STATE OF MICHIGAN

COURT OF APPEALS

MITAN PROPERTIES, VI, KENNETH MITAN, and KEITH MITAN,

Plaintiffs/Counterdefendants-Appellants,

v

FRANDORSON PROPERTIES, FRANCIS JEROME CORR, and THOMAS P. CORR,

Defendants/Counterplaintiffs-Appellees.

UNPUBLISHED
July 3, 2003

No. 234125
Ingham Circuit Court
LC No. 94-077994-CZ

Before: Whitbeck, C.J., and White and Donofrio, JJ.

PER CURIAM.

Plaintiffs Mitan Properties, VI, Kenneth Mitan and Keith Mitan (collectively "MPC" or plaintiff), appeal as of right the circuit court order awarding defendants Frandorson Properties, Francis Corr and Thomas Corr (collectively "FP" or defendant) attorney fees and costs totaling $316,827.06 on its counterclaims, pursuant to the slander of title statute, MCL 565.108. We affirm.

I

In 1993, plaintiff Mitan Properties, VI, entered into an agreement to purchase three shopping centers from defendant Frandorson Properties for approximately $22 million dollars. After the deal went sour, Mitan Properties, VI, filed the instant suit in July 1994 against FP and its partners, Francis and Thomas Corr, alleging breach of contract and constructive trust[1] (Case I). FP counterclaimed, alleging slander of title, tortious interference with advantageous business expectancy, and seeking to quiet title. Judge Carolyn Stell was assigned Case I.

[1] The complaint alleged that Mitan Properties, VI, had obtained an interest in the properties by virtue of the purchase agreement, and sought that a constructive trust be imposed based on FP's alleged constructive fraud in breaching the agreement.

Soon after Mitan Properties, VI, filed Case I, FP filed a related suit in August 1994 (Case II) against Mitan Properties, VI, Keith and Kenneth Mitan (MPC), and various others not parties to Case I,[2] alleging slander of title, tortious interference with a business or contractual relationship, and conspiracy to commit slander of title or tortious interference with a business or contractual relationship. *Frandorson Properties v Mitan et al.*, Ingham Circuit Court No. 94-78210-CH. Case II was also assigned to Judge Stell, and it is intertwined with Case I, having arisen from the same transaction or occurrences.

In January 1995, the parties stipulated to entry of a consent judgment in Case II as to damages only in the amount of $25,000. In Case II, the circuit court granted summary disposition in FP's favor and, separately, found Keith and Kenneth Mitan guilty of criminal contempt. The Mitans appealed and this Court affirmed both rulings as to the MPC parties named in the instant appeal.[3]

In the instant appeal from Case I, MPC challenges the validity of the final judgment awarding FP attorney fees and costs totaling $316,827.06 under the slander of title statute, MCL 565.108.[4] Judge Stell's opinion and order was prepared after she left the bench in December 2000, and while she was under temporary appointment by the State Court Administrator Office (SCAO) to complete several cases. MPC argues that Judge Stell was without authority to enter judgment because she no longer was an elected judge, that MPC was improperly denied an evidentiary hearing regarding the reasonableness of attorney fees defendants requested, that the attorney fees awarded were erroneously calculated on several grounds, and that a default judgment and summary disposition had been improperly entered.

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[2] The additional defendants were Teresa Mitan, mother of Keith and Kenneth Mitan, Mitan Properties V, and Mitan Doublewood Ancillary Control Section, Inc.

[3] Both appeals were resolved subsequent to MPC's filing the instant appeal in December 2001. See *Frandorson Properties v Mitan*, unpublished opinion per curiam of the Court of Appeals (Docket No. 220675, issued 1/4/02) (affirming circuit court's grant of summary disposition to FP as to all Mitan defendants except Teresa Mitan); and *In re Contempt of Keith Mitan and Kenneth Mitan*, unpublished opinion per curiam of the Court of Appeals (Docket Nos. 222230 & 222231, issued 9/17/02) (affirming circuit court's finding Mitans guilty of criminal contempt).

[4] MCL 565.108 provides:

> No person shall use the privilege of filing notices hereunder for the purpose of slandering the title to land, and in any action brought for the purpose of quieting title to land, if the court shall find that any person has filed a claim for that reason only, he shall award the plaintiff all the costs of such action, including such attorney fees as the court may allow to the plaintiff, and in addition, shall decree that the defendant asserting such claim shall pay to plaintiff all damages that plaintiff may have sustained as the result of such notice of claim having been so filed for record.

Underlying Facts and Procedural History

The underlying facts are quoted from *Frandorson Properties v Mitan* (*Frandorson I*), unpublished opinion per curiam of the Court of Appeals (Docket No. 182423, issued 12/13/96), although the parties' designations are reversed.

> Defendant Mitan Properties Company, VI ("Mitan VI") is a partnership composed of defendants Keith J. Mitan and Kenneth Mitan. On August 7, 1993, Mitan VI entered into a purchase agreement with plaintiff, Frandorson Properties, whereby Mitan VI agreed to purchase from plaintiff three shopping centers for $21,976,832.10. Plaintiff alleges that Mitan VI subsequently defaulted on the purchase agreement by failing to tender various deposits required by the agreement and by failing to obtain a required financing commitment, thereby rendering the agreement null and void under its terms.
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> On April 21, 1994, Mitan VI tendered to plaintiff a second offer to purchase the three shopping centers, this time for a price of $16,500,000. Plaintiff did not accept this offer. Instead, plaintiff entered into an agreement with Chemical Bank of New York, whereby plaintiff agreed to convey its interest in the three shopping centers to Chemical Bank in lieu of foreclosure. A closing date of July 20, 1994, was set.
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> On July 15, 1994, five days before the scheduled closing with Chemical Bank, Mitan VI filed a complaint in the Ingham Circuit Court, alleging an interest in the subject shopping centers pursuant to the August 7, 1993, purchase agreement ("Case I" [case No. 94-077994-CZ]). At the same time, Mitan VI recorded a lis pendens in both Ingham County and Clinton County for the purpose of notifying interested parties that an action was pending seeking "the transfer and conveyance to [Mitan VI] of title to the propert[ies]" in question. The case was assigned to Circuit Judge Carolyn Stell. On July 18, 1994, plaintiff filed its answer, together with a counter-complaint against Mitan VI, and Keith and Kenneth Mitan, alleging slander of title and tortious interference with a business or contractual relationship. Plaintiff also filed a motion for bond with surety as security. An expedited hearing was conducted on July 19, 1994, by Circuit Judge James Giddings, acting in place of Judge Stell, who was unavailable. Following oral arguments, Judge Giddings ordered Mitan VI to post a security bond with surety in the amount of $38.4 million by 1:00 p.m. on July 21, 1994. Judge Giddings also ordered that if the security bond was not posted by the date and time required, Mitan VI's complaint would be dismissed and Mitan would be enjoined from refiling any action or related action for a period of forty-five days. Judge Giddings gave the following reasons in support of his decision to issue the order: (1) that submitted documentation "belies any assertion that [Mitan VI] can rightfully claim that there is a lawful basis to proceed"; (2) Mitan VI's failure to demonstrate "that they have any lawful claim whatsoever arising out of the [August 7, 1993, purchase agreement]"; (3) "inconsistencies demonstrated by the conduct of [Mitan VI and its agents] in this matter"; and (4) that interference with the pending sale of the properties would have "a significant compelling effect on the financial future of [Plaintiff]."

