STATE OF MICHIGAN

COURT OF APPEALS

CATHERINE NICOLE DONKERS,

Plaintiff-Appellant,

v

LIVONIA POLICE DEPARTMENT and LIVONIA CHIEF OF POLICE,

Defendants-Appellees.

UNPUBLISHED
December 1, 2005

No. 262348
Wayne Circuit Court
LC No. 03-338350-CZ

Before: Jansen, P.J., and Cavanagh and Fort Hood, JJ.

PER CURIAM.

Plaintiff appeals as of right the grant of summary disposition in favor of defendants regarding plaintiff's claim of violation of the Freedom of Information Act ("FOIA"). Plaintiff additionally contends the trial court erred in (a) imposing procedural requirements upon plaintiff necessitating her participation in case evaluation proceedings; (b) refusing to waive transmittal fees based on indigency; (c) setting aside a prior default judgment entered against defendants; and (d) failing to disqualify the trial judge and refer the denial for a de novo review. We affirm.

Plaintiff contends that the trial court erred in setting aside the entry of a default judgment against defendants based on their failure to demonstrate "good cause" and a deficient affidavit of meritorious defenses. Specifically, plaintiff argues that defendants, in failing to answer her amended complaint, violated MCR 2.108(C)(3). This Court reviews a trial court's decision on a motion to set aside a default judgment for an abuse of discretion. *Amco Builders & Developers, Inc v Team Ace Joint Venture*, 469 Mich 90, 94; 666 NW2d 623 (2003).

While acknowledging a failure to timely respond to plaintiff's amended complaint, defendants argue that they had appeared in the action, filed a timely answer to the initial complaint and asserted defenses which remained applicable to the amended pleading. Defendants also filed a pleading in opposition to plaintiff's motion for entry of the default judgment. Defendants assert that any error is attributable to mere inadvertence and further, that plaintiff's amended complaint does not vary substantially from the initial pleading so that their initial answer and asserted defenses remained viable and that granting a default judgment would result in a manifest injustice.

Good cause sufficient to warrant the setting aside of a default judgment may be demonstrated by: (a) the presence of a substantial irregularity or defect in the proceeding on

which the default is based; or (2) there existed a reasonable excuse for failure to comply with the requirements that created the default. *Alken-Ziegler, Inc v Waterbury Headers Corp,* 461 Mich 219, 233; 600 NW2d 638 (1999). MCR 2.603(D)(3) permits a trial court to set aside a judgment in accordance with MCR 2.612. *Alken-Ziegler, Inc, supra* at 234 n 7. Our Supreme Court has indicated that manifest injustice occurs if a default were allowed to stand where a party has satisfied both the good cause and meritorious defense requirements. *Id.* at 233-234. When a party asserts a meritorious defense, the strength of the defense will impact the good cause showing that is necessary. Hence, if a party asserts a meritorious defense that would be absolute if proven, a lesser showing of "good cause" will be deemed sufficient than if the defense were weaker, to prevent a manifest injustice. *Id.*

In the present case, defendants raised the meritorious defense of res judicata which would be absolute if proven. Hence a lesser showing of good cause will suffice. Defendants asserted their counsel's workload to substantiate their claim of excusable neglect or inadvertence. While the failure of defendants to file an answer to the amended complaint might be viewed or classified as mere negligence and not good cause, 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). Prior to entry of the default, defendants filed an answer to plaintiff's initial complaint and appeared for purposes of a scheduling conference. At that time, they raised the defense of res judicata. Defendants further asserted that the substantive allegations within the amended complaint did not vary significantly from the original complaint, thus, permitting them to rely on their initial answer and affirmative defenses. Because defendants stated a defense of potential merit, the trial court did not abuse its discretion in setting aside the default.

