STATE OF MICHIGAN

COURT OF APPEALS

CCO MORTGAGE,

Plaintiff-Appellee,

v

ASHA K. TYSON,

Defendant,

and

VANESSA G. FLUKER,

Appellant.

UNPUBLISHED
August 14, 2012

No. 304841
Wayne Circuit Court
LC No. 10-011074-AV

Before: SERVITTO, P.J., and METER and FORT HOOD, JJ.

PER CURIAM.

Appellant, Vanessa G. Fluker, appeals by right the circuit court's judgment and order assessing sanctions pursuant to MCR 7.101(P) for a vexatious appeal involving litigation regarding real property owned by appellant's former client, defendant Asha K. Tyson, which was foreclosed upon by plaintiff, CCO Mortgage.[1] We affirm.

Appellant first argues that the circuit court erred in assessing sanctions under MCR 7.101(P) when plaintiff failed to file a proper motion for sanctions. We disagree.

In order to preserve an issue for appellate review, it must be raised before, addressed, and decided by the lower court. *Detroit Leasing Co v Detroit*, 269 Mich App 233, 237; 713 NW2d 269 (2005). Appellant did not object to plaintiff's request for sanctions on the basis that plaintiff

[1] Plaintiff urges us to conclude that defendant Asha Tyson is not entitled to any relief and that any issues with regard to her are moot. She is not a party to this appeal, and therefore, we decline plaintiff's invitation to render any conclusion regarding defendant. After the circuit court ruled that the district court appeal was vexatious, appellant withdrew from representing defendant.

failed to comply with proper motion requirements.[2] Thus, this issue is not preserved for appellate review. This Court reviews unpreserved claims for plain error affecting substantial rights. *Kloian v Schwartz*, 272 Mich App 232, 242; 725 NW2d 671 (2006). An error affects substantial rights when it is outcome determinative. *FMB-First Mich Bank v Bailey*, 232 Mich App 711, 718; 591 NW2d 676 (1998).

At the hearing on December 3, 2011, regarding the initial dismissal of defendant's appeal, the circuit judge stated that if defendant's claims were meritless, sanctions would be assessed. At the hearing on February 18, 2011, regarding the merits of defendant's appeal, plaintiff stated that it was standing on its circuit court brief in which it had requested sanctions for vexatious proceedings under MCR 7.101(P). The circuit judge ultimately assessed sanctions against appellant, stating that plaintiff had requested "costs against [appellant and defendant] pursuant" to MCR 7.101 and that the "motion is granted."

Appellant claims that this was a violation of the motion requirements of MCR 2.119, because plaintiff never actually filed an independent motion for sanctions. This argument is meritless for several reasons. First, appellant failed to cite any caselaw to support her argument that a motion under MCR 7.101(P) is improper if made during oral argument or in a circuit court brief. MCR 2.119 states:

> (A) Form of Motions.
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> (1) An application to the court for an order in a pending action must be by motion. *Unless made during a hearing or trial*, a motion must
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> (a) be in writing,
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> (b) state with particularity the grounds and authority on which it is based,
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> (c) state the relief or order sought, and
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> (d) be signed by the party or attorney as provided in MCR 2.114.
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> [MCR 2.119 (emphasis added).]

The phrase "unless made during a hearing or trial" implies that a motion may be made in the midst of a hearing and need not be in written form. A formal written motion is not required prior to a hearing for an issue to be properly raised when the position of both parties is presented before the court. See *Alpine Constr Co v Gilliland Constr Co*, 50 Mich App 568, 572 n 2; 213 NW2d 824 (1973). Accordingly, plaintiff properly raised this issue when it indicated at the hearing that it was relying on its circuit court appeal brief, wherein plaintiff requested sanctions.

Second, at the time of the circuit court ruling, MCR 7.101(P)[3] provided that a circuit court "may, on its own initiative or the motion of a party" assess sanctions for a vexatious

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[2] Although appellant did raise this issue in her motion for reconsideration of sanctions, "[w]here an issue is first presented in a motion for reconsideration, it is not properly preserved." *Vushaj v Farm Bureau Gen Ins Co of Mich*, 284 Mich App 513, 519; 773 NW2d 758 (2009).

[3] MCR 7.101 was amended effective May 1, 2012. The amendment to the circuit court appeal rules is not at issue in this appeal.

appeal. At the hearing on December 3, 2010, the circuit judge warned appellant of his intent to assess sanctions if the appeal was frivolous. Accordingly, the circuit court had the authority to assess sanctions irrespective of any request for sanctions by plaintiff in light of MCR 7.101(P). In fact, appellant continually references the December 3, 2010, hearing as evidence that the circuit court decided to assess sanctions before hearing the merits of the case. Therefore, appellant failed to demonstrate plain error affecting substantial rights when the circuit court had the authority to assess sanctions on its own initiative.

Third, while appellant cites unpublished cases from this Court interpreting MCR 7.211(C)(8), the rule for vexatious proceedings in this Court, appellant's analogy is deeply flawed. First, MCR 7.211(C)(8) is not even applicable because this case involves an appeal to circuit court, not an appeal to this Court. Unlike MCR 7.101(P), MCR 7.211(C)(8) specifically states that a party must request sanctions for vexatious proceedings in an independent motion and not in a brief or other pleading. In contrast, the version of MCR 7.101 in effect at the time of the circuit court ruling failed to contain any language indicating that a party may not request sanctions in a brief or during a hearing. Hence, appellant failed to establish that the circuit court did not follow the proper procedural requirements of MCR 7.101(P) or that any alleged error constituted plain error affecting appellant's substantial rights.