Mitan VI did not post a security bond as ordered. Consequently, on July 21, 1994, Judge Giddings issued an order dismissing Mitan VI's complaint and canceling all the lis pendens recorded by Mitan VI or its agents with respect to the properties in question. Additionally, the court enjoined Mitan VI from refiling its action or a related action for forty-five days. In the meantime, Mitan VI filed an appeal with this Court from the July 19 order requiring it to post a security bond. At the same time, it recorded a second set of lis pendens, this time using the caption of this Court on the lis pendens.

On the following day, July 22, 1994, plaintiff [Frandorson] filed a motion for bond, injunctive relief and contempt in the trial court and again obtained an expedited hearing. Judge Giddings thereupon issued a second order canceling the second set of lis pendens and enjoining Mitan VI from recording, "anywhere in the world," any further lis pendens pertaining to the subject properties. The order also enjoined Mitan VI and its agents "from initiating any new actions pertaining to the subject matter of the case in any court of general jurisdiction for forty-five days from July 21, 1994." Additionally, the order provided that a contempt hearing would be held at a future date and the matter of sanctions for the filing of the second set of lis pendens would be addressed at the contempt hearing.

Two days later, on July 24, 1994, Mitan VI assigned its alleged interest in the shopping centers to Mitan Properties Company V ("Mitan V"), which is a Michigan limited partnership composed of Keith and Kenneth Mitan as the limited partners and Mitan Doublewood Ancillary Control Section, Inc. ("Mitan, Inc.") as the general partner. On the following day, Monday, July 25, 1994, Mitan V recorded in both Ingham County and Clinton County copies of: (1) the August 7, 1993, purchase agreement between plaintiff and Mitan VI; (2) the above-described assignment from Mitan VI to Mitan V; and (3) an affidavit from Teresa Mitan, an officer of Mitan Inc., attesting to Mitan V's alleged interest in the shopping centers pursuant to the foregoing assignment. These documents, although not containing the label "lis pendens," nonetheless had the same effect of clouding plaintiff's title to the properties in question, thereby impeding plaintiff from consummating its pending transaction with Chemical Bank.

Plaintiff [Frandorson] responded to this latest course of events by filing a motion for bond, injunctive relief, contempt and cancellation of the third set of title-clouding documents. Judge Stell, who was now available, scheduled a hearing for August 1, 1994, at 4:00 p.m. on plaintiff's [Frandorson's] motion.

On August 1, 1994, before the scheduled hearing in Case I, plaintiff [Frandorson] commenced the present action in the Ingham Circuit Court against Mitan VI, Mitan V, Mitan, Inc., Keith J. Mitan, Kenneth Mitan and Teresa Mitan, alleging slander of title, tortious interference with a business or contractual relationship, and conspiracy to commit slander of title or tortious interference with a business or contractual relationship ("Case II" [Case No. 94-78210-CH]). The second action was commenced because, following the assignment of interest from Mitan VI to Mitan V, there were now several new participants involved in the matter who were not parties to the action in Case I. The complaint in Case II alleged that

the action arose out of the same transaction as that involved in Case I and, consequently, Case II was assigned to Judge Stell. Plaintiff's [Frandorson's] complaint requested an award of compensatory and exemplary damages, an award of costs and attorney fees under MCL 565.108. . . , an order canceling the latest set of title-clouding documents, and an order adjudging that the Mitan defendants had no right, title or interest in the properties in question.

Just hours before the scheduled hearing in Case I, Mitan VI caused Case I to be removed to federal court. The parties subsequently appeared for the scheduled hearing, but Judge Stell ruled that she no longer had jurisdiction over that case in light of its removal to federal court. However, Judge Stell agreed to entertain a motion for bond or other relief in Case II. Defendant Keith Mitan, an attorney, represented the defendants. Plaintiff's counsel apprised Judge Stell of the previously described history in the matter and informed her that plaintiff was unable to consummate its pending real estate transaction with Chemical Bank because [of] the various title-clouding documents that had been recorded by defendants. Following oral arguments, Judge Stell announced the following decision from the bench:

> "The argument that an affidavit of interest, or these latest filings [by Mitan] are not the equivalent of a lis pendens is completely without merit[.]
>
> * * *
>
> The Court grants bond in the amount of $38.4 million which is to be filed with the Clerk of this Court no later than 12:00 noon, Wednesday, August 3, 1994.
>
> Since this amount has been under discussion since a week ago Tuesday, I think that there has been ample notice.
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> * * *
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> The sanction, if the bond is not filed, is that no pleadings may be filed by Defendant Mitan until the bond is filed.
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> * * *
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> The Court dismisses any affidavit of interest, any lis pendens or any other document[s] that are currently clouding title to these subject properties.
>
> The Court enjoins any person or legal entity from filing any document that clouds title to the subject properties."

Plaintiff's attorney was directed to prepare an order consistent with Judge Stell's ruling. Judge Stell ordered the parties to appear at 2:00 p.m. the following day, i.e., August 2, 1994, for entry of the order.