Plaintiff further asserts that the affidavit of defendants' counsel, which purports to set forth a meritorious defense, was inadequate because it was merely conclusory and failed to set forth specific facts. The affidavit indicated it was based on personal knowledge of the attorney pertaining to the current litigation and the litigation pending in Oakland Circuit Court. The affidavit indicated that plaintiff was not entitled to the requested relief based on the Oakland Circuit Court having already denied the relief sought by plaintiff. The affidavit further provided that plaintiff, in the filing of the action, had violated the court rule which required disclosure of the action pending in Oakland Circuit Court and indicated specifically the application of res judicata as a defense to plaintiff's claim. The affidavit contained sufficient allegations of fact to establish a meritorious defense. Plaintiff's assertions that res judicata is not a viable defense and that the rulings in the Oakland Circuit Court did not address the relief sought in the current litigation were issues to be addressed through discovery and trial, and do not impact the viability of the affidavit solely for purposes of setting aside the default judgment.

Next, plaintiff takes issue with the trial court's failure to notify her of the amendment of the scheduling order and to conduct a hearing on plaintiff's request to extend the time for discovery. In reference to plaintiff's assertion of error regarding the trial court's failure to comply with court rules pertaining to the provision of notice for issuance and amendment of scheduling orders, because the issue involves the application and construction of court rules it is an issue of law subject to de novo review. *Barclay v Crown Bldg & Development, Inc,* 241 Mich App 639, 642; 617 NW2d 373 (2000). This Court reviews plaintiff's assertion of error regarding the trial court's failure to grant her motion for amendment of the scheduling order to extend

discovery for an abuse of discretion. *Nuriel v YWCA,* 186 Mich App 141, 146; 463 NW2d 206 (1990). The trial court, on October 12, 2004, entered an amended scheduling order, revising the date for discovery cutoff to "12-15-04," effectively expanding discovery almost six months beyond the original date set. Plaintiff complains that she was not made aware of the revised scheduling order until January 24, 2005, suggesting she was precluded and limited in conducting necessary discovery prior to a hearing on defendants' motion for summary disposition, which was scheduled for hearing on February 11, 2005.

Contrary to plaintiff's assertions, she was engaged in discovery prior to the cut-off designated by the October 12, 2004, amended scheduling order. Plaintiff filed requests for admissions upon defendants on November 1, 2004. Plaintiff petitioned the trial court on November 12, 2004, for an adjournment of the motion for summary disposition in order to complete discovery and suggested rescheduling the hearing to "January 14, 2005," based on her belief "that she can have discovery on this issue completed." In this motion, plaintiff averred that she could complete discovery prior to the cut-off date provided by the amended scheduling order and almost one full month prior to the actual hearing conducted on defendants' motion for summary disposition.

Plaintiff bemoans the prejudice she will suffer if the discovery cut-off date is not extended further, stating only that, "[p]laintiff requires that discovery be conducted in order to secure evidence that is material not only to the assertion of her legal position but to unequivocally defeat Defendants' erroneous defense of *res judicata.*" Although plaintiff cites to the necessity to "secure deposition transcripts," she fails to indicate with any specificity the discovery required to be completed or indicate the substance of what the requested discovery will reveal.

Plaintiff was aware that defendants filed a motion seeking summary disposition on October 29, 2004. The hearing on the motion was adjourned to at least three separate future dates, with an actual hearing not occurring on the motion until almost four months subsequent to its filing date. Plaintiff fails to explain her lack of diligence in pursuing discovery she deemed so necessary to defeat defendants' motion for summary disposition, despite having knowledge of defendants' reliance on the doctrine of res judicata since its filing or to engage in securing the discovery she deemed so necessary for any of the hearings scheduled earlier on the motion. Amendment of the scheduling order is irrelevant because plaintiff's failure to conduct discovery was not related to her lack of knowledge of the amended scheduling order and its relevant dates, but rather her inability to focus on the priorities of her own case. Based on plaintiff's failure to demonstrate that her desire to conduct additional discovery is nothing more than a "fishing expedition" or that extending discovery would facilitate rather than impede litigation, there existed no basis for granting plaintiff's requested extension of discovery. *VanVorous v Burmeister,* 262 Mich App 467, 477; 687 NW2d 132 (2004). Plaintiff is merely trying to use the scheduling order as a scapegoat for her own lack of diligence. "[A] party opposing a motion for summary disposition because discovery is not complete must provide some independent evidence that a factual dispute exists." *Michigan Nat'l Bank v Metro Institutional Food Service, Inc,* 198 Mich App 236, 241; 497 NW2d 225 (1993). The mere promise or assertion that facts will be established to contest defendants' arguments in support of summary disposition is insufficient. *Maiden v Rozwood,* 461 Mich 109, 121; 597 NW2d 817 (1999).

