STATE OF MICHIGAN

COURT OF APPEALS

GLENN BOTMA and CHARMAINE BOTMA, Plaintiffs/Counter-Defendants-Appellees,	UNPUBLISHED December 15, 2009
v	No. 287721 Newaygo Circuit Court
JAMES MERCER and MARILYN MERCER, Defendants/Counter-Plaintiffs-Appellants.	LC No. 06-019054-CZ

Before: Beckering, P.J., and Cavanagh and M. J. Kelly, JJ.

PER CURIAM.

In this property dispute, plaintiffs filed suit to establish an easement over property owned by defendants. Defendants appeal as of right the trial court's September 8, 2008, order granting summary disposition to plaintiffs, dismissing defendants' counterclaim, assessing sanctions against defendants and their counsel, and denying defendants' motion for disqualification of the trial court judge. We affirm.

I. Facts and Procedural History

The parties own adjoining properties in Section 29 of Brooks Township, Newaygo County, Michigan. The southern boundary line of the properties is the southern line of Section 29. Defendants' property lies immediately to the west of plaintiffs' property. Both properties are landlocked, with ingress and egress afforded by a common, unimproved drive. The access route connects the parties' properties to the nearest public road, 88th Street. In order to access 88th Street from their property, plaintiffs must travel west over defendants' property, as well as property referred to by the parties as the Wierenga property, which is located immediately to the west of defendants' property. Plaintiffs allege that the access route was always located in the southernmost portion of the parties' properties, just to the north of the section line, and that defendants have only recently attempted to "push" the route south of the section line by driving steel fence posts into the access route, gradually moving the posts south, and placing boards with nails sticking upward on the access route, forcing vehicles south. Defendants, on the other hand, deny such allegations and claim that the majority of the access route was always located south of the section line on property referred to by the parties as the Flemmings property.

According to the title documents plaintiffs submitted to the trial court, William and Bertha Faust originally owned the parties' properties. In August 1943, the Fausts entered into a land contract with Dale Blush and Connie Blush (a/k/a Leira Blush and Leira Nickett) for a portion of the property now owned by plaintiffs, referred to by plaintiffs as "parcel #1." The Fausts conveyed title to the Blushes in May 1944. In October 1953, the Blushes purchased additional property from the Fausts, referred to by plaintiffs as "parcel #2." The warranty deed conveying title to the Blushes reveals that parcel #2 completely encompassed parcel #1. After the conveyance, the Blushes owned the entirety of the property now owned by plaintiffs. Leira and her predeceased husbands held title to the property until July 2004, when she conveyed title to her granddaughter, plaintiff Charmaine Botma, through a series of divestments. In August 2006, Charmaine conveyed title to herself and her husband, plaintiff Glenn Botma, as tenants by the entireties. The Fausts retained title to the property now owned by defendants until July 1955 when they sold it to Loyal and Lois Herr. Lois was Leira's sister. In December 1982, the Herrs conveyed title to themselves and their daughter Elaine Mercer as joint tenants. In April 1989, after Loyal had died, Lois conveyed her remaining interest in the property to Elaine. In August 1992, Elaine entered into a land contract for the property with her son and daughter-in-law, defendants in this action. Elaine conveyed title to defendants in August 2004.

The parties agree that from the time the Fausts owned the properties at issue, the parties and their predecessors in interest have used the unimproved drive running along the southern boundary of their properties as an access route to and from 88th Street. They further agree that there was never any dispute regarding the use or location of the access route until approximately 2005. Plaintiffs initiated this action in August 2006, filing suit against defendants to quiet title and establish a prescriptive easement, trespass, and a permanent injunction. Defendants subsequently filed a counterclaim for trespass and nuisance. Plaintiffs then moved to amend their complaint and the trial court granted their motion. Plaintiffs filed their amended complaint in January 2007, adding a claim to establish an easement by necessity.

In August 2007, plaintiffs moved for summary disposition under MCR 2.116(C)(10), arguing that they were entitled to an easement by necessity. At the hearing on the motion, the trial court held that regardless of the historic location of the access route, plaintiffs were entitled to an easement by necessity over defendants' property because plaintiffs' property was landlocked by a common grantor. At a subsequent hearing, the trial court again explained its ruling with regard to plaintiffs' motion for summary disposition and clarified that it had dismissed defendants' counterclaim. The court subsequently issued its September 8, 2008, order granting summary disposition to plaintiffs, dismissing defendants' counterclaim, assessing sanctions against defendants and their counsel, and denying defendants' motion for disqualification of the trial court judge. Defendants now appeal as of right.

