STATE OF MICHIGAN

COURT OF APPEALS

STEVE RADULOVICH, EDITH RADULOVICH, and JOHN ROCHE,

Plaintiffs-Appellants,[1]

and

SUE RADULOVICH,

Plaintiff/Counter Defendant/Third-Party Appellant,

v

CITY OF GROSSE POINTE WOODS, TED BIDGARE, and GENE TUTAG,

Defendants,

and

WALTER LEVICK, STEVE LEVICK, and LEVICK CONSTRUCTION,

Defendants-Appellees,

and

DONN FRESARD, FRESARD DEMARCO, PC, and THERESA TENAGLIA, a/k/a THERESA LEVICK,

Third-Party Defendants-Appellees.

UNPUBLISHED
July 27, 2006

No. 256594
Wayne Circuit Court
LC No. 01-121296-NZ

[1] The issues involving the counterclaim and the third-party claim do not pertain to Steve Radulovich, Edith Radulovich, or John Roche.

STEVE RADULOVICH, EDITH RADULOVICH, and JOHN ROCHE,

Plaintiffs,

and

SUE RADULOVICH,

Plaintiff/Counter Defendant/
Third Party Plaintiff-Appellant,

v

CITY OF GROSSE POINTE WOODS, STEVE LEVICK, LEVICK CONSTRUCTION, VICKI DIAZ, TED BIDGARE, GENE TUTAG, GROSSE POINTE WOODS ZONING BOARD, RAY CARMONA, EARL WAKELY, DAVE CZUPRENSKI, PATRICIA CHYLINSKI, ERIC STEINER, ALLEN DICKINSON, THOMAS FAHRNER, ROBERT NOVITKE, and JOSEPH DANSBURY,

Defendants,

and

WALTER LEVICK,

Defendant/Counter Plaintiff-
Appellee,

and

DONN FRESARD, FRESARD DEMARCO, PC, and THERESA TENAGLIA, a/k/a THERESA LEVICK,

Third Party Defendants.

Nos. 258683, 260275
Wayne Circuit Court
LC No. 01-121296-NZ

Before: White, P.J., and Fitzgerald and Talbot, JJ.

PER CURIAM.

In Docket No. 256594, plaintiffs Steve Radulovich, Edith Radulovich, John Roche, and Sue Radulovich appeal as of right the order of dismissal. In Docket No. 258683, plaintiff Sue Radulovich (Radulovich) appeals as of right the order granting attorney fees and costs to defendant Walter Levick. In Docket No. 260275, Radulovich appeals by delayed leave granted the post judgment order awarding Walter Levick attorney fees and costs and denying Radulovich case evaluation sanctions.

Facts and Procedural History

The parties have had abundant disputes in various forums regarding a home construction/renovation project by Levick at 521 Hampton in Grosse Pointe Woods. Levick's property sits between homes owned by Steve and Edith Radulovich and their daughter, Sue Radulovich, and her husband, John Roche. Levick, a licensed builder, decided in January 2000 to "remodel and alter" his home, in which he had lived for seven years, and sell the home to Vicki Diaz. Diaz purchased the property from Levick on February 29, 2000[2]. After he began construction, Levick requested a height variance to accommodate a ten-foot basement ceiling.[3] Defendant city ultimately granted the variance.[4] Plaintiffs appealed to the zoning board and to the circuit court, which denied the appeals.[5]

Plaintiffs filed a lengthy complaint against Levick, the City of Grosse Pointe Woods, the Zoning Board of Appeals, Diaz, and various city officials in June 2001.[6] The principal complaint was that plaintiffs suffered serious and substantial damage to their property due to alleged encroachments, illegal trespassing, and the existence of nuisances caused by work on the Levick home. The September 14, 2001, amended complaint contained 106 allegations and 9 causes of action.[7] Plaintiffs sought demolition of the home, as well as other equitable remedies

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[2] On March 19, 2001, Diaz, who never lived at the premises, sold the property back to Levick, apparently as a result of this ongoing litigation.

[3] The basement could not be lowered because of the sewer line.

[4] A dispute regarding a side yard variance was no longer at issue following a January 23, 2001, order by Wayne Circuit Judge John Murphy as Levick apparently altered the building plans so that no variance was necessary.

[5] Thereafter, this Court denied plaintiffs' application for leave to appeal the grant of the variance to Levick (Docket Nos. 240713, 240714, issued 08/09/02). Plaintiffs' application for leave to appeal in the Supreme Court was denied in March 2003.

[6] Sue Radulovich is an attorney and represented the plaintiffs in this case. Co-counsel Walter Kotch appeared at approximately three hearings.

[7] The complaint alleged the following causes of action: maintaining a nuisance per se, unconstitutional taking/confiscation, conspiracy to illegally deprive plaintiffs of property rights and to maintain a nuisance per se, trespass, nuisance in trespass, section 1983 violations, 4th and 14th Amendment violations, injunctive relief, and intentional infliction of emotional distress.

and significant monetary damages. Radulovich also filed a notice of lis pendens with the Register of Deeds.[8]

On October 10, 2001, Levick filed an answer to the amended complaint and requested that Radulovich post a security bond for costs to continue the litigation in light of Radulovich's failure to disclose "previous litigation and prior cases" arising out of the same dispute between the parties in Macomb County. Levick also filed a counterclaim alleging (1) malicious nuisance; (2) interference with prospective advantageous economic activity; (3) diminution of property values due to continued nuisance; and (4) malicious prosecution and abuse of process. Radulovich brought a motion for summary disposition of Levick's first amended counterclaim on January 2, 2002. Following a hearing, the trial court granted summary disposition of Counts 1and 3 of the counterclaim.