In regards to plaintiff's assertion that the trial court violated the court rules by failing to provide proper notice of the issuance of an amended scheduling order, plaintiff fails to cite any law in support of her argument. "[T]his Court will not search for authority to support a party's position, and the failure to cite authority in support of an issue results in its being deemed abandoned on appeal." *Flint City Counsel v Michigan*, 253 Mich App 378, 393 n 2; 655 NW2d 604 (2002). Notably, the court rules do not designate the responsibility for dissemination of the scheduling order. The lower court docket sheet indicates that the amended scheduling order was completed in conjunction with a status conference conducted October 12, 2004. Plaintiff fails to indicate whether she attended this conference. If plaintiff voluntarily absented herself from the conference or was excused from participation, it would be plaintiff's responsibility to secure or determine any actions taken by the trial court and not merely ignore what occurred at the conference so that she might later disclaim any knowledge of what transpired.

Plaintiff primarily relies on MCR 2.401(B)(2)(c), but ignores important wording in the court rule. First, plaintiff has not demonstrated that she was not "permit[ed] meaningful advance consultation" before entry of the amended scheduling order. In addition, her objections to the order were not filed within the timeframe required for such objections. While plaintiff asserts the delay in filing objections and seeking amendment of the order is only attributable to the court's failure to timely supply her with a copy of the amended scheduling order, plaintiff fails to acknowledge any responsibility on her part to obtain information pertaining to the October 12, 2004, status conference, which she does not deny knowing occurred. Plaintiff's voluntary absence or election to not participate in the status conference does not alleviate her responsibility to discern and obtain information pertaining to what transpired at the conference.

Finally, the trial court did not refuse to hear plaintiff's motion to amend the scheduling order, it merely postponed the hearing. The trial court's determination to proceed with a hearing on the motion for summary disposition, despite plaintiff's assertion of the need for additional discovery, was not, on that basis, in error. Plaintiff failed to specify with any particularly what additional discovery would provide or to demonstrate to the trial court any basis to conclude that the grant of further time for discovery would stand a reasonable chance of uncovering factual support for her claims. Plaintiff mistakenly concludes that it was error to entertain a motion for summary disposition as premature if discovery was not complete. However, despite incomplete discovery, summary disposition may be appropriate if no disputed issue is before the court or if additional discovery does not present a fair opportunity of finding factual support for the nonmoving party's claims. *Vanvorous, supra* at 477. Hence, plaintiff provides only vague assertions that additional discovery would serve to negate defendants' defense of res judicata, but fails to define or identify how or what the additional discovery would add to bolster or support her position.

Plaintiff next contends that the trial court erred in granting summary disposition in favor of defendants based on the doctrine of res judicata. A trial court's decision on a motion for summary disposition is reviewed de novo on appeal. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). In addition, a determination that a public record is exempt from disclosure pursuant to the FOIA requires a legal determination that is reviewed de novo by this Court. Whether a record is exempt from disclosure in accordance with the FOIA which requires a discretionary determination is reviewed for clear error. Factual findings are also reviewed for clear error. *Local Area Watch v Grand Rapids*, 262 Mich App 136, 142; 683 NW2d 745 (2004).

The applicability of the doctrine of res judicata is reviewed de novo by this Court. *Pierson Sand & Gravel, Inc v Keeler Brass Co*, 460 Mich 372, 379; 596 NW2d 153 (1999).

