

STATE OF MICHIGAN
COURT OF APPEALS

MICHIGAN FIRST CREDIT UNION,

Plaintiff/Counter-Defendant-
Appellee,

v

BARBARA SMITH,

Defendant/Counter-Plaintiff-
Appellant.

UNPUBLISHED
January 12, 2012

No. 300359
Wayne Circuit Court
LC No. 07-728989-CZ

Before: MURRAY, P.J., and TALBOT and SERVITTO, JJ.

PER CURIAM.

Defendant/Counter-Plaintiff Barbara Smith appeals as of right the trial court's order dismissing her counter-complaint. We affirm.

I. BACKGROUND

The history of this case begins in 2005 when Smith defaulted on her car loan. Plaintiff/Counter-Defendant Michigan First Credit Union filed a complaint in 36th District Court, Judge Ruth Ann Garrett presiding, to repossess the vehicle. Thereafter, Smith, in propria persona, began an extensive legal battle wherein she alleged that Michigan First illegally repossessed and sold her vehicle and that Michigan First took \$40,000 from her checking account. Smith filed a counter-complaint in 36th District Court against Michigan First alleging conversion of both her vehicle and the \$40,000. During this time, Smith also picketed outside of Michigan First's place of business and handed out flyers to inform the general public that Michigan First had taken \$40,000 from her checking account. In response to Smith's picketing, Michigan First filed a complaint in Oakland County Circuit Court against Smith alleging defamation, libel, and slander.

Meanwhile, in 36th District Court Smith asserted that Judge Garrett was biased, and she began picketing outside the 36th District Court building. Additionally, Smith filed a motion to disqualify Judge Garrett, which Judge Garrett granted. The case was then transferred to Judge Ronald Giles. Judge Giles dismissed Michigan First's original complaint regarding the balance of the car loan because Smith had received a bankruptcy discharge and granted Michigan First's motion to transfer Smith's counter-complaint regarding the conversion of \$40,000 to Wayne County Circuit Court.

In Wayne County Circuit Court, Judge John A. Murphy presiding, the trial court placed a stay on the proceedings regarding Smith's counter-complaint pending the resolution of Michigan First's defamation complaint in Oakland County. The trial court noted that if Michigan First prevailed in Oakland County, res judicata would preclude relitigation, and summary disposition would be granted in favor of Michigan First on Smith's counter-complaint. However, if Smith prevailed in Oakland County, res judicata would not apply, and the parties would have to move forward with the issue of conversion in Smith's counter-complaint. Smith objected to the trial court's ruling regarding the application of res judicata as being biased and unfair, but, agreed that it made sense to stay the proceedings on her counter-complaint pending the resolution of Michigan First's defamation complaint.

In Oakland County Circuit Court, Judge John J. McDonald presiding, the trial court granted summary disposition in favor of Michigan First on its defamation complaint, but Smith appealed and this Court reversed and remanded. *Mich First Credit Union v Smith*, unpublished opinion per curiam of the Court of Appeals, issued October 22, 2009 (Docket No. 284863). On remand, Judge McDonald recused himself, and the case was transferred to Judge Michael D. Warren. The trial court involuntarily dismissed Michigan First's defamation complaint under MCR 2.116(C)(6) and MCR 2.504(B)(1) because it concluded that there was similar litigation pending in Wayne County between the two parties based on Smith's counter-complaint. However, Michigan First appealed this ruling, and this Court reversed and remanded for further proceedings. *Mich First Credit Union v Smith*, unpublished opinion per curiam of the Court of Appeals, issued June 21, 2011 (Docket No. 296670).

After Michigan First's defamation complaint was involuntarily dismissed on remand in Oakland County, and that dismissal was pending on appeal, the parties returned to Wayne County Circuit Court where the trial court lifted the stay on Smith's counter-complaint. Smith then filed a motion for summary disposition on her counter-complaint arguing that the involuntary dismissal of Michigan First's defamation complaint in Oakland County was an adjudication on the merits. The trial court denied Smith's motion for summary disposition. Subsequently, Judge Murphy recused himself because of a heated argument between Smith and Judge Murphy's court reporter regarding the accuracy of the transcripts, and the case was assigned to Judge Amy P. Hathaway. Judge Hathaway affirmed Judge Murphy's denial of Smith's motion for summary disposition.