As it turned out, Judge Stell was unable to issue an order as contemplated on August 2, 1994, because, shortly before the scheduled hearing, defendants [Mitans] caused Case II to be removed to federal court. On August 4, 1994, however, on plaintiff's [Frandorson's] motion, the federal court remanded Cases I and II to state court. In doing so, the federal court imposed sanctions against the Mitan litigants on the basis that removal "was instituted for the wholly improper purpose of delaying and impeding both the state court in conducting its business as well as Frandorson in conveying the title of the real property to Chemical Bank."

On the following day, August 5, 1994, Judge Stell, having regained jurisdiction over Case II, entered an order providing: (1) that the Mitan defendants were required to post a $38.4 million bond with surety as security for damages and costs, including attorney fees, for which they might be found liable for recording the various title-clouding documents; (2) that defendants were not permitted to file any pleadings "until said bond is filed or until further Order of th[e] Court"; (3) that if defendants failed to post the required surety bond, plaintiff could file a motion for summary disposition pursuant to MCR 2.116(C)(9); (4) that defendants and their agents were enjoined from filing or recording any further documents which cloud or may tend to cloud the title to the properties in question; (5) that all title-clouding documents previously filed were to be canceled and dissolved upon the recording of a certified copy of the court's order; and (6) that a contempt hearing would be scheduled for a future date.

On August 8, 1994, the law firm of Hardig & Parsons entered an appearance in Case II on behalf of each of the Mitan defendants. The following day, August 9, 1994, the Mitan defendants, through their newly retained counsel, once again removed Cases I and II to federal court. The federal court, once again, remanded the cases to the Ingham Circuit Court.

On August 26, 1994, without having posted any security bond as ordered, the Mitan defendants filed an answer to plaintiff's [Frandorson's] complaint. The answer was signed by defendant Keith Mitan, as attorney for all defendants. The answer was filed against the recommendation of Hardig & Parsons, which subsequently withdrew as legal counsel for the Mitan defendants.

On October 7, 1994, plaintiff moved to strike defendants' answer and sought summary disposition under MCR 2.116(C)(9). The motion alleged that defendants' answer violated the court's August 5, 1994, order, because defendants had not posted a security bond as required by the order. The motion further alleged that, due to defendants' noncompliance with the August 5, 1994, order, defendants could not defend plaintiff's action, thereby entitling plaintiff to summary disposition under MCR 2.116(C)(9). Defendants [Mitans], through newly retained counsel, responded to the motion by attacking Judge Stell's

August 5, 1994, order, arguing that it was unconstitutional and invalid. Defendants also informed Judge Stell that plaintiff had now consummated its real estate transaction with Chemical Bank and, therefore, a bond was no longer necessary.

In a decision from the bench, Judge Stell granted plaintiff's motion, stating:

> "Well, I believe that most of the arguments that have been made were made at the time of the original motion, and I reject those arguments at this time.
>
> It's certainly possible that I am wrong, and that one cannot impose a bond as a requirement for a Defendant to file pleadings; but I did address that issue previously. And I still think my ruling was correct.
>
> It does not at all surprise me that Defendant [Mitan] does not agree, and I recognize that Mr. Knowlton is not responsible for the things that occurred in this case before he took over.
>
> However, I do not believe that a party can, by consistently changing lawyers, evade the responsibility of its decisions.
>
> At the time that I signed that order, Defendants had at least two options. One was a Motion to Reconsider, and the second—which has to be filed within 14 days—the second was to go to the Court of Appeals and say, ['']we need immediate relief. This is an absurd ruling, and we ask for immediate consideration.['']
>
> To wait and do nothing, and then say, ['']oh, by the way, we think this isn't fair, just the way we thought it wasn't fair or constitutional initially,['] seems to me to be very inappropriate way to be proceeding. And I believe your clients have placed you in an awkward position, Mr. Knowlton.
>
> The Court denied the motion—or grants the Motion to Strike Answers and Summary Disposition, pursuant to MCR 2.116(C)(9)."

An order incorporating Judge Stell's decision was entered on November 28, 1994. Thereafter, on January 10, 1995, the parties stipulated to entry of a consent judgment as to damages only in the amount of $25,000. [*Frandorson I, supra,* slip op at 1-6 (footnotes omitted).]

This Court affirmed the circuit court's decision requiring a security bond for continuance of the title-clouding documents, but reversed on due process grounds the court's striking of the Mitans' answer and grant of summary disposition in Frandorson's favor, and remanded for further proceedings. *Frandorson I, supra,* slip op at 8-9. On remand, the circuit court granted summary

disposition on all counts under MCR 2.116(C)(10), and on the alternative ground of res judicata, MCR 2.116(C)(7).[5] The circuit court also found the Mitans guilty of criminal contempt.[6]

The Mitans appealed from that portion of the circuit court's order granting Frandorson summary disposition. In *Frandorson II*, this Court affirmed the grant of summary disposition on all claims except for the conspiracy claim against Teresa Mitan, mother of the Mitans. The Supreme Court denied the Mitans' application for leave to appeal *Frandorson II*. 467 Mich 864 (2002). This Court also affirmed the circuit court's finding Keith and Kenneth Mitan in criminal contempt. *In re Contempt of Keith Mitan and Kenneth Mitan, supra*. The Supreme Court denied the Mitans' application for leave to appeal by order dated May 30, 2003. ___ Mich ___ (2003).

II

In January 2001, after Judge Stell had left office, the SCAO assigned her to complete work on four cases, including the instant case. She did so, and entered her opinion and order in this case on February 18, 2001. Judge Giddings signed and entered the final judgment. Plaintiff argues that the SCAO's assignment of Judge Stell to sit in the county where she had been rejected in the November 2000 election[7] nullified the vote of the people, and countermanded the constitutional requirement that judges be elected, Const 1963, art 6, § 12. We disagree.

This issue presents a question of law this Court reviews de novo. *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000). Const 1963, art VI, § 23, provides in pertinent part:

> The supreme court may authorize persons who have been elected and served as judges to perform judicial duties for limited periods or specific assignments.

Section 226 of the Revised Judicature Act, MCL 600.226, provides in pertinent part:

> (1) The supreme court may authorize *any retired judge from any court* to perform judicial duties *in any court in the state*. The authorization may be for a period or periods as the supreme court shall designate with the consent of the retired judge. [Emphasis added.]

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[5] See *Frandorson Properties v Mitan et al, supra,* slip op at 6.