Plaintiff contends the trial court erred in granting summary disposition in favor of defendants on the basis of res judicata. Plaintiff asserts that her FOIA request and subsequent claim were substantially different from the litigation pursued in Oakland Circuit Court which was a claim of assault and involved different parties. Plaintiff distinguishes between the assertion of violation of the FOIA by defendants from her procurement of the same requested documents through discovery in another, distinguishable civil action.

Pursuant to MCL 15.233(1), a person has the right to inspect, copy or receive copies of nonexempt public records, upon submission of a sufficiently descriptive request. *The Herald Co v Bay City*, 463 Mich 111, 118; 614 NW2d 873 (2000). While a public body has the right to deny a request, it must specify the reasons for the denial and identify the basis for exemption from disclosure. MCL 15.235(4). The burden is on the public body to justify its denial. MCL 15.240(4); *Thomas v New Baltimore*, 254 Mich App 196, 203; 657 NW2d 530 (2002). Quite simply, what the trial court and plaintiff have overlooked, in the turmoil of all this unnecessary litigation, is the fact that defendants never denied plaintiff's FOIA request. Plaintiff acknowledges that she was permitted to inspect the records. Defendants indicated that they stood ready and prepared to release copies of the requested photographs to plaintiff upon payment of the fee and being allowed to retain a copy of plaintiff's photographic identification. The sole basis for plaintiff's inability to obtain copies of the requested photographs is attributable to her refusal to permit defendants to copy her identification. While plaintiff asserts defendants provided her with "no authority" compelling the necessity of her permitting reproduction of her identification prior to release of the documents, neither does plaintiff provide any proof that such a request is unreasonable or burdensome. MCL 15.233(3) provides in relevant part:

> A public body may make reasonable rules necessary to protect its public records and to prevent excessive and unreasonable interference with the discharge of its functions.

While neither party is blameless, having permitted this litigation to proceed with the resultant waste of judicial resources, plaintiff's assertion of violation of the FOIA is neither factually accurate nor legally sustainable. Quite simply, defendants never denied plaintiff access to the requested records.

The trial court granted summary disposition to defendants based on the doctrine of res judicata, indicating that the Oakland Circuit Court had, through the grant of discovery and issuance of subpoenas, already considered the relief being requested in conjunction with her FOIA claim. The doctrine of res judicata bars a subsequent actions between the same parties when the evidence or facts essential to the action are identical to the facts or evidence presented in the prior action. *Dart v Dart*, 460 Mich 573, 586; 597 NW2d 82 (1999). For res judicata to apply: (1) the prior action must have been decided on the merits, (2) the ruling in the prior actions was a final decision, (3) the issue contested in the subsequent case was or could have been resolved in the prior action; and (4) both actions involved the same parties or their privies. *Ditmore v Michalik*, 244 Mich App 569, 576; 625 NW2d 462 (2001). Based on the elements required for imposition of res judicata, this Court concurs with plaintiff that the doctrine was not applicable to bar plaintiff's claim in this case. Notably, plaintiff's Oakland Circuit Court action

remains pending and has not been decided on its, merits. The issuance of subpoenas or grant of discovery by the Oakland Circuit Court did not result in a final decision. Defendants were not a party to the Oakland Circuit Court action and cannot be construed to be in privity with the defendant or plaintiff in that court action. Finally, plaintiff's assertion of violation of the FOIA could not have been resolved in the Oakland Circuit Court action.

While this Court agrees that res judicata does not serve as a basis for dismissal of plaintiff's claim, this does not translate into agreement with plaintiff that summary disposition in favor of defendants was inappropriate. Rather, we find that the trial court reached the correct result, albeit for the wrong reason. *Taylor v Laban*, 241 Mich App 449, 458; 616 NW2d 229 (2000).

