of Judicial Conduct.

Plaintiff essentially asserts that Judge O'Brien is anti-Semitic or that he believes promotion of anti-Semitism is, in the words of plaintiff's brief, a "good thing." We would not

[1] "This Court reviews a trial court's factual findings on a motion to disqualify for an abuse of discretion and reviews de novo the trial court's application of the facts to the law." *Mitchell v Mitchell*, 296 Mich App 513, 523; 823 NW2d 153 (2012). An abuse of discretion occurs "when the trial court's decision falls outside the range of reasonable outcomes." *Id*.

hesitate to mandate recusal of a judge whose conduct or statements displayed or even implied such bias. However, after reviewing the record, we fully and unequivocally reject this accusation against Judge O'Brien. Nothing whatsoever in the trial court record suggests any such bias. The accusation is wholly without basis and the motion for disqualification was properly denied.

We also reject Plaintiff's argument that the trial court erred in granting defendants' motion for summary disposition[2] and dismissing all of her claims.[3] Plaintiff was offended by the movie *Drive*. It is not surprising that some moviegoers would find the film offensive; it is filled with disturbingly violent scenes and brutal characters. However, being offended by a film is not, in and of itself, grounds for a lawsuit. Plaintiff attempts to make it actionable by asserting that defendants violated the MCPA by advertising the film with a preview that is so inconsistent with the actual film to which it is intended to draw an audience that it is "[u]nfair, unconscionable, or deceptive." MCL 445.903(1). We are unaware of, and plaintiff does not refer us to, any such prior application of the MCPA.

Assuming that the MCPA does apply to film previews, plaintiff has failed, beyond the power of her own hyperbole, to support her claim. She first asserts that *Drive*'s preview and other advertising falsely promoted it as "a chase, race, or high speed action driving film," similar to *The Fast and the Furious* and that the preview failed to reveal that the film includes "many segments of slow paced, interpersonal drama," and is "an extremely graphically violent film." In fact, a review of the trailer demonstrates that it is not particularly inconsistent with the content of the film. Every scene displayed in the preview also appeared in the film. In addition to the racing scenes, the preview included several scenes of graphic violence, such as a scene where the main character smashes a man's face into the wall of an elevator, another where he repeatedly kicks a man lying on the ground, and third in which he holds a man on the ground and raises a hammer to smash the man's forehead. The preview includes a large display indicating that the movie is rated R by the Motion Picture Association of America. The trailer also contains several scenes with the main character and his neighbor and love interest, indicating that their relationship is a focus of the film. Thus, contrary to plaintiff's assertions, the trailer did not represent the movie to be solely about car racing and most of the scenes in the trailer do not show driving or racing scenes. Furthermore, any affirmative representations the trailer made about being a racing movie were not inaccurate; the movie does contain driving scenes.

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[2] The trial court did not specify whether it granted summary disposition under MCR 2.116(C)(8) or (C)(10). Because the court appears to have relied on evidence outside the pleadings, we treat the motion as having been granted under MCR 2.116(C)(10). See *Kefgen v Davidson*, 241 Mich App 611, 616; 617 NW2d 351 (2000).

[3] We review de novo a trial court's grant of summary disposition. *Ernstring v Ave Maria College*, 274 Mich App 506, 509; 736 NW2d 574 (2007). "Summary disposition is proper under MCR 2.116(C)(10) if the documentary evidence shows that there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Id*.

Second, plaintiff asserts, and this is the true gravamen of her complaint, that the movie *Drive* "used extreme gratuitous defamatory dehumanizing racism to depict members of the Jewish faith, and thereby promoted criminal violence against members of the Jewish faith" and that the trailer was misleading as it excluded any reference to the film's anti-Semitic nature. However, plaintiff does not provide factual support for her assessment of the film as anti-Semitic other than that two of the many "bad guys" are Jewish. Indeed, the multiple acts of violence described in the prior paragraph were all committed by a presumably non-Jewish character as are nearly all the other acts of violence in the film. Even if plaintiff's characterization of the film has some validity, a proposition we reject, the trailer certainly does not affirmatively suggest that all the "bad guys" are non-Jews or that the movie puts Jews in a favorable or even neutral light. Moreover, plaintiff, contrary to her hyperbole, does not refer us to any actual violence against, or even criticism of, Jews that has resulted from the film being shown. Thus, plaintiff has not presented any evidence that the movie *Drive* does, in fact, express or promote anti-Semitism and, thus, has not shown that the film's trailer failed to reveal a material fact, as required under MCL 445.903(1)(s). Finally, plaintiff concedes that no film critics were able to discern the anti-Semitic nature of the film and so admits that her subjective interpretation that the film is anti-Semitic was not shared by others. Consequently, plaintiff cannot show that defendants failed to reveal a material fact. See MCL 445.903(1)(s).

Finally, plaintiff contends that she should be allowed to amend her complaint to add a claim that the movie *Drive* contains subliminal anti-Semitic content, which is not protected by the First Amendment. US Const, Am I. We note that the First Amendment arguments were raised by defendants below as an alternative ground for dismissing plaintiff's claims under the MCPA. A lack of First Amendment protection is not a basis upon which plaintiff can state a claim. Whether the film contained unprotected subliminal content is irrelevant; the inclusion of such content does not, in and of itself, create a claim.

Plaintiff further asserts that *Drive*'s trailer is not speech protected by the First Amendment because the state can regulate misleading commercial speech. It is well-settled that the state can regulate misleading commercial speech. See *Metromedia, Inc v City of San Diego*, 453 US 490, 507; 101 S Ct 2882; 69 L Ed 2d 800 (1981). In fact, the MCPA does just that. See MCL 445.903(1). Nonetheless, plaintiff cannot state a claim simply based on the movie's alleged lack of protection under the First Amendment.

Affirmed.

/s/ Jane M. Beckering
/s/ Peter D. O'Connell
/s/ Douglas B. Shapiro