[6] See *In re Contempt of Keith Mitan and Kenneth Mitan, supra,* slip op at 7.

[7] Judge Stell attempted to withdraw from the 2000 election, and brought suit in circuit court when the Secretary of State prevented her from doing so. The circuit court ruled in Judge Stell's favor, and this Court denied the Secretary of State's motion for peremptory reversal. However, the Supreme Court peremptorily reversed the circuit court's ruling, holding that under an intervening change in the law Judge Stell's withdrawal from the 2000 election was untimely. Judge Stell's name therefore remained on the ballot.

The State Court Administrative Office (SCAO) is an administrative arm of the Supreme Court and acts under the supervision and direction of the Supreme Court. See MCR 8.103.[8] The SCAO's "Judicial Assignment Guidelines," dated January 1998, state in the Introduction:

> These guidelines are for the use of judges, court personnel and the SCAO staff involved in the assignment process. They are subject to change or exception at the direction of the State Court Administrator. . . .

SCAO Guideline N, on which plaintiff MPC relies, states:

> N. Former Judges
>
> > 1. "Former Judge" means any judge, no longer holding office, who was elected and served as a judge. This includes, but is not limited to, judges receiving retirement benefits.
> >
> > 2. Former judges may be assigned judicial duties in any court in the State.
> >
> > 3. **A former judge who has been defeated will not be assigned to any court in the jurisdiction in which s/he was defeated**. Jurisdiction means the county or counties of a judicial circuit or probate court, and means the judicial district, including all election divisions thereof, of a district court. [Emphasis added.]

Under the Michigan Constitution, art VI, § 23, and under MCL 600.226, the Supreme Court has authority to assign former judges to temporary judicial assignments. MCL 600.226 specifies that the Supreme Court "may authorize *any retired judge from any court* to perform judicial duties *in any court in the state*." (Emphasis added.)

Plaintiff MPC's reliance on *Brockman v Brockman*, 113 Mich App 233; 317 NW2d 327 (1982), as supporting its position is misplaced. In *Brockman*, the parties stipulated that the *circuit court judge* appoint a retired judge to preside over their trial, and make factual findings

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[8] MCR 8.103 provides in part:

> The state court administrator, under the Supreme Court's supervision and direction, shall:
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> (1) supervise and examine the administrative methods and systems employed in the offices of the courts . . . and make recommendations to the Supreme Court for the improvement of the administration of the courts;
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> * * *
>
> (4) recommend to the Supreme Court the assignment of judges where courts are in need of assistance and carry out the direction of the Supreme Court as to the assignment of judges . . . .

and conclusions of law, and a trial was so held (emphasis added). The plaintiff appealed, challenging for the first time the circuit court's authority to make such an appointment. This Court considered the issue although it had not been raised below, and concluded that the circuit court was without such authority. In the process, the *Brockman* Court noted that it is the Supreme Court that has the authority to assign former judges to perform temporary judicial assignments:

> The Supreme Court is empowered by the Michigan Constitution to authorize persons who have been elected and have served as judges to perform judicial duties for limited periods or specific assignments. Const 1963, art 6, § 23. The Legislature has enacted certain statutes to allow the Court to implement that authority. MCL 600.226 . . . . There are no constitutional or statutory provisions giving a circuit court judge the power to appoint a retired judge or any other person to sit as a court in a civil action. In fact, the constitution denies such authority. Const 1963, art 6, § 27.[9] Thus, Judge Hausner was without any constitutional or statutory authority to appoint former Judge Sullivan to sit as the court and try this matter. [*Brockman, supra* at 327.]

Plaintiff MPC's reliance on Const 1963, art VI, §§ 11 and 12,[10] is also misplaced. Those provisions establish that the method of selecting judges is by election and not by appointment.

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[9] Art VI, § 27 provides:

> The supreme court, the court of appeals, the circuit court, or any justices or judges thereof, shall not exercise any power of appointment to public office except as provided in this constitution.

[10] Those provisions state:

> Sec. 11. The state shall be divided into judicial circuits along county lines in each of which there shall be elected one or more circuit judges as provided by law. Sessions of the circuit court shall be held at least four times in each year in every county organized for judicial purposes. Each circuit judge shall hold court in the county or counties within the circuit in which he is elected, and in other circuits as may be provided by rules of the supreme court. The number of judges may be changed and circuits may be created, altered and discontinued by law and the number of judges shall be changed and circuits shall be created, altered and discontinued on recommendation of the supreme court to reflect changes in judicial activity. No change in the number of judges or alteration or discontinuance of a circuit shall have the effect of removing a judge from office during his term. [Const 1963, art VI(11).]
>
> Sec. 12. Circuit judges shall be nominated and elected at non-partisan elections in the circuit in which they reside, and shall hold office for a term of six years and until their successors are elected and qualified. In circuits having more than one circuit judge their terms of office shall be arranged by law to provide that not all terms will expire at the same time. [Art VI(12).]

Article VI, § 23, however, specifically grants the Supreme Court authority, without limitation, to assign former judges judicial duties for limited periods.

As stated in the introduction to the SCAO's guidelines, the guidelines are "subject to change or exception at the direction of the State Court Administrator." Plaintiff MPC has presented no authority to support that a discretionary SCAO guideline can trump the constitutional and statutory authority of the Supreme Court to appoint former judges to temporary assignments in any court in the state. Nor has plaintiff presented any authority to support that this Court may hear challenges to SCAO temporary appointments, which, presumably, are challenges to the Supreme Court's authority. Additionally, we agree with defendant FP that given Judge Stell's familiarity with the case, having presided over it from July 1994 until she left the bench more than six years later, she was best equipped to complete the case, particularly under the circumstance that she had taken the damages ruling at issue here under advisement before leaving the bench. Plaintiff's claim fails.

III

MPC contends that the circuit court's refusal to hold an evidentiary hearing regarding the reasonableness of the attorney fees constitutes error requiring reversal. We disagree.