As argued by plaintiff, she is not estopped from initiating or bringing a FOIA action despite the concurrent existence of another legal proceeding which permits her obtaining the requested records through discovery procedures. As recognized by this Court:

> The FOIA is not a statutory rule of practice, but rather a mechanism for the public to gain access to information from public bodies regardless of whether there is a case, controversy, or pending litigation. The fact that discovery is available as a result of pending litigation between the parties does not exempt a public body from complying with the public records law. [*Central Michigan University v Brd of Trustees*, 223 Mich App 727, 730; 567 NW2d 696 (1997).]

However, the ability of the two separate actions or schemes to operate independently to obtain the same information, does not mandate a ruling in plaintiff's favor. Plaintiff does not dispute that discovery in the Oakland Circuit Court action permitted her access to the requested records. The Oakland Circuit Court had compelled, through subpoenas, the presence of officers for trial and their production of the requested documents for that proceeding. This Court has ruled previously that, when the disclosure that is sought through an action has already been made, the substance of the controversy disappears and becomes moot. *Densmore v Dep't of Corrections*, 203 Mich App 363, 366; 512 NW2d 72 (1994). Based on the rulings and actions of the Oakland Circuit Court, plaintiff has failed to demonstrate that the current legal proceedings were necessary to ensure delivery of the requested information and compel disclosure. *Scharret v City of Berkley*, 249 Mich App 405, 414; 642 NW2d 685 (2002). Additionally, this Court has recognized that "the FOIA is not an appropriate mechanism for addressing the issues of personal need or hardship." *Messenger v Ingham County Prosecutor*, 232 Mich App 633, 645; 591 NW2d 393 (1998). Specifically:

> Where the issue of need does arise under the FOIA . . . the requester's case must rest on the *public* interest in disclosure. A petition pursuing purely personal interests, such as preparing for litigation or seeking vindication of reputation, does not state a public need for purposes of the FOIA. [*Id.* at 645 n 6 (citations omitted).]

Hence, even if this Court were to determine that plaintiff's filing of an action pursuant to the FOIA was substantiated, her procurement of the requested documentation through discovery in a separate court action, while not res judicata, did serve to preclude the necessity of defendants again producing the same documentation. *Densmore, supra* at 366.

Plaintiff further contends that Judge Daphne Curtis was not authorized to function as a circuit court judge based on her failure to have a copy of her oath of office on file with the county clerk within the time frame purportedly specified in accordance with MCL 168.420. Plaintiff asserts that her objection to Judge Curtis' serving as a de facto judge required a duly-elected judge with the circuit court to oversee this litigation. Plaintiff argues that, in addition to Judge Curtis lacking authority to make rulings in this litigation, that Judge Curtis' failure to properly refer her request for disqualification to the chief judge of the circuit was improper. "The interpretation, application, and constitutionality of statutes are questions of law that this Court reviews de novo." *By Lo Oil Co v Dep't of Treas*, 267 Mich App 19, 25; 703 NW2d 822 (2005). Findings of fact by a trial court regarding a motion for judicial disqualification are reviewed for an abuse of discretion and determination of the applicability of the facts to the law are subject to de novo review by this Court. *Armstrong v Ypsilanti Twp*, 248 Mich App 573, 596; 640 NW2d 321 (2001).

In support of her position, plaintiff cites to Michigan Election Law, MCL 168.1 *et seq.*, referencing, in particular, provisions pertaining to circuit court judges, MCL 168.411 *et seq.* Specifically, plaintiff contends that the failure of Judge Curtis to have on file with the county clerk, a copy of her oath of office resulted in her "office" being vacant and negating any authority of Judge Curtis to conduct proceedings in this, or any other matter before the court.[1]

MCL 168.419 provides:

> With the exception of the terms of certain judges elected in 1966, the term of office for judge of the circuit court shall be 6 years, commencing at 12 noon on January 1 next following his election and shall continue until a successor shall have been elected and qualified.