On October 25, 2001, Levick filed a motion for bond for security of costs,[9] and Diaz and the city defendants subsequently moved for a bond for security of costs.[10] The court granted the motions following a hearing on April 17, 2002, as follows: Diaz, $25,000; city, $50,000; city council and zoning board, $50,000. The court denied Levick's motion for bond.

Levick filed a "motion to strike or set aside default as to Walter Levick, Steven Levick and Levick Construction." The motion asserted that Radulovich and Donn Fresard, the attorney for Levick, agreed at a June 25, 2001, Grosse Pointe Woods zoning board meeting that Fresard would accept service on behalf of Walter Levick only, and that no discussion of Steven Levick or Levick Construction took place. Following a hearing on the motion, the trial court found that service was proper, but that Fresard represented neither Steven Levick nor Levick Construction. The court set aside the defaults and gave the parties 21 days to answer.

On June 7, 2002, Diaz and the city defendants filed a motion to dismiss for plaintiffs' failure to file bonds for security of costs. Following a June 14, 2002, hearing, the trial court granted the motion and dismissed plaintiffs' complaint against the city, the city council, the zoning board, and Diaz.

On July 23, 2002, Levick filed a second amended counterclaim, alleging: 1) interference with prospective advantageous economic activity; (2) abuse of process; (3) malicious prosecution and abuse of process regarding a personal protection order issued October 27, 1997; (4) violation of the Michigan wiretapping statute; and (5) slander of title. In conjunction with counts 3 and 4, Levick alleged that Radulovich assisted Tenaglia in obtaining a personal

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[8] Around the same time, Radulovich also filed suit against Levick's former wife, Theresa Tenaglia, a/k/a Theresa Levick, in Macomb Circuit Court. Attorney Donn Fresard and his professional corporation represented Levick and Tenaglia in these lawsuits.

[9] Levick cited "prior course of litigious conduct and tenuous legal theory" in support of the motion.

[10] Diaz and the city defendants cited the "106 counts [in the complaint], questionable legal theories, and voluminous discovery" in support of their motions.

protection order against him during divorce proceedings in 1997. Further, he alleged that Radulovich provided Tenaglia with telephone tapping equipment to tape record Levick's conversations in 1997. On May 12, 2003, Radulovich brought a third-party complaint against Fresard and Tenaglia seeking indemnification and contribution as to the counterclaim filed against her by Levick.

On March 21, 2003, Levick filed a renewed motion to require plaintiffs to file a bond for security of costs. He noted that the case evaluation resulted in a mediation award of $1.00, that plaintiffs rejected mediation and Levick accepted mediation, that the appellate courts upheld the building permit and the variance, and that the construction did not lower the plaintiffs' property values. Following a hearing on April 4, 2003, the court entered an order granting Levick's renewed motion and ordered plaintiffs to file a $25,000 bond for security of costs. The court also ordered that the lis pendens be discharged.[11] On April 18, 2003, the court extended the deadline for plaintiffs to file a bond to May 9, 2003.

On June 27, 2003, a hearing was held on Levick's motion to dismiss plaintiffs' complaint for failure to comply with the court order to file a bond for security of costs. Radulovich did not appear for the hearing. The court ordered that the lis pendens be discharged by act of the court, but indicated that it would extend the deadline to file a bond to July 14, 2003.

At the July 14, 2003, hearing, plaintiffs indicated that they were unable to secure a bond. The court dismissed plaintiffs' complaint for failure to file a bond. The court also entered a default on Levick's counterclaim for Radulovich's failure to discharge the lis pendens. The court also ordered Radulovich to file a $15,000 bond for security of costs with regard to the third party claim.[12] On August 1, 2003, the court granted the third-party defendants' motion to dismiss for failure to file a bond for security of costs. On September 5, 2003, the court granted the third-party defendants' motion for taxation of costs and entered an order for costs in the amount $4,616.92.

At an April 2, 2004, hearing on several of Radulovich's motions, Radulovich indicated that she learned during a de novo review hearing regarding her motion to disqualify the trial judge that Fresard dissolved his firm and was employed by the Wayne County prosecutor's office. Radulovich moved to disqualify Fresard. The court denied the motion to disqualify and awarded Levick $1,600 in costs and fees.

At a May 26, 2004, hearing to settle the jury instructions, the court found that Levick's counterclaim could not survive a motion for directed verdict. The court dismissed the counterclaim in a June 18, 2004, order.

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[11] Previously, the court had denied Levick's motion to remove the lis pendens after Levick purchased the property back from Diaz.

[12] Levick asked for a bond for security of costs at the June 27, 2003, hearing. He noted that the third-party complaint, filed against himself and his firm by Radulovich on May 12, 2003, arose from an allegedly improper attorney/client relationship between himself and Radulovich and that two courts had already held that an attorney/client relationship did not exist.

In post judgment proceedings, the trial court determined that Levick was entitled to $2,464 in actual costs incurred as a result of Radulovich's failure to follow the court's order to discharge the lis pendens. The court also determined that neither party was entitled to case evaluation sanctions and entered an order to that effect on July 2, 2004. On October 4, 2004, the court entered another order denying plaintiffs' motion for taxation of costs, finding that "since both the complaint and the counter complaint wound up being dismissed by the Court, . . . [neither] side was a prevailing party."