II. Plaintiffs' Motion for Summary Disposition and Defendants' Counterclaim

Defendants first argue that the trial court erred in granting plaintiffs summary disposition. We disagree.

A grant or denial of summary disposition is reviewed de novo to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion under MCR 2.116(C)(10) tests the factual sufficiency of a claim. *Id*. at 119-120. All substantively admissible evidence submitted by the parties is reviewed in the

light most favorable to the nonmoving party and summary disposition is appropriate only when the evidence fails to establish a genuine issue regarding any material fact. *Id.*; MCR 2.116(G)(6).

In describing an easement by necessity, this Court has held:

> An easement by necessity may be implied by law where a landowner splits its property so that one of the resulting parcels is landlocked except for access across the other parcel. An easement by necessity arises either by grant or reservation: by grant in a case where the grantor created a landlocked parcel in its grantee, or by reservation where the grantor splits its property and leaves itself landlocked. In either case, the party asserting the right to the easement by necessity must demonstrate that the easement is "reasonably necessary, not strictly necessary, to the enjoyment of the benefited property." An easement by necessity is based on "the presumed intent of the parties," as well as public policy that "favors the productive and beneficial use of property." Where a conveyance deprives the landowner of access to its property, access rights will be implied unless the parties clearly indicate a contrary intention.
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> The use of an easement must be confined to the purposes for which it was granted, including any rights incident to or necessary for the reasonable and proper enjoyment of the easement, which are exercised with as little burden as possible to the fee owner of the land. [*Schumacher v Dep't of Natural Resources*, 275 Mich App 121, 130-131; 737 NW2d 782 (2007) (citations omitted).]

In this case, the trial court properly determined that plaintiffs established an easement by necessity over defendants' property. The title histories for the parties' properties reveal that a common grantor, the Fausts, originally owned both properties and conveyed the landlocked property currently owned by plaintiffs to the Blushes. At that time, the only means of ingress and egress was over the property currently owned by defendants. Therefore, considering that there was no clear indication to the contrary, an easement by necessity was implied by law. See *id*. In their brief on appeal, defendants assert that plaintiffs have "set forth very confusing chains of title" and have failed to prove that the parties' titles "emanated from a 'common grantor.'" Specifically, defendants assert that the "confusing series of transactions lends question as to what interest if any, [plaintiffs] possess in parcel number 2." We find, however, that the title documents submitted by plaintiffs very clearly lay out the title histories of the parties' properties. The conveyance of parcel #2 from the Fausts to the Blushes fully encompassed parcel #1 and Leira conveyed her property to Charmaine in a series of divestments. There is no factual dispute that plaintiffs now possess the entirety of the property transferred from the Fausts to the Blushes and that the parties' titles emanated from a common grantor. Further, the easement established by the trial court provides plaintiffs with a reasonable means of ingress and egress, with as little burden as possible to defendants. See *id*. at 131. The court established a 16-1/2 foot easement across the southernmost portion of defendants' property, butting up to the edge of defendants' concrete sidewalk and driveway. The easement is located, at least partially, where vehicles have historically traveled.

Defendants argue that the access route over their property has always been located primarily south of the section line, that plaintiffs abandoned any right they had to an easement by

necessity north of the historic and currently existing access route, and, therefore, that the trial court erred in establishing a "new" easement entirely north of the section line. In so arguing, defendants rely on *Powers v Harlow*, 53 Mich 507; 19 NW 257 (1884), *Douglas v Jordan*, 232 Mich 283; 205 NW 52 (1925), and *Schadewald v Brule*, 225 Mich App 26; 570 NW2d 788 (1997) for the general proposition that once the location of a right of way by necessity has been defined by agreement or usage, the location is fixed and cannot be unilaterally altered. But in this case, the access route was never clearly defined by either party. Cf. *Powers*, *supra* at 512-513. The route is an unimproved road running along the southern portion of the parties' properties, without any fences, curbs, or other markers (except the recent addition of the three steel rods installed by defendants) defining the width or direction of the route. The parties disagree about the historic location of the route–plaintiffs claim that the route was always located north of the section line but admit that they may have unintentionally traveled south of it, and the affidavit of Elaine Mercer, submitted by defendants, suggests that vehicles may have utilized an "alternate route" in the past. Therefore, defendants' assertion that the access route over their property has been "fixed" and cannot be altered is without merit. Moreover, defendants' assertion that the parties or their predecessors in interest could establish an easement by necessity over property that was never owned by their common grantor is nonsensical. The cases cited by defendants do not support such an assertion.