A

This Court reviews a trial court's award of attorney fees for an abuse of discretion. *In re Attorney Fees & Costs*, 233 Mich App 694, 704; 593 NW2d 589 (1999). In *Head v Phillips Camper Sales*, 234 Mich App 94, 113; 593 NW2d 595 (1999), the court awarded the plaintiff attorney fees under the Michigan Consumer Protection Act without holding an evidentiary hearing, and this Court affirmed:

> We likewise reject plaintiff's initial contention that the trial court erred in failing to hold an evidentiary hearing regarding the reasonableness of her [attorney] fee request. The trial court should normally hold an evidentiary hearing when the opposing party challenges the reasonableness of a fee request. *B & B Investment Group v Gitler*, 229 Mich App 1, 15-17; 581 NW2d 17 (1998); *Petterman v Haverhill Farms, Inc*, 125 Mich App 30, 33; 335 NW2d 710 (1983). Here, however, the trial court did not err in awarding fees without having held an evidentiary hearing because the parties created a sufficient record to review the issue, and the court fully explained the reasons for its decision. See *Giannetti Bros Constr Co v Pontiac*, 175 Mich App 442, 450; 438 NW2d 313 (1989).

In *Giannetti Bros Constr Co v Pontiac*, 175 Mich App 442, 450; 438 NW2d 313 (1989), the defendant challenged the trial court's award of expert witness fees as being too low, arguing that it had "no clue as to the basis on which the claimed expert witness fees were allowed or denied and that it was error for the trial court to refuse an evidentiary hearing on the issue." 175 Mich App at 449. This Court disagreed, noting:

> While it is true that the trial court did not expressly state which expert witness fees had been disallowed, we think it of some significance that the figure awarded

($10,844.27) was, apparently, precisely the figure proposed by plaintiff Giannetti in its brief to the trial court.

Pontiac bore the burden of proving its fees and costs. Giannetti challenged portions of the costs submitted. After considering the briefs of both parties, the trial court, in the exercise of its discretion, sided with Giannetti and disallowed the bulk of Pontiac's claimed expert witness fees. In view of the parties' briefing of the issue, the voluminous record before the trial court, and the trial court's familiarity with the circumstances of the case**,** we find no abuse of discretion in the trial court's limited award of expert witness fees nor in its having made the award without having held an evidentiary hearing on the matter. The issue of costs in this matter had been before the trial court off and on for nearly three years. The cost issues were extensively briefed by both parties. We do not view as unreasonable the trial court's unwillingness to needlessly drag this case out any longer. [*Giannetti, supra* at 449-450. Emphasis added.]

The *Giannetti* Court further noted:

We distinguish *Petterman* [*v Haverhill Farms, Inc*, 125 Mich App 30, 33; 335 NW2d 710 (1983)], wherein we remanded for an evidentiary hearing as to the reasonableness of the attorney fee sought since, in that case, the trial court had failed to give due consideration to the opposing party's challenge to the reasonableness of the figure. [175 Mich App at 450.]

On appeal, plaintiff MPC relies on *Wilson v General Motors Corp*, 183 Mich App 21; 454 NW2d 405 (1990), to support its position that the failure to hold an evidentiary hearing constitutes reversible error. The *Wilson* Court relied on *Petterman, supra*, when it stated that where the opposing party challenges the reasonableness of the fee requested, although a full blown trial is not necessary, an evidentiary hearing is. *Id.* at 42-43. *Petterman*, however, does not stand for the proposition that evidentiary hearings must always be granted. Rather, it states:

In the present case, the trial court considered none of [the *Wood v DAIIE*[11] factors] on the record. It made no findings of fact. Instead, it found the bill of costs to be "prima facie accurate." . . . .

The itemized bill in itself was not sufficient to establish the reasonableness of the fee, nor was the trial judge required to accept it on its face. . . . When plaintiff challenged the reasonableness of the fee requested, the trial court should have inquired into the services actually rendered by the attorney before approving the bill of costs. . . . Since plaintiff claimed that defendants' attorney fees were excessive in general and the trial court failed to actually consider the issue of reasonableness but instead found the bill acceptable on its face, the trial court abused its discretion. This case is therefore remanded to the trial court for an

[11] 413 Mich 573; 321 NW2d 653 (1982).

evidentiary hearing on the reasonableness of the fee requested by defendants' attorney. . . . [*Petterman*, *supra* at 30-31.]

B

In the instant case, a description of the proceedings and documentary record pertinent to attorney fees is set forth in the circuit court's opinion, to which plaintiff does not object:

> On May 8, 1996, a[n] . . . Order was entered, which granted Frandorson's Petition for an Award of Attorney Fees, Costs and Damages pursuant to MCL 565.108 in an amount to be determined by the Court.
>
> Frandorson submitted on or about May 29, 1996 a Supplemental Filing Regarding Petition for an Award of Damages, Costs and Attorney Fees Pursuant to MCL 565.108 . . . which included Exhibit A, an updated statement of attorney fees and costs, adding those incurred by Frandorson between February and April 1996. This was followed on or about June 25, 1996 by Frandorson's Motion for Summary Disposition as to the Amount of Its Award of Attorney Fees and Costs Pursuant to MCL 565.108. . . ., in which Frandorson claimed that despite repeated letters to Mitan's counsel requesting notice of the specific objections to the proposed attorney fees, none had been provided. Finally on or about July 11, 1996 Mitan filed Objections to Frandorson's Bills for Attorney Fees and Costs Submitted Pursuant to MCR [sic MCL] 565.108. . . and [t]his Court's May 8, 1996 Order (1996 Objections).
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> Mitan appealed the decision in Case II, and on December 13, 1996, the Court of Appeals affirmed in part, reversed in part and remanded the matter to this Court for further proceedings. The Court of Appeals decision in Case II effectively undermined the Order Granting Summary Disposition in Case I because that order was based on res judicata. As a result, no further action was taken to determine the appropriate amount of attorney fees.
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> On May 28, 1999, this Court issued another Opinion and Order in Case II, again granting summary disposition to Frandorson. Frandorson brought a new motion for summary disposition in Case I, and the Court adopted her opinion in Case II and again entered an Order Granting Summary Disposition in Case I on July 10, 1999.
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> On or about February 10, 2000 Frandorson filed the instant Motion. Mitan filed a generalized response on or about February 29, 2000 and later, on or about April 7, 2000 filed Counter-Defendants' Identification of Objections to the Reasonableness of Claimed Hours Billed by Frandorson's Counsel and Request for Evidentiary Hearing (Identification of Objections). The Identification of Objections incorporated by reference the 1996 Objections. A hearing was held on April 26, 2000 on Mitan's Request for Evidentiary Hearing. The Court denied the request, ordered both counsel to provide unredacted billings to each other by May 17, 2000, Mitan to file its objections and the reasons for them by June 14, 2000 and Frandorson to file its response to Mitan's objections by June 28, 2000. A

later stipulation and order of May 16, 2000 extend the deadline for exchanging the unredacted billings to May 22, 2000.