MCL 168.420 requires:

> Every person elected to the office of judge of the circuit court, before entering upon the duties of his office, shall take and subscribe to the oath as provided in section 1 of article 11 of the state constitution, and file the same with the secretary of state and a copy with each county clerk in his circuit.

Vacancies in the office of circuit court judge occur:

> [U]pon the happening of any of the following events before the expiration of the term of office: The death of the incumbent; his resignation; his removal from

[1] Plaintiff implies that the failure of Judge Curtis to have on file with the secretary of state, a certificate authenticating her election to the position of circuit court judge will not be addressed in detail. Suffice it to say that plaintiff's interpretation of MCL 168.418 is not consistent with the wording of the statute. The language of this statute imposes a burden on the secretary of state to maintain verification of election. Contrary to plaintiff's interpretation, this provision does not impose any requirement to act upon the elected official.

> office for cause; his ceasing to be an inhabitant of the circuit for which he shall have been elected or appointed or within which the duties of his office are required to be discharged; his conviction of any infamous crime, or of any offense involving a violation of his oath of office; the decision of a competent tribunal declaring his election or appointment void; or his neglect or refusal to take and subscribe to the constitutional oath of office and deposit the same in the manner and within the time prescribed by law. [MCL 168.422.]

During this ongoing litigation, plaintiff took time out to inquire of the secretary of state and county clerk regarding Judge Curtis' compliance with MCL 168.420 and MCL 168.422. Following her submission of FOIA requests, plaintiff received documentation indicating that neither the secretary of state nor the county clerk had on file a copy of Judge Curtis' oath of office. Plaintiff contends Judge Curtis' failure to assure filing of her oath of office, by January 1, of the year of her assumption of the bench following her most recent election, necessitates her removal from the bench and the position to be considered vacant. Plaintiff goes on to assert that Judge Curtis' lack of authority to function as a circuit court judge makes her a de facto rather than de jure judge, to which plaintiff objects.

There is no support for plaintiff's interpretation of MCL 168.422 to require both the execution of the oath of office and its filing before January 1. MCL 168.420 does require that the oath of office be taken "before entering upon the duties of his office," but the subsequent provision pertaining to filing is not a condition precedent to assumption and exercise of duties of a circuit court judge. Importantly, plaintiff does not assert that Judge Curtis failed to take her oath of office, or did not execute the oath of office in a timely manner consistent with MCL 168.419. Rather, she merely asserts that a copy of the oath was not filed with the required authorities prior to January l following Judge Curtis' election.

While there is an absence of any case law addressing the interpretation of this statute within this state, a similarly worded provision and issue was addressed by the Washington Court of Appeals in *State of Washington v Stephenson*, 89 Wash App 794; 950 P2d 38 (1998). In *Stephenson*, a statute required superior court judges:

> Before entering upon the duties of his office, take and subscribe an oath that he will support the Constitution of the United States and the Constitution of the state of Washington, and will faithfully and impartially discharge the duties of judge to the best of his ability, which oath shall be filed in the office of the secretary of state. [*Stephenson, supra* at 44-45, quoting RCW 2.08.080.]

In *Stephenson*, the defendant challenged the classification of two judges as "public servants" based on the failure to prove that they had filed copies of their oaths of office with the local secretary of state. In reviewing the relevant statutory provisions, the Washington Court of Appeals ruled, in relevant part:

> The filing of the oath with the Secretary of State is not a condition precedent to assuming the duties of office. The clause, 'which oath shall be filed,' does not relate to the antecedent clause 'before entering upon the duties of his office.' Nor does it relate to the list of judicial requirements connected by "ands" ('take *and*

> subscribe an oath'). Thus, the failure to file the oath did not disqualify the judges from office. [*Stephenson, supra* at 45.]

That court went further, noting that:

> [B]oth judges were 'in actual possession of the office [of judge], exercising its functions and discharging its duties under color of title.' Thus, they also occupied their positions as judges de facto. [*Id.* (citations omitted).]