Docket No. 256594

I

Plaintiffs first argue that the trial court abused its discretion by setting aside the defaults entered against Levick, Steven Levick, and Levick Construction. A trial court's ruling on a motion to set aside a default is reviewed for an abuse of discretion. *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 227; 600 NW2d 638 (1999).

A copy of the summons and complaint was delivered to Fresard on September 19, 2001. An answer to the complaint was filed on behalf of Walter Levick, only, on October 10, 2001. On that same day, plaintiffs filed a "Default Application, Entry, Affidavit." Plaintiffs filed a proof of service on October 22, 2001, stating that a copy of the application for default, entry, and affidavit were served on Donn Fresard on October 17, 2001, by first class mail. Previously, on October 16, Fresard faxed a letter to Radulovich, which stated:

> I enclose a copy of my initial answer and counter-claim on behalf of Walter Levick only. In reviewing a copy of the complaint that was dropped off at my office, pursuant to our agreement, wherein I would accept service on behalf of Walter Levick, I note that there is also the summons directed towards Steven Levick and Levick Construction.
>
> I have not represented Steven Levick or Levick Construction, and would ask if you want these summons returned to your office? Please advise.

On October 25, 2001, Levick filed a "Motion to Set Aside 'Default' as to Walter Levick, Steven Levick, and Levick Construction." A hearing was held on the motion on April 17, 2002. The court officer who served the summons and complaint testified that he typed the proof of service in an office down the hall from Fresard's office and that he typed it before Fresard signed the proof of service. He indicated that he asked whether service was being accepted for Steven Levick and Levick Construction and that the reply was "yes." Robin Sedgeman, Fresard's secretary, testified that the court officer indicated that he was at Fresard's office to serve a summons and complaint on Levick. Sedgeman produced Fresard's appointment book, which indicated that Fresard was not in the office on September 18, 2001, when the court officer served the summons and complaint. She testified that she signed Fresard's name with permission and that she did not recall any typing on the proof of service at the time she signed it. The court officer did not mention anything about serving Steven Levick or Levick Construction. Sedgeman indicated that the firm did not represent Steven Levick or Levick Construction and that she did not accept service for either party. The trial court found that service on Steven Levick and Levick Construction was proper, but that Fresard represented neither Steven Levick

nor Levick Construction. The court stated that, "In fairness, the Court's discretion, the Court is going to set aside the defaults against Steven Levick and Levick Construction, and from today, give them 21 days to answer the complaint."

Plaintiffs argue that the trial court erred by setting aside the defaults of Levick, Steven Levick, and Levick Construction. However, the trial court set aside only the defaults of Steven Levick and Levick Construction, apparently because there was no dispute at the time of the hearing that the default of Walter Levick was improper.[13]

MCR 2.603(A)(1) provides:

> If a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules, and that fact is made to appear by affidavit or otherwise, the clerk must enter the default of that party.

Levick filed an answer in the trial court within 21 days of receiving the summons and complaint, and therefore did plead as contemplated by the court rule.[14] Fresard also faxed a copy of the answer and counterclaim to Radulovich, along with a letter inquiring what to do with the summons for Steven Levick and Levick Construction, a day before Radulovich filed the default on October 17. Levick also filed an affidavit of meritorious defense, stating in part that his "answer to the complaint was filed on the 21st day after service." Thus, only the setting aside of the default as to Steven Levick and Levick Construction is at issue.

MCR 2.603(A)(3) states:

> Once the default of a party has been entered, that party may not proceed with the action until the default has been set aside by the court in accordance with subrule (D) or MCR 2.612.

Subrule (D) states:

> (1) A motion to set aside a default or a default judgment, except when grounded on lack of jurisdiction over the defendant, shall be granted only if good cause is shown and an affidavit of facts showing a meritorious defense is filed.

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[13] Although the affidavit for default names Walter Levick, no discussion regarding Walter Levick was had, and Radulovich made no argument at the hearing that the default against Walter Levick should not be set aside.

[14] Presumably, this explains the lack of discussion regarding a default as to Walter Levick at the hearing, as well as the fact that the order setting aside the default pertains only to Steven Levick and Levick Construction.

(3) In addition, the court may set aside a default and a default judgment in accordance with MCR 2.612.

MCR 2.612 provides in relevant part:

(B) Defendant Not Personally Notified. A defendant over whom personal jurisdiction was necessary and acquired, but who did not in fact have knowledge of the pendency of the action, may enter an appearance within 1 year after final judgment, and if the defendant shows reason justifying relief from the judgment and innocent third parties will not be prejudiced, the court may relieve the defendant from the judgment, order, or proceedings for which personal jurisdiction was necessary, on payment of costs or on conditions the court deems just.

"The good cause requirement of MCR 2.603(D)(1) may be satisfied by demonstrating a procedural irregularity or defect or a reasonable excuse for failing to comply with the requirements that led to the default judgment." *ISB Sales Co v Dave's Cakes*, 258 Mich App 520, 526; 672 NW2d 181 (2003). Additionally, good cause is demonstrated when permitting the judgment to stand would result in a manifest injustice. *SNB Bank and Trust v Kensey*, 145 Mich App 765, 771; 378 NW2d 594 (1985).