Likewise, defendants' argument that plaintiffs have abandoned any right to an easement by necessity north of the current access route is without merit. Defendants admit that the access route runs across their property, at least in part. More importantly, assuming that an easement that has not been officially established can in fact be abandoned, there is no evidence that plaintiffs intentionally abandoned their right to an access route located entirely north of the section line. See *Minerva Partners, Ltd v First Passage, LLC*, 274 Mich App 207, 214; 731 NW2d 472 (2007) (stating that "[a]n easement is abandoned when the owner of the easement relinquishes it with the intention of releasing his or her right to the easement.").

Defendants further argue that in order to obtain relief in this action, plaintiffs were required to add as parties the Flemmings, the Wierengas, and the owner of the property immediately south of the Wierenga property, because the access route runs over all of their properties. MCR 2.205(A) provides that "persons having such interests in the subject matter of an action that their presence in the action is *essential* to permit the court to render complete relief must be made parties and aligned as plaintiffs or defendants in accordance with their respective interests" (emphasis added). As indicated, plaintiffs could not establish an easement by necessity over property that was never owned by the parties' common grantor. Furthermore, whether plaintiffs could have negotiated or established a right of access, such as a prescriptive easement, over adjoining properties is irrelevant to the question whether plaintiffs are entitled to an easement by necessity over defendants' property. The trial court could, and did, render complete relief to plaintiffs without the addition of other property owners as parties.

Finally, we hold that the trial court properly dismissed defendants' counterclaim for trespass and nuisance. The court dismissed defendants' claims because they "anticipated that . . . [p]laintiffs had no right on the property." Although the claims raised in defendants' counterclaim were cursory and very general, it appears that they were, in fact, premised upon plaintiffs' use of the access route over defendants' property and plaintiffs' presence on the

property for that purpose. Given that plaintiffs had the right to traverse defendants' property for ingress and egress, defendants' claims fail.

III. Plaintiffs' Motion for Sanctions

Defendants next argue that the trial court erred in granting plaintiffs' motion for attorney fees and costs under MCR 2.114 and MCL 600.2591, assessing sanctions against defendants and their counsel for frivolous defenses. Again, we disagree.

MCR 2.114 provides, in part:

> (A) Applicability. This rule applies to all pleadings, motions, affidavits, and other papers provided for by these rules. See MCR 2.113(A). In this rule, the term "document" refers to all such papers.
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> * * *
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> (C) Signature.
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> (1) Requirement. Every document of a party represented by an attorney shall be signed by at least one attorney of record. A party who is not represented by an attorney must sign the document.
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> * * *
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> (D) Effect of Signature. The signature of an attorney or party, whether or not the party is represented by an attorney, constitutes a certification by the signer that
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> (1) he or she has read the document;
>
> (2) to the best of his or her knowledge, information, and belief formed after reasonable inquiry, the document is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and
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> (3) the document is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.
>
> (E) Sanctions for Violation. If a document is signed in violation of this rule, the court, on the motion of a party or on its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the document, including reasonable attorney fees. The court may not assess punitive damages.
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> (F) Sanctions for Frivolous Claims and Defenses. In addition to sanctions under this rule, a party pleading a frivolous claim or defense is subject to costs as provided in MCR 2.625(A)(2). The court may not assess punitive damages.

MCR 2.625(A)(2) states that "if the court finds on motion of a party that an action or defense was frivolous, costs shall be awarded as provided by MCL 600.2591."

