

STATE OF MICHIGAN
COURT OF APPEALS

HARLAN VERMILYA, MARY FULKERSIN,
KEN REINHARDT, VICTOR L. KAIDAN,
FREDERICK C. RIFFELMACHER, RICHARD
SNIECINSKI, JOHN ROBERTS, DARLA
MORRISSETTE, HAROLD CHOSAY, DEBBIE
SAWYER, GEORGIA YOUNG, EARL
SCHULTE, JUDY SCHULTE, NORMA
BLENDE, LEO KLENDER, MELVIN ARNOLD,
TUJI ARNOLD, GERALD RICKER, MARY
RICKER, BARBARA DEWALD, DOUG
DEWALD, SHIRLEY COGAN, AL
ARMSTRONG, WILLIAM RICKER, BARBARA
RICKER, ROBERTO RICHARD, WILLIAM
RUSHO, JULIE RUSHO, JACK HORNER,
MARY ANN TOBIAS, CLARA JEAN,
RICHARD POMAVILLE, DINAH POMAVILLE,
HERB GEIGER, JEAN GEIGER, MARY K.
BLACK, MARGIE BLACK, KIMBERLY
DROPTINY, BRIAN DROPTINY, JANET
PAULEY, HERMAN DESHAW, LILLIAN
DESHAW, KELLY BUCZEK, RICK BUCZEK,
BILL BLANCHARD and LAURA ANKLAM,

Plaintiffs-Appellees,

v

DELTA COLLEGE BOARD OF TRUSTEES,
DELTA COLLEGE PRESIDENTS
COMPENSATION COMMITTEE, JACK R.
MACKENZIE, DR. THOMAS H. LANE, KAREN
L. LAWRENCE-WEBSTER,

Defendants-Appellants,

and

DELTA COLLEGE PRESIDENT and
MICHIGAN COMMUNITY COLLEGE RISK
MANAGEMENT AUTHORITY,

UNPUBLISHED
March 1, 2011

No. 291919
Bay Circuit Court
LC No. 09-003024-CZ

Defendants.

Before: CAVANAGH, P.J., and HOEKSTRA and GLEICHER, JJ.

PER CURIAM.

Defendants appeal by leave granted a circuit court order denying their motion to disqualify plaintiffs' counsel. We reverse and remand for additional proceedings.

Plaintiffs, who reside and pay taxes in Bay County and Saginaw County, commenced this action in January 2009. The complaint averred that the Delta College Board of Trustees (the Board) and the Delta College Presidents Compensation Committee (the Compensation Committee) had committed multiple violations of the Open Meetings Act (OMA), MCL 15.261 *et seq.* Over the course of first and second amended complaints, the numbers of plaintiffs and defendants changed, and plaintiffs added two distinct counts alleging that the Board, the Delta College President and the Michigan Community College Risk Management Authority had made several unlawful expenditures.

In February 2009, the Board and the Compensation Committee filed a motion to disqualify plaintiffs' counsel, Kim A. Higgs, on the grounds that Higgs "is a duly elected member of the Defendant Delta College Board of Trustees," Higgs attended at least one of the meetings giving rise to the complaint's OMA assertions, and Higgs thus "is a potential witness to the acts and omissions alleged in the Complaint." The Board and the Compensation Committee insisted that Michigan Rule of Professional Conduct 3.7 precluded Higgs from acting as "both a witness and an attorney for a party in these proceedings." The Board and the Compensation Committee additionally theorized that Higgs had "a personal conflict of interest . . . that disqualifies him from acting as attorney for . . . Plaintiff[s] here" under MRPC 1.7, in light of the facts that the complaint sought an award of attorney fees to Higgs, yet Higgs owed the Board "a fiduciary duty to serve and act in the best interests of the" college, the Board and the public.

Plaintiffs responded that no conflict or potential conflict existed between Higgs's fiduciary duty to the Board on which he served and his fiduciary duty to his clients in this action, summarizing in pertinent part as follows:

Plaintiffs disagree[d] . . . that Trustee Higgs' duty of loyalty to his clients is materially limited by his responsibilities to the Board of Trustees because the interest of the Plaintiffs and the Board of Trustees is the same as it relates to the Board complying with the Michigan Constitution and the Open Meetings Act. In his capacity as a Delta College Trustee, Higgs has a duty to comply with the Michigan Constitution and the Open Meetings Act. The rights the Plaintiffs are attempting to protect in this action are the duty and responsibility . . . the Board of Trustees owes to these taxpayers to comply with the Michigan Constitution and the Open Meetings Act.

The response noted that plaintiffs “have consented to Higgs’ representation after he has consulted with them about the issue.” Plaintiffs also disputed the Board’s and the Compensation Committee’s suggestion that Higgs would have to testify in this matter. According to plaintiffs, “[o]nly the members of the . . . Compensation Committee can testify whether additional meetings were held which were not properly noticed and not open to the public,” and “[a]ll other allegations contained in the Complaint alleging improper notices and improper postings can be established through official records and witnesses other than Plaintiffs’ Counsel.” Lastly, plaintiffs asserted that the Board and the Compensation Committee had not met the disqualification threshold because they “failed to identify what testimony Plaintiffs’ counsel would give that would be prejudicial to their interests.”

At a March 2009 hearing, the circuit court explained as follows that it would deny the motion to disqualify Higgs:

Well, based upon the opinion of the Attorney General, 5927, it is clear that Mr. Higgs could, at once, be a member of the Delta College Board of Trustees and also, in his individual capacity, file a law suit against the board. And on that basis, I find that it is improper to disqualify him as acting as an attorney in this matter. He could do it in his own right. He has agreements. His clients understand the potential for conflict coming up. It doesn’t exist right now. He is not an essential witness in this matter, at this time. His claims are based upon matters of record. The postings, the testimony of others, and the minutes of the . . . meetings—he is not an essential witness that’s going to be in the center of this. At least, that’s not the way it appears at this time. Although it would not be right to limit the defendants in any way, and their pursuit of discovery in this case.