Here, Fresard alleged in the motion that he did not represent Steven Levick or Levick Construction and that he did not accept service of process for them. He inferred that neither Steven Levick nor Levick Construction had knowledge of the suit because Radulovich did not respond to his inquiry when he asked what he should do with the summons and complaint for each of these parties. Additionally, Fresard alleged that neither Steven Levick nor Levick Construction had any liability as Walter Levick is the owner of the property as well as the permit applicant. Under these circumstances, Fresard demonstrated good cause to set aside the default as well as a meritorious defense, and it cannot be said that the trial court's decision to set aside the defaults of Steven Levick and Levick Construction and to allow them 21 days to answer is "so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias." *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000).

II

Plaintiffs argue that the trial court erred by granting the requests of Diaz and Levick that plaintiffs file a bond for security of costs. This Court reviews a trial court's decision to order a bond for security of costs for an abuse of discretion. *Farleigh v Amalgamated Transit Union, Local 1251*, 199 Mich App 631, 633; 502 NW2d 371 (1993).

Plaintiffs first contend that the trial court abused its discretion by ordering plaintiffs to file a bond in the amount of $25,000 for security of costs with respect to Diaz. Initially, plaintiffs argue that Diaz made only an oral motion for a bond for security of costs and that plaintiffs were not on notice and had no opportunity to address the issue. The record reveals that Diaz answered plaintiffs' complaint on October 31, 2001, and asked the court to "Require that the plaintiffs post a bond to continue this litigation in light of the previous litigation and the prior

cases which were not disclosed when this complaint was filed." Previously, on October 25, 2001, Levick had filed a motion for security of costs. And on December 7, 2001, the city defendants filed a motion for security of costs. A hearing was held on April 17, 2002, regarding "defendants' motion for security of costs." Plaintiffs were clearly on notice regarding defendants' requests for bonds for security of costs, and their argument to the contrary is erroneous. Further, even if Diaz had not requested a bond, this Court has stated that "We do not believe that the court rule prohibits a court from imposing bond on its own initiative." *Zapalski v Benton*, 178 Mich App 398, 404; 444 NW2d 171 (1989).

Diaz' motion for a bond for security of costs was brought under MCR 2.109(A), which provides:

> On motion of a party against whom a claim has been asserted in a civil action, if it appears reasonable and proper, the court may order the opposing party to file with the court clerk a bond with surety as required by the court in an amount sufficient to cover all costs and other recoverable expenses that may be awarded by the trial court, or, if the claiming party appeals, by the trial and appellate courts. The court shall determine the amount in its discretion. MCR 3.604(E) and (F) govern objections to the surety.

The movant must show a substantial reason for security of costs. A "substantial reason" for requiring security may exist where there is a "tenuous legal theory of liability" or where there is good reason to believe that a party's allegations are "groundless and unwarranted." *Hall v Harmony Hills Recreation, Inc*, 186 Mich App 265, 270; 463 NW2d 254 (1990). If a party does not file a bond as ordered, the trial court may dismiss the party's claims. *Id*. at 273.

The trial court's May 3, 2002, order clearly required plaintiffs to file the bond with the court clerk on or before June 3, 2002. Given plaintiffs' litigious propensities, as well as the fact that Diaz sold the property back to Levick three months before filing the present suit, the trial court did not abuse its discretion by ordering plaintiffs to file a bond. Plaintiffs did not file the required bond by June 7, 2002, and, therefore, the trial court did not abuse its discretion by dismissing plaintiffs' claims against Diaz.

Also, the trial court did not abuse its discretion in determining the amount of the security bond. The trial court was not required to conduct an evidentiary hearing to set a security bond. *Dunn v Emergency Physicians Medical Group, PC*, 189 Mich App 519; 523; 473 NW2d 762 (1991). A trial judge may "set the bond in light of his own experience." *Belfiori v Allis-Chalmers, Inc*, 107 Mich App 595, 600-601; 309 NW2d 682 (1981). All costs and recoverable expenses that may be awarded by the trial court, including potential attorney fees for unwarranted allegations, may be allowed under MCR 2.109(A). See *Flanagan v Gen'l Motors Corp*, 95 Mich App 677, 683; 291 NW2d 166 (1980); MCR 2.114(E) and (F); MCR 2.625(A)(2); MCL 600.2591.

Plaintiffs further argue that the trial court abused its discretion by granting Levick's motion for a bond for security of costs. Levick filed the motion on March 21, 2003, asserting in part that substantial and compelling reasons existed for the court to revisit the issue.[15] As noted above with regard to Diaz, plaintiffs clearly had litigious propensities, as demonstrated by the numerous lawsuits filed as a result of the home construction, and the facts that the courts upheld the building permits and the variance and that the case evaluated at $1.00, provide support for a finding that plaintiffs' claims were tenuous. The trial court did not abuse its discretion by ordering plaintiffs to file a bond for security of costs in the amount of $25,000 to continue the litigation.[16]

III

Plaintiffs argue that the trial court erred by discharging the lis pendens "before final decree." In support of this argument, plaintiffs cite *Maedel v Wies*, 309 Mich 424; 15 NW2d 692 (1944), wherein the Court stated:

> The effect of the suit, and the filing of the requisite notice under the statute upon purchaser or mortgagors pendente lite, continues through the entire time of its pendency, and ends when the suit is actually ended by a final decree. .... The notice of lis pendens, once filed, continues in effect during the time allowed for appeal and during consideration by this court of such appeal, and can only be terminated by a final decree.