On June 14, 2000 Mitan filed its Further Objections to the Reasonableness of Claimed Hours Billed by Frandorson's Counsel (Further Objections), which incorporated by reference the 1996 Objections and the Identification of Objections. Frandorson filed a responsive pleading (Response) to the Further Objections on June 28, 2000.

In its Motion, Frandorson claimed $322,218.79 in attorney fees and costs through April 1996 and an additional $71,232.07 between May 1996 and December 1999 for a total of $393,450.86. Frandorson unilaterally agreed to reduce that amount by $28,456.32 (the total of sanctions imposed against Mitan by various other courts involved in this matter) and by $1,095.81 (the amount by which Frandorson's requested sanctions against Mitan were reduced in Federal court proceedings). After those deductions, the amount actually requested was $363,898.73.

In Frandorson's Response, it modified its earlier request to add the attorney fees and costs incurred between January 1, 2000 and April 30, 2000 ($32,081.32) and its estimated attorney fees and costs for May and June 2000 ($5,000) and to deduct $25,003.56 (the amount of damages in Case I) and $7,600 (twice the amount of fees inadvertently billed to this matter). Frandorson now seeks $394,051.97 in attorney fees and costs.

In its Further Objections, Mitan asked the Court to:

> (1) Deny Frandorson's Motion because Frandorson has failed to show that the requested fees were reasonably necessary, that they arouse [sic] out of Case I and that they were reasonably incurred.
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> * * *
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> (3) Permit Mitan to have an evidentiary hearing.
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> (4) Sharply reduce the amount of attorney fees because it was out of proportion to the damages allegedly claimed, if the Court proceeded with its consideration of the Motion without an evidentiary hearing.
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> * * *

In support of its request for an evidentiary hearing on this issue (a request which the Court has already denied), Mitan cites *Howard v Canteen Corp,* 192 Mich App 427, 437; 481 NW2d 718 (1992). *Howard* involved a challenge by the defendant to the appropriateness of the attorney fees awarded to the prevailing plaintiff in a gender discrimination suit. . . .

The Court of Appeals remanded *Howard* to the trial court for an evidentiary hearing regarding the reasonableness of fees, finding there was insufficient opportunity for defendant to challenge the specific hours or rates and that the trial court's findings were insufficient to satisfy the . . . requirement that the trial court make findings of fact. The trial court was directed to give consideration to the nonexclusive list of factors and guidelines in *Wood v DAIIE*, 413 Mich 573, 588; 321 NW2d 653 (1982), make a finding regarding the actual time spent on the case and determine a reasonable attorney fee. The Court of Appeals indicated that the trial court was not required to detail its findings regarding each factor.

The factual basis for the *Howard* decision is not present in this case. The plaintiff's attorney in *Howard* told the court that no contemporaneous billing records were kept because the firm did not usually bill on an hourly basis since it was a "plaintiffs' firm." The Court of Appeals noted:

> While such records are not required to be kept, in demanding a large sum of attorney fees the lack of contemporaneous time records leaves room for doubt regarding the reasonableness of the hours expended. Where the opposing party challenges the reasonableness of the requested fee, the trial court should hold an evidentiary hearing regarding the issue. If any of the underlying facts, such as the number of hours spent in preparation, are in dispute, the trial court should make findings of fact regarding the disputed issues. *Howard,* p 438.

Here, *not only were contemporaneous records kept, they were voluminous and they were provided to Mitan's counsel, who have had ample opportunity to examine them, as shown by the more than 1,000 objections filed*. In addition, the billings for the bulk of the claimed fees have been in Mitan's counsel's possession since May 1996—some three years and seven months before this Motion was filed.

Mitan also relies on *B & B Investment Group v Gitler*, 229 Mich App 1; 581 NW2d 17 (1998), in which defendants contested, *inter alia*, attorney fees awarded in a statutory slander of title action and attorney fees awarded in three contempt proceedings. The Court of Appeals upheld the amount of the attorney fees awarded in the slander of title action, but remanded for an evidentiary hearing with respect to the reasonableness of attorney fees awarded during the contempt proceedings.

The facts in *B & B Investment* are strikingly dissimilar to the facts in this case. The district court in *B & B Investment*, in the first contempt hearing, adopted plaintiff's counsel's oral representations as to the number of hours expended and the hourly rates for himself and an associate over defense counsel's objections. In the second contempt hearing, the court granted the requested attorney fees with no inquiry on the record into the reasonableness of the fee request, notwithstanding defense counsel's challenge. The court continued this pattern in the third

> contempt hearing by ordering the payment of additional attorney fees without any basis for that award being placed on the record.
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> With that factual basis, it is hardly surprising that the Court of Appeals noted "Under these circumstances, we remand for an evidentiary hearing to determine reasonable attorney fees." 229 Mich App 17. Contrast those circumstances to the facts in this case. *Mitan has availed itself of three separate opportunities to identify specific objections to the fees requested by Frandorson. It has also had access to the unredacted billings.*
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> The facts in this case are not analogous to the facts in *Howard* or *B & B.* [Emphasis added.]

Given the voluminous documentary record reviewed by the court, and the fact that the court made extensive factual findings, we conclude that the circuit court did not commit error requiring reversal by not holding an evidentiary hearing. *Head, supra,* and *Giannetti, supra.*

IV

Plaintiff MPC next argues that, as to the attorney fees and costs for the period of January 1, 2000 to April 30, 2000, the circuit court's refusal to grant an evidentiary hearing deprived plaintiff of due process, since as to that time period the court decided to predict plaintiff's objections to the fees sought instead of allowing it to respond.

> Analysis of what process is due in a particular proceeding depends on the nature of the proceeding and the interest affected by it. Generally, due process in civil cases requires notice of the nature of the proceeding, an opportunity to be heard in a meaningful time and manner, and an impartial decision maker. The opportunity to be heard does not require a full trial-like proceeding, but does require a hearing to the extent that a party has a chance to know and respond to the evidence. [*Klco v Dynamic Training Corp,* 192 Mich App 39, 42-43; 480 NW2d 596 (1991). Citations omitted.]