A reading of Const 1963, art 11, §1 is consistent with this interpretation. The focus of the constitutional provision is the taking of the oath. Filing of the oath is a procedural requirement, the failure to comply with, standing alone, does not serve to void a judge's authority to serve in their elected capacity. This is supported by the clear and unambiguous language of MCL 168.422, which requires, in order to create a judicial vacancy, that a judge "neglect or refusal to take and subscribe to the constitutional oath of office **and** deposit the same in the manner and within the time prescribed by law." MCL 168.422 (emphasis added). Interpretation of this language indicates, for a vacancy to occur, that a circuit court judge must not have taken the oath of office, thus, obviating the ability to file a copy with the requisite authorities. Failure to take the oath of office is the key factor in these statutes and plaintiff has not demonstrated that Judge Curtis did not comply with this requirement. Plaintiff merely demonstrated that either the oath had not been filed with authorities or that the authorities could not verify the filing.

This leads to plaintiff's next assertion that she was entitled to a de jure judge and not a de facto judge to oversee her proceedings. The Supreme Court in *Ryder v United States,* 515 US 177, 180; 115 S Ct 2031; 132 L Ed 2d 136 (1995) defined the de facto officer doctrine as conferring "validity upon acts performed by a person acting under the color of official title even though it is later discovered that the legality of that person's appointment or election to office is deficient." While this Court asserts that Judge Curtis was acting in her duly-elected capacity and not as a de facto judge, plaintiff's argument that her objection to a de facto judge precludes the authority of that person to act or oversee her litigation is without merit. The very purpose of the de facto doctrine:

> springs from the fear of the chaos that would result from multiple and repetitious suits challenging every action taken by every official whose claim to office could be open to question, and seeks to protect the public by insuring the orderly functioning of the government despite technical defects in title to office. [*Id.* (citation omitted).]

Contrary to plaintiff's position, merely because an assigned judge is functioning in a de facto capacity does not serve to open their actions to a "collateral attack." *Id.* at 181. In order for the authority of a de facto judge to be called into question the claim must extend to a more substantial challenge to the validity of the source of judicial authority, such as involving a "trespass upon the executive power of appointment." *Id.* In other words, the Supreme Court has determined "a judge's actions to be valid de facto when there is a 'merely technical' defect of statutory authority." *Nguyen v United States,* 539 US 69, 77; 123 S Ct 2130; 156 L Ed 2d 64 (2003) (citation omitted). Specifically, for a de facto judge's authority to be questioned something "more fundamental than whether some effort has been made to conform with the formal conditions on which [a judge's] particular powers depend" must be involved. *Id.* at 79

(internal quotations omitted). Therefore, even if Judge Curtis acted in a de facto capacity, her authority to act is neither diminished nor defective.

Plaintiff specifically sought disqualification of Judge Curtis based solely upon alleged violations of MCL 168.420 and MCL 168.422. Plaintiff averred that disqualification was not being sought with regard to any assertions pertaining to MCR 2.003. Upon refusal of Judge Curtis to recuse herself from the proceedings, plaintiff did request a de novo review by the chief judge. Plaintiff contends that the staff for Judge Curtis informed her that it was her responsibility to schedule the de novo hearing. Plaintiff refused based on the failure of Judge Curtis' staff to provide her with the authority relied upon to require her scheduling of the review and based on the language of MCR 2.003(3)(a).

Plaintiff is correct is asserting, consistent with rulings of this Court, that "failure to refer the motion to disqualify to the chief judge on the request of a party is wrong and improper. The requirement that the motion be referred to the chief judge is not discretionary." *Gilbert v Daimler Chrysler Corp,* 469 Mich 889, 891; 670 NW2d 560 (2003) (citations omitted). Notably, plaintiff does not present evidence of a refusal by Judge Curtis to refer the disqualification motion to the chief judge. Rather, plaintiff merely asserts it was not her responsibility to participate in or assure scheduling of the hearing. Even if the trial court erred in failing to refer the matter on to the chief judge, any error is harmless. *People v Coones,* 216 Mich App 721, 727; 550 NW2d 600 (1996). Plaintiff has not presented a valid argument or basis for disqualification of Judge Curtis. Consistent with this Court's prior determination, any error that occurs or is attributable to the failure of a trial court to refer a motion for disqualification to the chief judge is deemed harmless when the motion for disqualification was properly denied. *Id.*