But in *Silberstein v Silberstein*, 252 Mich 192, 194, 233 NW 222 (1930), the Supreme Court held that a technically proper notice of lis pendens which meets all of the statutory requirements could be cancelled on equitable principles if in the discretion of a trial judge the benefits of the notice are far outweighed by the damage it causes. Accord *Altman supra*; *Action Auto, Inc v Anderson*, 165 Mich App 620, 628; 419 NW2d 36 (1988). Here, the benefit that plaintiffs would have received under the notice of lis pendens was too minimal in comparison to the damage Levick would continue to suffer. Levick stood to suffer great harm, and it was extremely unlikely that plaintiffs would ever succeed in their action.[17] The trial court did not abuse its discretion by

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[15] The reasons included a case evaluation of $1.00, the courts' upholding of the issuance of the building permit and the granting of the variance, and the tax tribunal's finding that plaintiffs' property values were not diminished by the construction at 521 Hampton,

[16] Plaintiffs assert in their brief on appeal that they had only "26 hours" to secure a bond. Considering that plaintiffs were on notice as of the April 4 hearing that they would have to post a bond by April 11, plaintiffs' repeated contention that that they had "only 26 hours" to post the bond is misleading. Further, plaintiffs neglect to acknowledge that the court extended the time to file a bond until after April 11 and advised that, if plaintiff showed that she was making progress at obtaining a bond, she would be given more time to post it. Thus, we reject plaintiffs' characterization of the court's decisions regarding the bond as "outrageous and extreme."

[17] Defense counsel noted at the hearing that the trial judge had advised that he would withhold his ruling on that until after the Supreme Court had ruled regarding the variance and the building

(continued…)

discharging the lis pendens. *Altman v City of Lansing*, 115 Mich App 495, 507; 32 NW2d 707 (1982).

IV

Plaintiffs contend that the trial court erred by awarding Levick costs and fees with regard to plaintiffs' motion to disqualify Fresard. This Court reviews a trial court's decision on a request for costs and fees for an abuse of discretion. See *In re Condemnation of Private Property for Highway Purposes*, 221 Mich App 136, 139-140; 561 NW2d 459 (1997).

MCL 600.2591 authorizes awards of costs and attorney fees to the prevailing party in a frivolous civil action, which subsection (3)(a) defines as one where the primary purpose of a party is to "harass, embarrass, or injure the prevailing party," where the party had "no reasonable basis to believe that the facts underlying that party's legal position were in fact true," or where the party maintained a legal position that was "devoid of arguable legal merit."

Plaintiffs argue that their motion to disqualify was prudent in light of the fact that MCL 15.342(3) prevents government employees from working while on the public payroll. This statute provides:

> A public officer or employee shall use personnel resources, property, and funds under the officer or employee's official care and control judiciously and solely in accordance with prescribed constitutional, statutory, and regulatory procedures and not for personal gain or benefit.

Although Fresard became an employee of the Wayne County Prosecutor's Office, there is no indication in the record that Fresard was providing services to Levick "while on the public payroll." There is also no indication that Levick's continuing representation of Levick for purposes of trial on the issue of damages only would present a conflict of interest. The trial court did not err in assessing costs and fees for filing a frivolous motion. MCL 600.2591; *In re Costs & Attorney Fees*, 250 Mich App 89, 94, 104; 645 NW2d 697 (2002).

V

Plaintiffs argue that the trial court abused its discretion by refusing to grant their motion to disqualify after the case evaluation was revealed to the court. When reviewing a motion to disqualify a judge, this Court reviews the trial court's findings for an abuse of discretion, but reviews de novo the applicability of the facts to the relevant law. *Gates v Gates*, 256 Mich App 420, 439; 664 NW2d 231 (2003).

On April 4, 2003, in the context of a motion to require plaintiffs to file a bond, defense counsel disclosed the case evaluation to the trial judge. Despite plaintiffs' claim that the case evaluation panel considered the equitable claims, the court pointed out that the case evaluation

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(…continued)

permit. That discounts plaintiffs' claim that the trial judge waited to rule on the lis pendens until after he learned of the case evaluation.

panel could not consider claims in equity, so the award went only to her damages. The court rejected plaintiffs' argument that the case evaluators awarded plaintiffs only one dollar because they realized that plaintiffs would have rejected any amount of damages to preserve the equitable claims. Under the circumstances, the court imposed a $25,000 bond requirement on all plaintiffs.

Plaintiffs moved to disqualify the trial judge. At the hearing on the motion, plaintiffs complained that some of the remarks made by the judge were "bothersome" and added that the court should have imposed a bond no higher than $5,000 pursuant to MCR 2.403. The judge noted that plaintiffs' comments were gratuitous and unfounded, and stated that he had no bias against plaintiffs. The judge added that he ordered the bond under MCR 2.109, not MCR 2.403. Plaintiffs then asked the judge to recuse himself under *Bennett v Medical Evaluation Specialists,* 244 Mich App 227; 624 NW2d 492 (2000). The judge interjected:

> The *Bennett* [case] says because the hearing on the issue of damages is tantamount to a bench trial, the judge should not have presided over the hearing on the issue of damages. I'm not presiding over any damage issue. You have a jury demand for that. I think it's totally inappropriate and I'm not going to recuse myself. There's absolutely no reason to.

Later in the hearing, the court ordered the discharge of the lis pendens and reiterated the requirement that a bond for security of costs be filed. The court denied the motion for disqualification in an order dated April 18, 2003. Plaintiffs thereafter asked the Chief Judge to disqualify the trial judge. In an order dated June 18, 2003, Chief Judge Mary Beth Kelly denied the motion.