The circuit court's opinion stated in pertinent part:

> The Court notes, however, that the additional request for fees and costs for the period of January 1, 2000 – April 30, 2000 (Exhibit 6 to Frandorson's Response) was made too late for Mitan to respond. She has still considered the request, believing that after reviewing Mitan's three previous sets of objections in excruciating detail, she is able to accurately predict the objections and bases for them that Mitan would make.

Neither party explains how much or how many hours defendant FP requested for the January through April 2000 period, or how much the circuit court awarded. Our review of the

record disclosed that the circuit court awarded $21,902.00 of the claimed $28,604.00 in attorney fees, representing 121 of the claimed 176.4 hours.[12]

Plaintiff at no time below, or on appeal, identified objections it would have made to the fees defendants sought, nor does plaintiff argue on appeal that any such objections would have differed from those the circuit court predicted. The circuit court disallowed approximately $7,000 of the amount defendants requested in attorney fees and plaintiff does not argue that any objection it would have voiced could have, if adopted, resulted in greater diminishment in the award of attorney fees.

We conclude that under the circumstances that defendants provided extensive detailed records breaking out the legal services performed during the four months at issue by date, initials, description of service performed and fee sought; that the court disallowed a significant portion of the fees requested; and that plaintiff has not articulated objections to the fees, plaintiff has not shown a deprivation of due process.

V

Plaintiff next argues that the circuit court improperly shifted the burden of proof regarding the reasonableness of attorney fees. Plaintiff argues that without expert testimony, the circuit court should have resolved the issue in plaintiff's favor because plaintiff did not have the burden of proof.

The circuit court's opinion stated several times that the burden was on defendant FP to prove the fees requested were reasonable. The court properly placed the burden of proof on defendant FP to establish the reasonableness of the fees requested. The court's reference in passing to the fact that expert testimony would have been helpful does not support that it shifted the burden of proof to plaintiff, rather, the statement was responding to defendant's contention that expert testimony is often presented. The court in fact stated that there is no requirement that such testimony be presented, and there is no indication that this played any role in the burden of proof the court applied. Plaintiff's claim is unsupported by the record and fails.

VI

Plaintiff MPC also asserts that the circuit court abused its discretion in allowing fees related to proceedings in other courts, i.e., for removals to federal court and the appeals to the Court of Appeals. The circuit court's opinion states in this regard:

[12] Attachment A of the circuit court's opinion and order sets forth by date and initials the services for which it disallowed fees, and indicates that it disallowed 55.4 hours of the claimed 176.4, i.e., all services performed by a law clerk (initials BPM) totaling 53.6 hours ($6,432.00), and 1.8 hours ($270.00) for services performed by AOR that the court deemed were not necessary to prosecute this action. These figures assume the court found the hourly fees sought for the allowed services were reasonable, which is a fair assumption given that plaintiff never contested the reasonableness of the hourly fees defendant sought, and the court so noted in its opinion, at page 8.

Federal Removal Cases, Federal and State Appeals, Contempt Proceedings

> Mitan has objected to all charges for services provided in the federal removal cases, Mitan's appeal to the Sixth Circuit of sanctions awarded in the removal cases, Mitan's two claims of appeal to the Michigan Court of Appeals and the contempt proceedings in this Court. It has acknowledged that "this Court has already rejected the Mitans' objections to fees and expenses incurred in the related federal removal cases, appeals, and contempt proceedings". (1996 Objections, p 5.) Given that there would be no federal removal cases or appeals from them but for Mitan's actions, it is ludicrous to suggest that fees for those proceedings do not arise out of this litigation. The same is true for Mitan's appeals to the Michigan Court of Appeals.
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> The contempt proceedings are part of this case and Case II. Mitan's only new argument is that fees and costs should not be awarded because the findings of contempt are now on appeal to the Michigan Court of Appeals. This argument is without merit.
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> The Court will not revisit earlier rulings that attorneys fees and costs which were incurred in these matters would be awarded. Objections on these grounds are again overruled.

After plaintiff filed the instant appeal, a panel of this Court affirmed the circuit court's findings of contempt against the Mitan brothers in *In re Contempt of Keith Mitan and Kenneth Mitan, supra*.

Defendant FP argues that, in any event, the award was proper under MCL 565.108 because the statute places no limit on the award of attorney fees other than that a plaintiff must prevail on the slander of title claim, which FP did in this case. MCL 565.108 provides in pertinent part that the court "shall award the plaintiff all the costs of such action [to quiet title], including such attorney fees as the court may allow the plaintiff." There are very few cases involving damage awards under MCL 565.108. Some guidance is provided in *B & B Investment v Gitler*, 229 Mich App 1; 581 NW2d 17 (1998), where this Court stated that an award of attorney fees under MCL 565.108 is not limited to fees incurred up to the time the cloud on title is removed. *Id.* at 11.

Given the complex and protracted litigation at issue here, the number of suits and appeals involved, the broad wording of the statute, and the absence of authority supporting plaintiff's position, we conclude the circuit court did not abuse its discretion in awarding defendant attorney fees pertinent to the federal removals and appeals to this Court. The facts underlying these proceedings are well documented in prior decisions of this Court. Those decisions place responsibility for these additional proceedings squarely on MPC. We find no error.

VII

Plaintiff also contends that the circuit court improperly allowed attorney fees that were incurred long after the claims of interest were discharged, contrary to *B & B Investment, supra*. As discussed in the previous issue, *B & B Investment, supra* at 11, states that attorney fees under

MCL 565.108 are not limited to fees incurred up to when the cloud on title is removed. Given the broad wording of the statute, the complicated and protracted litigation here, the number of suits and appeals involved, and the absence of authority supporting plaintiff's position, we affirm the circuit court's determination.

VIII

Plaintiff asserts that the circuit court improperly calculated attorney fees because it disallowed only 25% of the fees incurred in the RICO lawsuit. Plaintiff notes that it specifically objected to $51,046 of such fees, but that the circuit court disallowed only $7,600, which was a figure defendant advanced, not plaintiff. Plaintiff also contends that the circuit court improperly allowed attorney fees defendant incurred in contempt proceedings, in contravention of MCL 565.108, which permits an award of "all the costs of such action." MPC maintains that fees incurred in regard to contempt proceedings do not constitute costs in an action to quiet title.