And so I will rule that while Mr. Higgs can remain in the case, there . . . may be the need for his deposition to be taken. I’ll authorize that. He may be . . . subjected to discovery requests and procedures, the same as any other person.

The Attorney General’s opinion says quite clearly that a supervisor can sue a township for all manner of things, including . . . declaratory judgments and do that in his or her own right. And I think that the fact that there’s an attorney/client relationship here, adds another complication to it. But it is not an impediment. And any potential problems that we face at this time . . . I think are outweighed by the need to respect the rights of the plaintiffs to have an attorney of their own choosing, to represent them in this matter. And so the Motion to Disqualify Mr. Higgs is denied.

The Board and the Compensation Committee moved for reconsideration of the circuit court’s March 2009 order denying the motion to disqualify. The motion for reconsideration primarily invoked MRPC 1.11(a), which applies to public officers and employees, as a basis for disqualification. In the Board’s and the Compensation Committee’s estimation, given that Higgs as a member of the Delta College Board of Trustees participated personally and substantially in that capacity with respect to the issues raised in the Complaint[s] . . . regarding the allegations of violation of the Open Meetings Act and the matters pertaining to the employment contract of [the] College President,” he “cannot represent a private client in connection with those matters

against the” Board and the Compensation committee “unless the Board . . . consents,” which it did not intend to do. The circuit court found no palpable error in its prior ruling and denied reconsideration.

Defendants initially contend on appeal that MRPC 1.11(a) bars Higgs “from representing plaintiffs . . . because . . . [he] participated in his role as a Delta trustee in the matters giving rise to the complaint.”

The determination of the existence of a conflict of interest that disqualifies counsel is a factual question that we review for clear error. A trial court’s findings of fact are clearly erroneous only if we are left with a definite and firm conviction that a mistake was made. But we review de novo the application of “ethical norms” to a decision whether to disqualify counsel. [*Avink v SMG*, 282 Mich App 110, 116; 761 NW2d 826 (2009).]

Although issues not raised and decided by the circuit court do not qualify as preserved for appellate review, this Court may consider for the first time on appeal a legal question concerning which the relevant facts appear in the record. *In re Nestorovski Estate*, 283 Mich App 177, 183; 769 NW2d 720 (2009).

The circuit court did not specifically evaluate the propriety of Higgs’s simultaneous membership on the Board and representation of plaintiffs under MRPC 1.11, a rule that squarely applies to the circumstances of this case, given Higgs’s undisputed position as a public officer. As reflected in the relevant portions of MRPC 1.11:

(a) Except as law may otherwise expressly permit, a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency consents after consultation.

* * *

(d) As used in this rule, the term “matter” includes:

(1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter involving a specific party or parties; and

(2) any other matter covered by the conflict of interest rules of the appropriate government agency.

Whether a public officer has substantially and personally participated in a matter, and whether a matter at issue in litigation comprised the same matter as a matter in which a public officer has participated, of necessity mandate a searching inquiry into the circumstances of each case. See *Killingbeck v Killingbeck*, 269 Mich App 132, 148; 711 NW2d 759 (2005) (“The conclusion that a conflict of interest exists is a question of fact . . .”) (internal quotation omitted).

We deem the instant record insufficient for us to make an informed pronouncement concerning a violation of the legal standard contained in MRPC 1.11,¹ and therefore, we remand this matter to the circuit court. The court should hold an evidentiary hearing to make findings of fact and conclusions of law with respect to whether Higgs had personal and substantial involvement in his capacity as a public officer in the same matters that plaintiffs alleged as the foundation for their complaint. Our research of MRPC 1.11 has led us to a multitude of Michigan State Bar ethics opinions that consistently define and delineate the concepts of personal and substantial participation and a “matter,” and may prove useful to the circuit court’s findings and legal conclusions. *Barkley v Detroit*, 204 Mich App 194, 202; 514 NW2d 242 (1994). The court should feel free to take into account the ethics opinion definitions and analyses, but of course also may direct the parties to submit any other pertinent sources of law relevant to these questions.

Our review of the record also leaves us with an inadequate factual foundation for discerning Higgs’s compliance with MRPC 1.7, which the circuit court did not specifically address in its bench ruling. The rule reads as follows:

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer’s responsibilities to another client or to a third person, or by the lawyer’s own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

The record in this case documents especially sparsely the extent to which Higgs consulted with each plaintiff and explained any potential conflict between his representation of them and his duties to the Board. Consequently, we remand for further development of the record, findings of fact and legal conclusions regarding Higgs’s compliance with MRPC 1.7.

¹ Plaintiffs did not respond to the Board’s and the Compensation Committee’s motion for reconsideration, presumably because the circuit court viewed a response unnecessary.

We detect no clear error in the circuit court’s factual findings that Higgs “is not an essential witness in this matter, at this time,” and that MRPC 3.7 thus does not amount to a potential ground for disqualification.

In conclusion, we emphasize that defendants, the parties seeking disqualification, “bear[] the burden of demonstrating specifically how and as to what issues in the case the likelihood of prejudice will result.” *Rymal v Baergen*, 262 Mich App 274, 319; 686 NW2d 241 (2004) (internal quotation omitted).

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Joel P. Hoekstra
/s/ Elizabeth L. Gleicher