Because Smith disagreed with Judge Hathaway's ruling, she began picketing outside Wayne County Circuit Court at the Coleman A. Young Municipal Center and she filed a motion to disqualify Judge Hathaway. Judge Hathaway denied Smith's motion to disqualify because she determined that she was not biased or prejudiced in ruling on Smith's motion for summary disposition and Chief Judge Virgil C. Smith affirmed the denial of Smith's motion to disqualify Judge Hathaway.

Thereafter, Michigan First filed a motion to dismiss Smith's counter-complaint because Smith had failed to timely follow Judge Hathaway's final joint pretrial order regarding the

submission of her witness list and exhibits for trial.¹ Initially, the trial court gave Smith additional time to comply with the joint pretrial order by issuing another order to submit the witness list and exhibits; however, Smith continued to ignore the trial court's orders, and on September 15, 2010, the trial court granted Michigan First's motion to dismiss Smith's counter-complaint with prejudice. From these rulings, Smith now appeals as of right.

II. ANALYSIS

A. EQUAL PROTECTION & DUE PROCESS

Smith argues that the trial court denied her both due process and equal protection under the law when it denied her motion for summary disposition on her counter-complaint. Smith raises these arguments for the first time on appeal; thus, they are not preserved for appellate review. However, whether a party's due process or equal protection rights were violated is question of law that may be reviewed regardless of preservation if all the necessary facts for review are present. *Royce v Chatwell Club Apartments*, 276 Mich App 389, 399; 740 NW2d 547 (2007). Unpreserved constitutional issues are reviewed for outcome determinative plain error. *In re Application of Consumer Energy Co*, 278 Mich App 547, 568; 753 NW2d 287 (2008).

The Michigan and federal constitutions guarantee that no person shall be denied equal protection of the laws. US Const, Am XIV; Const 1963, art 1, § 2. Michigan's equal protection provision is coextensive with the equal protection provision of the United States Constitution. *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp*, 486 Mich 311, 318; 783 NW2d 695 (2010). "The Equal Protection Clause requires that all persons similarly situated be treated alike under the law." *Id.* When reviewing government action "challenged as denying equal protection, the threshold inquiry is whether plaintiff was treated differently from a similarly situated entity." *Id.*

Smith compares herself to Michigan First and argues that because the trial court stated that res judicata would be applied against her on her counter-complaint if she lost Michigan First's defamation complaint, res judicata should be applied against Michigan First on Smith's counter-complaint because the defamation complaint was involuntarily dismissed. Res judicata or collateral estoppel "bars a subsequent action between the same parties when the evidence or essential facts are identical." *Dart v Dart*, 460 Mich 573, 586; 597 NW2d 82 (1999). Smith asserts that the elements of res judicata are satisfied here because (1) Michigan First's defamation complaint in Oakland County was decided on the merits; (2) the issues raised in Smith's counter-complaint were resolved in the Oakland County action; and (3) both actions involved the same parties or their privies. *Id.* Smith's argument must fail because this Court reversed and remanded the trial court's involuntary dismissal of Michigan First's defamation complaint on June 21, 2011. See *Mich First Credit Union v Smith*, unpublished opinion per curiam of the Court of Appeals, issued June 21, 2011 (Docket No. 296670). Consequently, there

¹ Smith did file a document entitled joint final pretrial order, in which she refused to participate in any pretrial orders because she did not believe that there were any issues of fact to be litigated in her counter-complaint.

had not been a final decision on the merits. Rather, Michigan First's defamation complaint in Oakland Circuit was still pending at the time of the Wayne Circuit decision.