When reviewing a motion to disqualify a trial judge, this Court reviews for an abuse of discretion the trial court's findings of fact and reviews de novo the court's application of facts to the law. *Olson v Olson*, 256 Mich App 619, 637-638; 671 NW2d 64 (2003). MCR 2.003(B)(1) provides that a trial judge is disqualified when the judge cannot impartially hear a case due to the judge's personal bias or prejudice against a party or an attorney. To prevail on a motion to disqualify a judge brought pursuant to MCR 2.003(B)(1), the moving party must show actual bias or prejudice against the party or his attorney. *Cain v Dep't of Corrections*, 451 Mich 470, 503; 548 NW2d 210 (1996).

A strong presumption of impartiality exists when a judge is challenged on the basis of bias. *Id*. at 497. Thus, as a general rule, absent a showing of actual bias or prejudice, a trial judge will not be disqualified. *Armstrong v Ypsilanti Twp*, 248 Mich App 573, 597; 640 NW2d 321 (2001). Additionally, unless a "deep-seated favoritism or antagonism" is demonstrated "that would make fair and impartial judgment impossible," then disqualification is not warranted. *Cain, supra* at 496 (citation omitted).

Plaintiffs first assert that the trial judge should have been disqualified when the case evaluation was revealed. Plaintiffs claim that the revelation violated MCR 2.403(N)(4), which provides:

> (4) The ADR clerk shall place a copy of the case evaluation and the parties' acceptances and rejections in a sealed envelope for filing with the clerk of the

> court. ***In a nonjury action***, the envelope may not be opened and the parties may not reveal the amount of the evaluation until the judge has rendered judgment. [Emphasis supplied.]

Plaintiffs cite *Bennett, supra*. In *Bennett*, the plaintiff revealed the mediation amount after eight days of the bench trial, but before the trial court had issued its decision. *Id.* at 229. This Court noted that MCR 2.403 aimed to preserve judicial impartiality where a case proceeded to trial. *Id.* at 231.

Both the court rule and the *Bennett* case, however, apply to nonjury trials. Here, in contrast, plaintiffs requested a jury trial as to damages. The case evaluation was revealed to the court before commencement of the jury trial on plaintiff's damages claim. Hence, at the time the case evaluation was revealed to the judge, no violation of MCR 2.403(N)(4) existed. Consequently, *Bennett* is not controlling and MCR 2.403(N) does not apply.[18] See also *Cranbrook Prof Bldg v Pourcho*, 256 Mich App 140, 144; 662 NW2d 94 (2003) (reiterating that *Bennett* indicated that any appropriate sanctions for a violation of MCR 2.403 depended on the facts of each individual case).

Plaintiffs contend, however, that they also have equitable claims to be decided by the trial judge. But no such claims remain. Plaintiffs' complaints to the Zoning Board of Appeals were resolved in defendants' favor by the ZBA and this Court and the Supreme Court denied leave to appeal. Even assuming that equitable claims did remain, plaintiffs have provided no authority for the proposition that the trial judge must be disqualified from hearing those equitable claims merely on account of knowing the damages awarded by the case evaluators.

VI

Radulovich argues that the trial court erred by awarding Levick costs after dismissing the third party complaint. The determination whether a motion for sanctions under MCR 2.114 was filed within a reasonable time is a matter within the discretion of the trial court. *Maryland Casualty Co v Allen*, 221 Mich App 26, 31; 561 NW2d 103 (1997).

Radulovich argues that the trial court did not have the authority to entertain Levick's motion for taxation of costs under MCR 2.114 and MCL 600.2591 after the court entered an "order dismissing third party complaint with prejudice and without costs." Citing *Antonow v Marshall*, 171 Mich App 716, 719; 430 NW2d 768 (1988), she contends that failure to request sanctions prior to dismissal of the case bars sanctions.

Although MCR 2.114 and MCL 600.2591 do not impose a time limit for filing a motion for sanctions, this court has ruled that a request for sanctions under the court rule must be made before the case is dismissed. *Antonow, supra*. Here, in their motion to dismiss, the third-party defendants averred in part:

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[18] Similarly, plaintiffs' characterization of *O'Neill v Home IV Care, Inc*, 249 Mich App 606; 643 NW2d 600 (2002), another jury case, as "a case directly on point," is misplaced.

> Radulovich's Third Party Complaint has been filed in an effort by Radulovich to have this Court disqualify Mr. Fresard and his law firm from this matter. The Third Party Complaint has not basis in law or fact and was filed in an effort to annoy, embarrass, and harass Mr. Fresard and his law firm. In such a situation it is appropriate for the Court to sanction Radulovich.

And at the hearing on the motion, Fresard asked for costs in the amount of "approximately $4,000 defending" the claim. The court responded that "I think we'd have to have a hearing relative to that particular amount. You'd have to itemize the number of hours and the costs." The third-party defendants thereafter filed a motion for taxation of costs, and a hearing was held on the motion.

"So long as the request has been made before dismissal, the trial court can award attorney fees at a later date." *Maryland Casualty Co, supra* at 30.[19] The motion was timely under MCR 2.114. A request for sanctions under the state must be filed "within a reasonable time after the prevailing party was determined." *In re Attorney Fees & Costs*, 233 Mich App 694, 699; 593 NW2d 589 (1999). The third-party defendants filed their motion twenty-six days after their motion for dismissal was granted, which was not an unreasonable time. *Id.* at 699-701 (finding a seventy-day period reasonable).