MCL 600.2591 provides:

> (1) Upon motion of any party, if a court finds that a civil action or defense to a civil action was frivolous, the court that conducts the civil action shall award to the prevailing party the costs and fees incurred by that party in connection with the civil action by assessing the costs and fees against the nonprevailing party and their attorney.
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> (2) The amount of costs and fees awarded under this section shall include all reasonable costs actually incurred by the prevailing party and any costs allowed by law or by court rule, including court costs and reasonable attorney fees.
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> (3) As used in this section:
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> (a) "Frivolous" means that at least 1 of the following conditions is met:
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> (*i*) The party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party.
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> (*ii*) The party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true.
>
> (*iii*) The party's legal position was devoid of arguable legal merit.
>
> (b) "Prevailing party" means a party who wins on the entire record.

"A trial court's finding that an action [or defense] is frivolous is reviewed for clear error. A decision is clearly erroneous where, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made." *Kitchen v Kitchen*, 465 Mich 654, 661-662; 641 NW2d 245 (2002) (citations omitted).

Plaintiffs moved for assessment of attorney fees and costs against defendants under MCR 2.114 and MCL 600.2591 in October 2007. Plaintiffs' counsel subsequently filed an itemized statement of attorney fees and costs incurred in this cause of action, totaling $20,497.04. At a hearing on the matter, plaintiffs argued that they should be awarded the total amount of fees and costs incurred, but if the court found that plaintiffs were entitled only to the fees and costs associated with their easement by necessity claim, they should be awarded $18,519.86. At the conclusion of the hearing, the trial court granted plaintiffs' motion in part, stating:

> Now, the Court is going to find that the defense to essentially the part of the complaint that dealt with this implied easement [i.e., easement by necessity] was indeed frivolous, and I've stated my statements on the record, and so therefore it would deal only with the sum of $18, 519.86, which essentially has to do with that part of the lawsuit which required the approved, the motion for summary judgment on that basis.

> In that respect, . . . [p]laintiffs are somewhat at fault because they bought a piece of property where there essentially was no legally recognized method of ingress and egress as a matter of record, and so when they bought that property or got into that siatuion [sic], I recognize that this is a family situation . . . . But in any event, they essentially took title, assuming they were living next to relatives, without a requirement that there be a legally defined ingress and egress; so to that extent I would charge them twenty-five (25) percent. The argument over this situation was essentially developed by [defendants] who contested their use of the property and necessitated this lawsuit, so I would charge [defendants] twenty-five (25) percent. I would charge the balance of fifty (50) percent against [defense counsel] for his failure to recognize the law in this regard.

In its September 8, 2008, order, the court awarded plaintiffs $18,274.54[1] in attorney fees and costs pursuant to MCR 2.114 and MCL 600.2591.

We agree with the trial court that the defenses raised in regard to plaintiffs' claim for an easement by necessity were frivolous in nature. Plaintiffs filed their amended complaint, along with the title histories for the parties' properties, in January 2007. In response, defendants raised the affirmative defenses of: standing, permissive use and license (asserting that plaintiffs had no "right" to utilize defendants' property because their use of the property was permissive or by license), civil procedure violations pertaining to the filing of the complaint, unclean hands (asserting that plaintiffs behaved antagonistically and improperly), and "failure to meet elements of easement by necessity" (asserting that plaintiffs failed to set forth facts that a "common grantor convey[ed] to a third party the supposedly landlocked parcel, thereby placing the vendee in the position where the vendee possesses no access to a public road"). Thereafter, plaintiffs moved for summary disposition, arguing that they were entitled to an easement by necessity over defendants' property. Given that plaintiffs attached the title histories for the parties' properties to their amended complaint, there was no merit to the affirmative defense that plaintiffs failed to meet the elements of easement by necessity. Further, after plaintiffs moved for summary disposition, defendants filed an additional affirmative defense, asserting that plaintiffs could not establish an easement by necessity without the addition of other necessary parties, i.e., the owners of the Flemmings property, Wierenga property, and the property south of the Wierenga property. For the reasons indicated, this argument was meritless. Accordingly, the trial court properly determined that the defenses raised by defendants regarding plaintiffs' claim for an easement by necessity were frivolous, in that they were devoid of arguable legal merit, and sanctions were properly assessed against defendants and their counsel. See MCL 600.2591(3)(a)(*iii*); see also MCR 2.114(E), (F).