Regardless, even when Michigan First's defamation complaint was involuntarily dismissed, the issue of conversion within Smith's counter-complaint was not resolved by the involuntary dismissal. For collateral estoppel to apply and preclude relitigation of an issue in a subsequent and different cause of action between the same parties or their privies, the prior action must culminate in a valid final judgment and the issue must have been actually and necessarily litigated in that action. *Ditmore v Michalik*, 244 Mich App 569, 577; 625 NW2d 462 (2001). The ultimate issue to be decided must be identical and not merely similar to that involved in the first action. *Eaton Co Rd Comm'rs v Schultz*, 205 Mich App 371, 376; 521 NW2d 847 (1994). To be actually litigated, a question must be put into issue by the pleadings, submitted to the trier of fact, and determined by the trier. *VanDeventer v Mich Nat'l Bank*, 172 Mich App 456, 463; 432 NW2d 338 (1988). Furthermore, the parties must have had a full and fair opportunity to litigate the issue in the first action. *Knoblauch v Kenyon*, 163 Mich App 712, 716; 415 NW2d 286 (1987). When it involuntarily dismissed Michigan First's defamation complaint, the trial court stated:

Moreover, the Plaintiff [Michigan First] can have its day in court with regard to the merits of the claim in Wayne County. The Wayne County Circuit Court judge, in the transcript says, if the Oakland County case gets reversed, my case should be revived. That's where the merits of the claim should be decided. That's where the claim was first filed in connection with whether or not the predicate for slander has merit.

* * *

As I indicated previously, the Plaintiffs [Michigan First] have conceded they cannot prevail in this matter if it loses in Wayne County Circuit Court. The response to the order to show cause specifically conceded the counter[-]complaint was filed at the time this case was filed and that the counter[-]complaint, as attached to the Plaintiff's response, clearly alleges Michigan First converted \$40,000 and asked for treble damages for the same. The truth of those allegations form the predicate of this case.

* * *

And, again, the Plaintiff [Michigan First] will still have its day in court on the allegation regarding its conversion of funds. It will just have to be in Wayne County.

Upon the parties returning to Wayne County Circuit Court, the trial court recognized that the involuntary dismissal of Michigan First's defamation complaint did not resolve the issue of conversion and properly denied Smith's motion for summary disposition:

After a review of the order of Judge Warren, we see that the court in Oakland granted summary disposition pursuant to [MCR] 2.11(6)(C3) [sic]. Due to the

pending case here in Wayne County, and also involuntarily dismissed this case, according to the transcript, pursuant to [MCR] 2.514(B)(1).

The dismissal was an adjudication on the merits according to subsection 3 of that same court rule.

Now while it is deceptively appealing to apply res judicata and find that since this was an adjudication on the merits, defendant Smith's affirmative defense of truth to the plaintiff's allegations of defamation was resolved in her favor, this we won't do. The issue regarding the conversion of the fund is still in play for purposes of our trial and in addition to those issues regarding the vehicle.

Because the involuntary dismissal is deemed an adjudication on the merits, the Oakland defamation case is forever barred.

* * *

So in terms of the motions, the summary disposition motions, I guess granted in part, denied in part to the extent that the defamation case will not be a part of it.

Consequently, the trial court treated both parties alike by correctly applying the law to the facts of the case when it declined to apply res judicata. See *Great Lakes Society v Georgetown Twp*, 281 Mich App 396, 427; 761 NW2d 371 (2008) (Equal protection seeks to ensure "that all persons similarly situated...be treated alike.") (citation and quotation marks omitted).