VII

Radulovich maintains that the trial court erred by awarding Levick costs when the third party complaint was dismissed for failure to file a bond for security of costs. This Court reviews a trial court's ruling on a motion for costs for an abuse of discretion. *Klinke v Mitsubishi Motors Corp*, 219 Mich App 500, 518; 556 NW2d 528 (1996).

In their motion for taxation of costs, the third-party defendants asserted that the third party complaint was frivolous under MCL 2.114(f) and MCL 600.2591, and that the court had previously determined that Radulovich's entry of a default with regard to the third-party complaint was improper. The trial court granted the motion.

Citing only *In re Security Bond for Costs*, 226 Mich App 321, 331-332; 573 NW2d 300 (1997), Radulovich argues that the only penalty for the failure to comply with an order to file a bond for security of costs is dismissal of the action. She contends that an award of costs when a dismissal is predicated upon the failure to post a bond for security costs is not permissible. While *In re Security Bond* does hold that a court may dismiss a party's claims if that party does not file a security bond as ordered, that case does not address the issue presented here. Radulovich does not cite any relevant authority in support of the argument that a court cannot order a party to pay sanctions under MCR 2.114 and MCL 600.2591 for filing a frivolous claim simply because that claim was dismissed for failure to file a bond for security of costs as ordered. A party may not leave it to this Court to search for authority in support of its position by giving

[19] The order of dismissal was entered on August 1, 2003, and the motion for taxation of costs was filed on August 27, 2003.

"issues cursory treatment with little or no citation of supporting authority." *Peterson Novelties, Inc v Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003).

In the context of this issue, Radulovich also summarily argues that the trial court improperly ordered Radulovich to file a $15,000 bond for security of costs. This issue is not raised in the statement of the questions presented and review is inappropriate. *Weiss v Hodge*, 223 Mich App 620, 634; 567 NW2d 468 (1997).

VIII

Radulovich asserts that the trial court erred by setting aside the default on the third party complaint. A trial court's ruling on a motion to set aside a default is reviewed for an abuse of discretion. *Alken-Ziegler, supra* at 227.

Radulovich contends that the trial court erroneously set aside the default against the third-party defendants because the third-party defendants failed to file responsive pleadings and because an oral request to set aside a default is insufficient. She asserts that "no responsive pleading was filed by any TP-Defendant and that a default dated July 28, 2003, was entered by the clerk on July 31, 2003."

A review of the record does not support Radulovich's contention that the default was properly entered. The third-party defendants filed a motion for bond for security of costs, and were given an extension of time in which to answer to July 26, 2003. But Radulovich had been ordered to file a bond for security of costs by July 21, 2003, and the order provided that, "if Radulovich fails to post the required bond by the required date, the Third-Party Complaint shall be dismissed, with prejudice." Radulovich did not file the required bond and, on July 25, 2003, the third-party defendants filed a motion to dismiss.[20] In their motion to dismiss, the third-party defendants averred in part:

> Third Party Defendants are required to file their response to the Third Party Complaint by July 26, 2003. This motion is to request an additional thirty (30) days within which to file their responsive pleadings, if necessary.

The "default application, entry, affidavit" was filed on July 31, 2003.

Following a hearing, the trial court entered an order setting aside the default on August 1, 2003. Because the third-party defendants did not fail to plead or otherwise defend, see MCR 2.603(A)(1), the trial court did not abuse its discretion in setting aside the default because the default was not properly entered.

[20] In that motion, the third-party defendants also sought an additional 30 days in which to answer in the event the dismissal was not granted.

IX

Radulovich argues that the trial court erred by dismissing her third-party complaint. This Court reviews a trial court's ruling on a motion to dismiss for an abuse of discretion. *People v Stephen*, 262 Mich App 213, 218; 685 NW2d 309 (2004).

Radulovich argues that the trial court erred by dismissing the third-party complaint because (1) the third-party defendants did not file a responsive pleading, and (2) the third-party complaint "was not without merit." But Radulovich's arguments distort the nature of the trial court's dismissal of the third-party complaint. The third-party complaint was dismissed as a result of Radulovich's failure to comply with a court order requiring her to file a bond for security of costs. The order provided that failure to comply with the order would result in dismissal of the third-party complaint. *Hall v Harmony Hills Recreation, Inc*, 186 Mich App 265, 270; 463 NW2d 254 (1990). If a party does not file a bond as ordered, the trial court may dismiss the party's claims. *Hall, supra* at 273.

X

Radulovich argues that the amount of sanctions ordered by the trial court with regard to the third party complaint is unreasonable. The documentation attached to the motion reflected fees and costs in the amount of $4,066.92. Counsel stated at the hearing that the third-party defendants were seeking $4,616.92, which included costs precipitated by Radulovich's failure to timely sign a stipulation and order regarding an extension of time in which to file an answer as well as costs and fees incurred as a result of the hearing on the motion. Aside from a general challenge regarding the time claimed by counsel for the third-party defendants to have spent while in Judge Kelly's courtroom, Radulovich has not argued that the requested attorney fees were excessive or unreasonable. We find no abuse of discretion in the amount of sanctions imposed by the trial court. *In re Costs & Attorney Fees, supra* at 104.