Defendants have not specifically challenged the amount of attorney fees and costs awarded plaintiffs, apart from their contention that no amount of sanctions was warranted in this

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[1] After the hearing on plaintiffs' motion for sanctions, plaintiffs moved to amend the findings of the trial court with respect to the awarded amount of attorney fees and costs by reducing the amount to $18,274.54, based on a scrivener's error in calculating the amount originally awarded by the court.

case. In their brief on appeal, defendants briefly address the amount of the award, stating: "Even the bill of costs is absolutely ludicrous. For example: a. Appellees' counsel charges a total of approximately 12 hours to prepare a circuit court complaint! b. Appellees' counsel includes, in his bill of costs, the time in court associated with [defense counsel's] efforts to have the bogus temporary restraining order and bogus preliminary injunctive order rescinded."[2] Defendants provide no basis for their assertion that these particular charges or any other charges listed in plaintiffs' "bill of costs" were "ludicrous" or otherwise improper. A party may not merely announce its position and leave it to this Court to discover and rationalize the basis for its claims. *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998). Therefore, we decline to address this portion of defendants' argument.

IV. Defendants' Motion to Disqualify the Trial Court Judge

Defendants argue that the trial court judge, Judge Terrence R. Thomas, should have been disqualified from this case and, pursuant to the recent circuit court order disqualifying him from all cases involving defense counsel, that all of the judge's rulings in this case are void. Considering, however, that defendants' motion to disqualify was untimely and contained little evidence that Judge Thomas was actually biased or prejudiced against defense counsel, we disagree.

Defendants moved to disqualify Judge Thomas under MCR 2.003(B)(1), arguing that he was personally biased and prejudiced against defense counsel. The motion was supported by the affidavit of defense counsel. A hearing was held on the motion and Judge Thomas declined to disqualify himself from the case. Defendants appealed. Following a hearing on the matter, the chief judge of the circuit denied the motion to disqualify, concluding that it was not timely filed under MCR 2.003(C)(1).

MCR 2.003(B)(1) provides that a trial court judge "is disqualified when the judge cannot impartially hear a case," including when the "judge is personally biased or prejudiced for or against a party or attorney." A trial judge is presumed to be impartial and the party who asserts partiality has a heavy burden of overcoming that presumption. *Cain v Dep't of Corrections*, 451 Mich 470, 497; 548 NW2d 210 (1996). In regard to the procedure for disqualifying a trial court judge, MCR 2.003(C)(1) provides:

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[2] The trial court signed a temporary restraining order on August 22, 2006. A proposed preliminary injunctive order was sent to the trial court along with the temporary restraining order and was apparently mistakenly signed by the court on the same day. Defendants objected and plaintiffs admitted that the order should be set aside. An order setting aside the preliminary injunctive order was entered on September 25, 2006, based on a stipulation by the parties. A new preliminary injunctive order, based on the trial court's determination that plaintiffs should be allowed to use the access route over defendants' property for the duration of the proceedings, was entered on October 23, 2006. Defendants' motion to quash the temporary restraining order was denied.

> Time for Filing. To avoid delaying trial and inconveniencing the witnesses, a motion to disqualify must be filed within 14 days after the moving party discovers the ground for disqualification. If the discovery is made within 14 days of the trial date, the motion must be made forthwith. If a motion is not timely filed, untimeliness, including delay in waiving jury trial, is a factor in deciding whether the motion should be granted.

Initially, we find, as did the chief judge of the circuit, that defendants' motion for disqualification was untimely. MCR 2.003(C)(1) requires that a motion to disqualify "be filed within 14 days after the moving party discovers the ground for disqualification," and provides that "untimeliness . . . is a factor in deciding whether the motion should be granted." Defendants moved to disqualify Judge Thomas on September 6, 2007, over a year after plaintiffs filed their original complaint on August 14, 2006 and ten days after the August 27, 2007, hearing when the court awarded plaintiffs summary disposition. Although defense counsel points to several alleged instances of bias and prejudice that occurred at the summary disposition hearing, defense counsel also alleges that Judge Thomas demonstrated bias and prejudice against him, and favoritism for plaintiffs' counsel, at proceedings unrelated to this case in 2006, unlawfully issued the temporary restraining order and initial preliminary injunctive order requested by plaintiffs' counsel, both of which were issued in August 2006, and ignored or rejected the arguments defense counsel raised in various prehearing motions and conferences as early as January 2007. Defense counsel knew or should have discovered the alleged grounds for disqualification well before defendants filed their motion in September 2007.