Regarding the due process claim, to begin, we note that while Smith asserts a due process violation within her statement of questions presented, she has abandoned this issue because she failed to brief the merits of the argument or cite to any supporting legal authority for her position within the argument section of her brief. *DeGeorge v Warheit*, 276 Mich App 587, 600-601; 741 NW2d 384 (2007) (an issue is abandoned where the party fails to brief the merits her argument); *Schellenberg v Rochester Elks*, 228 Mich App 20, 49; 577 NW2d 163 (1998) (the failure to cite to supporting legal authority results in abandonment of the issue). It is not enough for a party to simply assert an error and then leave it up to this Court to discover and rationalize the basis for their claims, elaborate and unravel their arguments for them, and then search for authority to sustain or reject their position. *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002). Nevertheless, we will review this unpreserved issue. *Van Buren Twp v Garter Belt, Inc*, 258 Mich App 594, 632; 673 NW2d 111 (2003) (this Court has discretion to consider an issue in a nonconforming brief when it is a question of law and the record has sufficient facts present).

The Michigan and federal constitutions guarantee that no person shall be deprived of life, liberty, or property without due process of law. US Const, Am XIV; Const 1963, art 1, § 17. Due process enforces the rights enumerated in the Bill of Rights and includes both substantive and procedural due process. *Kampf v Kampf*, 237 Mich App 377, 381-382; 603 NW2d 295 (1999). Procedural due process serves as a limitation on government action and requires the government to institute safeguards in proceedings that affect those rights protected by due process, including life, liberty, or property. *Id.* at 382. In civil cases, due process generally requires notice of the nature of the proceedings, a meaningful time and manner to be heard, and

an impartial decision maker. *Cummings v Wayne Co*, 210 Mich App 249, 253; 533 NW2d 13 (1995). We find no due process violation in the trial court's denial of Smith's motion for summary disposition on her counter-complaint because when Smith filed her motion, she received notice of the hearing, and she argued her position before the trial court rendered its decision.

In addition, Smith asserts that the trial court denied her both due process and equal protection under the law when it: misquoted the Michigan court rule Judge Warren used to involuntarily dismiss Michigan First's defamation complaint, refused to review the lower court file from 36th District Court, dismissed Smith's counter-complaint with prejudice, and failed to recuse itself from the case. We will consider each of Smith's unpreserved constitutional issues for outcome determinative plain error. *Consumer Energy*, 278 Mich App at 568.

First, whether or not Smith is correct that the trial court's May 17, 2010, opinion and order incorrectly cited the court rules used by Judge Warren to involuntarily dismiss Michigan First's defamation complaint, neither Judge Murphy nor Judge Hathaway treated the parties differently in refusing to apply res judicata where the conversion issue in Smith's counter-complaint had not been previously decided. Thus, Smith's right to the equal protection of the laws was not violated. Likewise, due process was not violated because Smith had notice and a meaningful opportunity to be heard before the trial court rendered its decision.

Second, even assuming that the trial court refused to review the lower court file from 36th District Court before issuing its May 17, 2010, ruling, Smith's rights to equal protection and due process were not violated. Smith's equal protection right was not violated because the trial court did not treat Smith differently from Michigan First when it ordered Michigan First to produce its records. The trial court's order required both parties to comply with previous rulings from the Wayne County Circuit Court. Likewise, there was no due process violation because Smith received notice and had a meaningful opportunity to be heard at the May 7, 2010, motion hearing before the trial court ordered Michigan First to produce its records in the May 17, 2010, order.

Third, Smith contends that equal protection and due process were violated when the trial court granted Michigan First's motion to dismiss Smith's counter-complaint with prejudice. The trial court did not violate equal protection when it granted Michigan First's motion for dismissal because it did not treat Smith differently from Michigan First when it ruled on the motion. The trial court gave Smith months to comply with its final pretrial orders and to submit her witness and exhibit lists; however, Smith refused to comply with the trial court's orders because she did not believe that she should have to litigate her counter-complaint.

Regarding due process, Smith alleges that on September 14, 2010, one day before the hearing, she received a call from the trial court's legal secretary informing her that the trial court had a mandatory meeting on September 15, 2010, and it had to adjourn the 9:00 a.m. hearing. Smith provides no proof that the hearing was adjourned and the register of actions does not reflect that the September 15, 2010, hearing was ever adjourned. Moreover, although the record does reflect that the trial court requested that the September 15, 2010, hearing be moved from 9:00 a.m. to 11:00 a.m., due process was not violated because the hearing time was not changed

once Smith objected, Smith received notice prior to the hearing, and she had a meaningful opportunity to be heard.