Because plaintiff's challenge regarding the RICO suit contains no discussion or citation to authority, it is waived. *Silver Creek Twp v Corso*, 246 Mich App 94, 99; 631 NW2d 346 (2001). We will not disturb the circuit court's analysis and determination.

Plaintiff's conduct in this case necessitated the institution of contempt proceedings. MCL 565.108 authorizes the court to award "all the costs of such action, including attorney fees." Further, MCL 600.1721, governing payment of damages in contempt proceedings, provides that if the alleged misconduct has caused an actual loss or injury, the court shall order the contemnor to pay a sufficient sum to indemnify the injured person. This statute does not differentiate between civil and criminal contempt. We conclude that the circuit court's award of attorney fees was proper.

IX

Plaintiff also argues that in determining a reasonable attorney fee, the circuit court abused its discretion by failing to consider the third factor (amount in question and results achieved), and by substituting the first factor (professional standing and experience of the attorney) in its place. We disagree.

The circuit court's opinion stated in pertinent part:

> The party seeking attorney fees and costs has the burden of proving that they are reasonable, *i.e.* [sic] reasonably necessary and reasonably incurred. *In re O'Neill Estate,* 168 Mich App 540 (1988). The trial judge has the duty to make findings of fact on disputed issues. In doing so the judge must consider the factors set forth in *Crawley v Schick*, 48 Mich App 728, 737; 211 NW2d 217 (1973), later adopted in *Wood v DAIIE*, 413 Mich 573, 588; 321 NW2d 653 (1982), but is not required to detail its findings as to each specific factor.
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> [discussion of facts in *In re O'Neill* and *Wood, supra*]

In *Wood v DAIIE*, the Michigan Supreme Court held that a determination under the law that a party is entitled to attorney fees does not decide the amount of the award.

> . . . As to this question, we agree with the defendant that the controlling criterion is that the attorney fees be 'reasonable'. We adopt the guidelines for determining 'reasonableness' set forth in *Crawley* [*supra* at 737].
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> The *Crawley* panel noted that there is no precise formula for computing the reasonableness of an attorney's fee, but said that factors to be considered are:
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> '(1) the professional standing and experience of the attorney; (2) the skill, time and labor involved; (3) the amount in question and the results achieved; (4) the difficulty of the case; (5) the expenses incurred; and (6) the nature and length of the professional relationship with the client.' (Citations omitted.)

There has been no suggestion that the law firm and the attorneys involved do not enjoy a high degree of professional standing within the legal community. The experience of the two attorneys who led the case, Robert W. Stocker, II and Mark R. Fox, is sufficient for the Court to believe that they exercised good judgment in the choices they made in determining the strategy of this case.

The skill, time and labor involved in this case was enormous—for both sides. That was occasioned primarily by strategic decisions made by Mitan and also by its remarkable recalcitrance in complying with reasonable discovery demands. Mitan's wholly unjustified actions in removing Case I, and later Case II, to federal court on the flimsiest of rationales and its subsequent appeal of the sanctions imposed as a result of those unwarranted removals to the Sixth Circuit Court of Appeals [sic Eastern District of Michigan] significantly increased the time and labor required to prosecute this case. Even the timing of those removals increased the fees charged to Frandorson by its attorneys. Mitan's practice of removing the case just hours before a scheduled hearing meant the attorneys appeared even though this Court had automatically been divested of its jurisdiction by the removal. Mitan took what should have been a reasonably straightforward case and transformed it into a monstrosity. It should not now complain that the attorney fees and costs are too high.

The difficulty of the case was also increased by Mitan's tactics. For example, there would have been no need to research federal law on removals but for Mitan's decision to remove the cases to the federal district court.

The only one of the *Wood* factors that Mitan addressed to any degree was that of the amount in question and the results achieved. Mitan argued that the fees and costs requested was far in excess of the results achieved. This argument could well be persuasive if this were a personal injury lawsuit. Certainly a request for

> $394,051.97 in attorney fees and costs where the plaintiff in an automobile accident received an award of $25,003.56 would raise anyone's eyebrows. But what was at stake in this case was Frandorson's ability to clear title to its properties in order to proceed with a closing with Chemical Bank and its need to remove the threat that the personal indemnifications and its partners were required to make would be required. Frandorson did prevail on all three counts of its counterclaim. Although for reasons stated below, the Court will not award the entire $394,051.97, a significant amount of fees and costs is consistent with the result achieved.

The circuit court's opinion addressed the third factor and did not inordinately weigh the first factor. Plaintiff's argument is unsupported by the record and fails.

X

Plaintiff's argument that the default judgment against Kenneth Mitan was wrongly entered is moot, because the court granted FP summary disposition in July 1999 on the merits.

XI

Plaintiff asserts that summary disposition was improperly entered because the judgment in Case II is on appeal, and if that appeal is successful, then summary disposition in the instant case will be improper because res judicata will be inapplicable.

Res judicata requires that the parties to the second action be substantially identical to the parties in the first action. *In re Humphrey Estate*, 141 Mich App 412, 434; 367 NW2d 873 (1985). The parties must have been adversaries, i.e., arrayed on opposite sides and have a controversy between them. *York v Wayne Co Sheriff,* 157 Mich App 417, 426-427; 403 NW2d 152 (1987). Plaintiff does not argue that Teresa Mitan was not its privy.

Plaintiff's argument that this Court's partial reversal in Case II (which was as to Teresa Mitan only), renders the judgment in that case interlocutory and thus res judicata is inapplicable, is meritless. Plaintiff provides no authority to support that res judicata does not apply here. As discussed above, this Court has resolved the appeals from Case II against MPC, including affirming the grant of summary disposition in FP's favor except as to the conspiracy claim against Teresa Mitan. The Supreme Court denied MPC's application for leave to appeal the grant of summary disposition to FP. 467 Mich 864 (2002). The judgment in Case II is final as to the rights and liabilities of the parties at issue here and res judicata applies.

We affirm in all respects.

/s/ William C. Whitbeck
/s/ Helene N. White
/s/ Pat M. Donofrio