XI

Radulovich argues that the trial court erred by failing to award her sanctions on the counterclaims of Diaz and Levick. She contends that Diaz' withdrawal of her counterclaim, as well as the trial court's grant of summary of summary disposition on Levick's counterclaim, demonstrate that the counterclaims were frivolous. After making this contention, she concludes that "a finding that MCR 2.114 has been violated" requires an award of sanctions.

MCR 2.114(F), authorizing sanctions in response to frivolous claims, refers to MCR 2.625(A)(2), which authorizes a court to award costs "as provided by MCL 600.2591." The statute in turn authorizes awards of reasonable costs and attorney fees to the prevailing party in a frivolous civil action. An action is frivolous if the party bringing it had "no reasonable basis to believe that the facts underlying that party's legal position were in fact true," or if the party maintained a legal position that was "devoid of arguable legal merit." MCL 600.2591(3)(a). Here, the trial court never made a finding that the counterclaims were frivolous. Thus, her argument that sanctions are mandatory upon a finding that claim is frivolous is misplaced.

Docket No. 258683

Radulovich contends that the trial court erred in denying her motion for costs under MCR 2.625(A)(1) with regard to the Levick's counterclaim because she was the prevailing party. MCR 2.625(A)(1) provides that "[c]osts will be allowed to the prevailing party in an action, unless prohibited by statute or by these rules or unless the court directs otherwise, for reasons stated in writing and filed in the action." Consequently, the taxation of costs under MCR 2.625(A) is within the trial court's discretion, even when the party prevailed in the action. See *Blue Cross & Blue Shield of Michigan v Eaton Rapids Community Hosp*, 221 Mich App 301, 308; 561 NW2d 488 (1997).

To be considered a "prevailing party" within the meaning of MCR 2.625(A), the party seeking costs must show that "its position was improved by the litigation." *Forest City Enterprises, Inc v Leemon Oil Co*, 228 Mich App 57, 81; 577 NW2d 150 (1998). Here, the trial court held on the record that neither party was a prevailing party in light of the dismissal of both the complaint and the counterclaim. We find no abuse of discretion in the court's denial of the motion for costs. *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000).[21]

Docket No. 260275

I

Radulovich argues that the trial court erred by awarding Levick costs incurred as a result of Radulovich's failure to comply with the order to discharge the lis pendens because Levick was not a prevailing party on the counterclaim. But Levick moved the court to hold Radulovich in contempt for failing to discharge the lis pendens as ordered. A circuit court may hold a party in contempt for failing to obey an order of the court and require the offending party to compensate the opposing parties for the losses sustained as a result of the actions of the party held in contempt. *In re Contempt of Auto Club Ins Ass'n*, 243 Mich App 697, 711-712; 624 NW2d 443 (2000). In other words, the attorney fees in question were not the result of appellants' litigation activities, but instead, their failure to obey the court. The trial court did not abuse its discretion by ordering Radulovich to pay the actual attorney fees incurred by Levick as a result of Radulovich's contemptuous conduct.

II

Radulovich contends that the order awarding costs and fees incurred in enforcing the order to discharge the lis pendens violates the prohibition against double jeopardy. She argues that the July 14, 2003, order discharging the lis pendens punished her, and that the attorney fees awarded to Levick as a result of having to enforce the April 18, 2003, order requiring Radulovich to discharge the lis pendens also punished her in violation of her "right to be free from multiple prosecutions and multiple punishments." She fails to cite any relevant legal authority in support

[21] Radulovich also argues that she is entitled to attorney fees as a sanction with regard to the counterclaim. This issue was raised and addressed in Docket No. 256594.

of her arguments. Failure to brief an issue abandons it on appeal. *Steward v Panek*, 251 Mich App 546, 558; 652 NW2d 232 (2002). "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claim nor may he give only cursory treatment [of an issue] with little or no citation of supporting authority." *People v Matuszak*, 263 Mich App 42, 59; 687 NW2d 342 (2004) (citation omitted). Nonetheless, double jeopardy is not at issue in this case because the default and the award of attorney fees do not involve criminal charges.

III

Radulovich next argues that she was entitled to review a correct fee statement. At the hearing on the motion for fees incurred in enforcing the order to discharge lis pendens, Radulovich disputed the propriety of the entry of the order, as well as the propriety of awarding costs, but did not directly challenge the amount of the fees. Rather, Radulovich asked if she "could have a bill at least"[22] and Fresard indicated that the bill was attached to the motion. Radulovich acknowledged that she did have a fee statement from DeMarco Yono. The appellate court need not address issues first raised on appeal. *Booth Newspapers, Inc v University of Michigan Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993).

IV

Radulovich contends that the trial court erred by denying her sanctions with respect to Levick's request for attorney fees incurred in the Macomb County proceedings. Radulovich did not request sanctions below, and in fact, expressed satisfaction with the language of the amended order denying attorney fees against Radulovich for Levick's defense of Tenaglia. The appellate court need not address issues first raised on appeal. *Booth Newspapers, supra.*

V

Radulovich asserts that the attorney fees incurred by Levick to enforce the order discharging lis pendens were improperly awarded because the order discharging the lis pendens was improperly entered. Because we have already concluded that the trial court did not err by ordering the discharge of the lis pendens, the factual premise for the present argument is erroneous, rendering the argument without merit.

Docket Nos. 256594, 258683, and 260275 are affirmed.

/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot

[22] Radulovich wrongfully suggested that the bill was false because it was from "DeMarco Yono."