Finally, Smith asserts that equal protection and due process were violated when the trial court denied Smith's motion to disqualify itself because the trial court was biased and prejudiced. Smith argued that the trial court's rulings against Smith highlighted the trial court's bias and prejudice. In denying Smith's motion to disqualify, the trial court stated:

With respect to the recusal, the Court is satisfied that recusal is an extreme circumstance. And it's not to be used when a party is unhappy with a May 17th, 2010 order.

Again, the proper procedure is to appeal it. If you choose to recognize your first amendment right, you probably came to the best judge in the courthouse, because there is know [sic] one that loves the constitution and respects it more than this Court. And if you think that by exercising your first amendment right causes a personal abuse or criticism, then you will use that method every time you're not happy with the Judge. But it's a right that you're entitled to, a right that I will respect, but it's not in my personal capacity that you're picketing. It's not my personal – you don't know me. You're upset with the rulings. It's my professional rulings. That does not amount to a personal abuse or criticism. It's a professional criticism, and you're entitled to it. But that does not come under the case that you're citing. It has to be personal criticisms.

So the Court is satisfied, that's not grounds to recuse me.

Finally, I have no judge bias. I don't have a dog in this race. If I had an actual bias, it would have to be something outside this courtroom. You're upset with the ruling. That's okay. The Court of Appeals is down in the GM building across from the Fisher building. And they're there every day.

So, the Court is going to respectfully deny the motion to recuse me.

The trial court's denial of Smith's motion to disqualify did not violate equal protection because Smith was not treated differently from Michigan First when the trial court ruled on the motion. As noted by the trial court, the mere fact that Smith disliked the outcome of the trial court's ruling is not evidence of personal bias or actual prejudice by the trial court. *Cain v Dep't of Corrections*, 451 Mich 470, 495-496; 548 NW2d 210 (1996) (an unfavorable ruling alone does not demonstrate actual bias or prejudice). Likewise, due process was not violated because Smith had notice and a meaningful opportunity to be heard before the trial court denied the motion.

B. MOTION TO DISQUALIFY

Smith contends that Wayne Circuit Court Chief Judge Virgil C. Smith abused his discretion when he affirmed the trial court's denial of Smith's motion to disqualify Judge Hathaway. We review a trial court's factual findings regarding a motion for disqualification for an abuse of discretion and its application of the facts to the law de novo. *In re Contempt of*

Henry, 282 Mich App 656, 679; 765 NW2d 44 (2009). “An abuse of discretion occurs when the trial court’s decision is outside the range of reasonable and principled outcomes.” *Moore v Secura Ins*, 482 Mich 507, 516; 759 NW2d 833 (2008).

“A judge is disqualified when he [or she] cannot hear a case impartially.” *Garter Belt*, 258 Mich App at 598. The party challenging the judge’s impartiality ““must overcome a heavy presumption of judicial impartiality.”” *Id.*, quoting *Cain*, 451 Mich at 497. In general, the challenger must prove that the judge harbors an actual bias or prejudice for or against a party or attorney that is both personal and extrajudicial. *Id.*, citing *Armstrong v Ypsilanti Charter Twp*, 248 Mich App 573, 597; 640 NW2d 321 (2001); MCR 2.003(C)(1).

Smith argues that the chief judge abused his discretion in ruling on her motion to disqualify because he previously indicated that he would have to recuse himself from ruling on the motion to disqualify. Smith and the chief judge engaged in the following discussion:

The Court: Ma’am, you filed a lawsuit against me, also?

[Ms. Smith]: Only – yes, Your Honor, based on the fact that Michigan – based on the fact that – how did Judge Murphy – Judge Murphy just up and runs because he said that – something about an altercation – no, not an altercation. Something about his court recorder [sic] and I had a heated disagreement. That’s because she produced a transcript that she made three corrections with.