Plaintiff asserts that the trial court erred in failing to rule on her motion to preclude referral of her case for case evaluation. In the lower court, the basis for plaintiff's objection to case evaluation was her assertion that it denied her due process and her right to a trial by jury. The interpretation and application of court rules are questions of law which this Court reviews de novo. *CAM Constr v Lake Edgewood Condo Ass'n,* 465 Mich 549, 553; 640 NW2d 256 (2002). Constitutional issues are also reviewed de novo. *Taylor v Gate Pharmaceuticals,* 468 Mich 1, 5; 658 NW2d 127 (2003).

MCR 2.403(A)(1) indicates the discretionary nature of a trial court's referral of a matter for case evaluation. Contrary to plaintiff's assertion that referral to case evaluation deprives her of a right to a jury trial, MCR 2.403(B)(2) provides:

> Selection of an action for case evaluation has no effect on the normal progress of the action toward trial.

Additionally, MCR 2.403(N)(1) indicates:

> If all or part of the evaluation of the case evaluation panel is rejected, the action proceeds to trial in the normal fashion.

This Court has previously ruled, in *Haberkorn v Chrysler Corp,* 210 Mich App 354, 381; 533 NW2d 373 (1995), that the case evaluation process is not violative of either due process or equal protection because it is rationally related to the legitimate governmental purpose of expediting

litigation. In addition, it has been determined that submission to case evaluation does not violate an individual's right to a jury trial because it does not prevent a party from rejection of the evaluators' decision and proceeding to a trial. *Great Lakes Gas Transmission Ltd Partnership v Markel*, 226 Mich App 127, 133; 573 NW2d 61 (1997).

A review of the lower court record, indicates plaintiff timely objected to submission of her claim to case evaluation. MCR 2.403(C)(1). As such, the trial court was required to conduct a hearing, in accordance with MCR 2.403(C)(2). However, given the lack of merit inherent in plaintiff's constitutional challenge to submission of the case for case evaluation, the conduct of a hearing would not have altered the outcome of the case. Hence, any error in failing to conduct the hearing is harmless. *Feaster v Portage Public Schools*, 210 Mich App 643, 655; 534 NW2d 242 (1995), rev'd on other grds 451 Mich 351 (1996).

Finally, plaintiff contends the trial court erred in failing to rule on her request for a waiver of fees for transmittal of the lower court file from the circuit court to this Court. The lower court record reveals that plaintiff never properly moved for a waiver of fees and costs and the trial court did not address the issue. Thus, this issue is unpreserved. *Trost v Buckstop Lure Co*, 249 Mich App 580, 590 n 3; 644 NW2d 54 (2002). Unpreserved issues are viewed by this Court for plain error. *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000).

The lower court record does not disclose the filing of any motion by plaintiff specifically seeking waiver of the circuit court's record transmittal fee. Consistent with her assertions throughout the entire proceedings, plaintiff has claimed indigency status, necessitating the waiver of fees and costs, but only filed an updated affidavit of indigency. Although plaintiff submitted a new affidavit seeking waiver of fees and costs, she failed to note that MCR 2.002(A)(1) indicates that "for the purpose of this rule 'fees and costs' applies only to filing fees required by law." Even if plaintiff's indigency status was reaffirmed, that status does not necessarily imply or require the waiver of transmittal fees. Based on the lower court record, the trial court did not fail to rule on the issue. Rather, plaintiff has merely relied on her assertion of indigency and failed to come forward with an appropriate motion to secure the relief sought.

Affirmed.

/s/ Kathleen Jansen
/s/ Mark J. Cavanagh
/s/ Karen M. Fort Hood