Moreover, even if the motion for disqualification were timely, we find that defendants failed to establish that Judge Thomas was actually biased or prejudiced against defense counsel under MCR 2.003(B)(1). First, review of defense counsel's affidavit reveals that, in large part, he simply disagrees with Judge Thomas's decisions on the merits of the case but offers little evidence that those decisions were based on personal bias or prejudice. See *In re Contempt of Henry*, 282 Mich App 656, 680; 765 NW2d 44 (2009) (stating that disqualification based on bias or prejudice cannot be established merely by repeated rulings against a litigant). For example, defense counsel asserts that Judge Thomas demonstrated bias and prejudice by ignoring or rejecting his arguments regarding the necessity of plaintiffs adding parties to this action and the affidavits submitted by defendants establishing the historical location of the access route, rejecting the proposition that questions of fact existed and the notion of abandonment, and moving the access route to the north without regard to how it affected defendants. While defense counsel is correct that Judge Thomas disagreed with him on these points, the judge explained his reasoning, based on the facts and law, on the record. Further, based on our review of the transcript of the summary disposition hearing, it does not appear that Judge Thomas treated defense counsel unfairly or rudely. Rather, it seems that the judge acted appropriately and only spoke abruptly after defense counsel offered very lengthy or repetitive arguments. See *Schellenberg v Rochester Elks*, 228 Mich App 20, 39; 577 NW2d 163 (1998) (stating that a trial judge's remarks made during trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases do not ordinarily establish disqualifying bias). Defense counsel further asserts that Judge Thomas showed favoritism to plaintiffs' counsel by unlawfully issuing the temporary restraining order and initial preliminary injunctive order. But, as explained, the initial preliminary injunctive order was mistakenly signed by Judge Thomas and was set aside by

stipulation. Given the lack of evidence of bias or prejudice, coupled with the untimeliness of defendants' motion to disqualify, we hold that the motion was properly denied.

Additionally, defendants assert that in February 2008, defense counsel filed a request for investigation related to Judge Thomas's conduct in this case, as well as other cases, with the Michigan Judicial Tenure Commission. In July 2009, the Commission completed its investigation and concluded that formal disciplinary proceedings against Judge Thomas were not warranted. The Commission informed defense counsel that it had taken "appropriate corrective action," presumably a private communication with Judge Thomas. Thereafter, defense counsel was retained in an unrelated criminal case. When the case was assigned to Judge Thomas, defense counsel moved for disqualification. Judge Thomas granted the motion, explaining that he was disqualifying himself to "avoid the appearance of impropriety or appearance of bias and/or preference." The chief judge of the circuit subsequently disqualified Judge Thomas from any case involving defense counsel, noting that "it is in everyone's best interests that attorney Kozma's cases not be assigned to Judge Thomas until further order of the Chief Judge."

Defendants argue that in light of the October 19, 2009, order of the chief judge disqualifying Judge Thomas from all cases involving defense counsel, all of Judge Thomas's rulings in this case are void. Defendants assert in their supplementary brief: "The discretionary determinations of Judge Thomas, therefore, are void ab initio, and there exists no reason for oral argument or further proceeding. Oral argument should be cancelled per MCR 7.214(E), and Appellants respectfully contend that all orders, judgments and discretionary determinations of Judge Terrence R. Thomas in this case, be expeditiously reversed." In making this assertion, defendants rely on Callaghan's Michigan Pleading & Practice (2d ed), § 3:24 (stating that absolute disqualification makes judicial action void), and *Horton v Howard*, 79 Mich 642; 44 NW 1112 (1890) (holding that a decree issue by a judge, who is disqualified due to consanguinity, is void). In this case, Judge Thomas issued its final order in September 2008. Judge Thomas was not disqualified from cases involving defense counsel until October 2009, pursuant to an order in an unrelated case. There was no finding that Judge Thomas acted with partiality in this case. Contrary to defendants' argument, the authorities cited in their supplemental brief do not establish that the October 2009, order should be applied retroactively, such that any ruling issued by Judge Thomas in any former case involving defense counsel is now void. Defendants' argument fails.

Affirmed.

/s/ Jane M. Beckering
/s/ Mark J. Cavanagh
/s/ Michael J. Kelly