The Court: Well – well, ma’am, I’m – I’m just trying to get to the heart of your argument. And it – it seems that you – you have issues that – that are important

[Ms. Smith]: Yes, Your Honor.

The Court: And it seems that – that may not have always gotten the best actions by the court. But – but the remedy that you seek today to recuse Judge Hathaway is more based on your – your feelings that she is ruling incorrectly.

[Ms. Smith]: Well, that is true to that extent, Your Honor.

The Court: And – and it doesn’t really go to her – her bias on behalf of you as – as an individual.

[Ms. Smith]: If I just may state for the record under People versus -

The Court: And – and this is also complicated because you say that you are also suing me. So I don’t know whether I should recuse myself because you’re suing me.

[Ms. Smith]: Well, yes, Your Honor, I asked for the whole bench to be rescued, Your Honor.

The Court: Okay, well -

[Ms. Smith]: Yes, if you'll see my motion is titled that, Judge Hathaway and Judge – I mean, and the entire bench. I don't – I don't have anything personal against you, Your Honor -

The Court: All right.

[Ms. Smith]: Really, I don't. I don't even know you. This is the first time – second time I've ever seen you so it's not something personal. It's only that I may acquire justice, Your Honor.

The Court: All right. Well – and – and I'm interested in you acquiring justice so I – I – I'm inclined to want to give you a ruling but since you've included me in – in your lawsuit, I think you – you put me in a position where I have to recuse myself and – and I – I believe we need to refer you to – to a jurisdiction outside of the Wayne Circuit so you can have an independent jurist make determinations as to – to – to the behaviors of judges in this particular court.

I – I also think that you probably should – should hire a good attorney to help you in – in your – in your battle because it seems that this is a – this is – obviously this – this battle is very close to you. And it's kind of complicated because you're operating in courts in both the Oakland Circuit Court and the Wayne County Circuit Court. And now you've got a lawsuit against myself and other judges in the Wayne County Circuit Court.

So on that basis, I'm – I'm not going to issue a ruling regarding your – your- your motion to disqualify Judge Hathaway.

And I will recuse myself based on the fact that I am a party defendant to a lawsuit that you have filed against me. I -

* * *

The Court: I – I note for the record that the – that the lawsuit that you filed against Judge Hathaway, Judge Murphy and myself, is – is case number 10-006147 CZ. Where has that lawsuit been assigned to?

[Ms. Smith]: That was assigned – that was assigned to Judge Colombo. And Judge Colombo dismissed it on the basis of sovereign absolute immunity, Your Honor.

The Court: So – so this lawsuit has been dismissed then?

[Ms. Smith]: Yes, sir.

The Court: So there is – is no existing lawsuit against myself?

[Ms. Smith]: No, sir.

* * *

The Court: All right. Well, then I will turn down your motion to recuse Judge Hathaway.

[Ms. Smith]: Okay.

The Court: Because I feel that you are disgruntled with her rulings. And the disqualification of a judge specifically goes to objective and reasonable perception that there is actual bias on behalf of the Judge. So I don't see that based on the argument that you made in front of me. I'm going to deny your motion to recuse Judge Hathaway. And that will at least allow you to pursue whatever legal appeals that are open to you on that basis. [Emphasis added.]

The chief judge did not abuse his discretion in ruling on Smith's motion to disqualify Judge Hathaway once Smith herself made it clear to the chief judge that he was not a party to any litigation involving Smith. Moreover, the chief judge did not abuse his discretion in denying Smith's motion to disqualify Judge Hathaway because Smith failed to produce evidence of actual bias or prejudice. Smith seems to conclude that a ruling against her position is evidence of bias. However, as we previously noted, an unfavorable ruling is not evidence of personal bias or actual prejudice by the trial court. *Cain*, 451 Mich at 495-496.

Affirmed.

Michigan First may tax costs, having prevailed in full. MCR 7.219(A).

/s/ Christopher M. Murray

/s/ Michael J. Talbot

/s/ Deborah A. Servitto