Next, appellant argues that the circuit court erred in holding that res judicata barred defendant's Federal Housing Act (FHA) claims and in holding that the federal lawsuit involving the Center for Community Justice and Advocacy (CCJA) was irrelevant. We disagree.

"The applicability of the doctrine of res judicata is a question of law" which this Court reviews de novo. *Ditmore v Michalik*, 244 Mich App 569, 574; 625 NW2d 462 (2001).

"The doctrine of res judicata will bar a subsequent action between the same parties when the facts or evidence essential to the action are identical to those that were essential to a prior action." *Begin v Mich Bell Tel Co*, 284 Mich App 581, 599; 773 NW2d 271 (2009). "The doctrine of res judicata is intended to relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and encourage reliance on adjudication, that is, to foster the finality of litigation." *TBCI, PC v State Farm Mut Auto Ins Co*, 289 Mich App 39, 43; 795 NW2d 229 (2010). In order for res judicata to apply, the first lawsuit must have resulted in a final decision on the merits. *Richards v Tibaldi*, 272 Mich App 522, 531; 726 NW2d 770 (2006). Res judicata does not apply, however, "[i]f the facts change, or new facts develop." *Labor Council, Mich Fraternal Order of Police v Detroit*, 207 Mich App 606, 608; 525 NW2d 509 (1994).

Three requirements must be met in order to apply the res judicata doctrine: (1) the first case was decided on the merits; (2) the first case and the second case involve the same parties or their privies; and (3) the matter in the second case was, or could have been, resolved in the first case. *Adair v State*, 470 Mich 105, 121; 680 NW2d 386 (2004). The doctrine of res judicata is broadly applied to bar "not only claims already litigated, but also every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not." *Id.* This comprises the same transaction test, which focuses on "whether the facts are related in *time, space, origin, or motivation*, [and] whether they form a convenient trial unit." *Begin*, 284 Mich App at 601 (emphasis in original) (citations omitted).

All three elements of res judicata have been met in this case. The circuit judge dismissed the first circuit court case by granting plaintiff's motion for summary disposition, and a "summary disposition ruling is the procedural equivalent of a trial on the merits that bars relitigation on principles of res judicata." *The Mable Cleary Trust v The Edward-Marlah Muzyl Trust*, 262 Mich App 485, 510; 686 NW2d 770 (2004). Second, the first circuit court case involved the exact same parties, defendant and plaintiff. Lastly, whether the mortgage and foreclosure was invalid because of discriminatory practices involves the same facts as those involved in the first circuit court case, such as the nature and time of the transaction between plaintiff and defendant, the motivations of plaintiff and defendant, and the origin of the relationship. In other words, "the factual basis" for defendant's civil rights claims was "inextricably interwoven" with the issue of whether the mortgage and foreclosure was valid, which was addressed in the first circuit court case. *Begin*, 284 Mich App at 604. These common facts also would have formed a "convenient trial unit." *Id.* at 601.

However, appellant argues that she did not discover plaintiff's discriminatory practices until after the first circuit court case and that reasonable diligence could not have uncovered the claims before then. Yet, as the circuit court noted, the CCJA filed its federal complaint before the first circuit court case was dismissed. "'When, in the course of a lawsuit, the plaintiff becomes aware of a new cause of action against the same defendant, the plaintiff should move to include the new claim or risk having the doctrine of [res judicata] apply to the omitted claim.'" *Begin*, 284 Mich App at 607, citing *Dubuc v Green Oak Twp*, 117 F Supp 2d 610, 625 (ED Mich, 2000). Furthermore, appellant admitted that defendant was in contact with the CCJA even before foreclosure and that appellant had previously litigated FHA claims. Hence, had appellant "exercised reasonable diligence, [she] could have raised this claim in [the] first lawsuit," and since she did not, "it is now barred by res judicata." *Begin*, 284 Mich App at 605.

Appellant also claims that the circuit court failed to understand that the federal lawsuit was relevant because defendant could only assert the FHA claims in district court if the CCJA was successful in establishing plaintiff's liability under the FHA. Yet, it is appellant, not the circuit court, who has failed to understand the relevancy of the federal lawsuit. Because defendant litigated the validity of the mortgage and foreclosure in the first circuit court case, the issue in the circuit court appeal was whether defendant should have raised the civil rights claims in that first circuit court action. Even if the federal lawsuit could establish that CCJA had standing to sue under the FHA, that is a separate question from whether defendant should have brought the FHA claims in the first circuit court case. Moreover, since defendant was not a party in the federal lawsuit, the issue of res judicata and defendant's claims would not have been addressed or even relevant in the federal case.

Additionally, we note that in state district court to prevent defendant's eviction, appellant misrepresented that defendant was a party in the federal district court action. *Ctr for Community Justice & Advocacy v RBS Citizens, NA*, 776 F Supp 2d 460, 463-465 (ED Mich 2011). When the district judge assigned the eviction questioned defendant's status as a party in the federal lawsuit, appellant responded that defendant was a "comparable." This prompted the district judge to direct appellant to answer "yes or no" to whether defendant was a party to the federal lawsuit. Appellant answered that defendant was not named on the caption. *Id.* The federal district court ultimately dismissed the CCJA complaint, finding that appellant misrepresented the parties in the federal case to delay the state court proceedings, appellant failed to provide any

specific factual information to allow the conclusion that defendant could be construed as a comparable to grant CCJA standing, and defendant, "a serial bankruptcy filer," was unique and a "non-comparable" under the circumstances.[4] *Id*. at 465-468. Thus, the circuit court did not err in holding that the federal court case was irrelevant in deciding whether res judicata applied.

Appellant next argues that the circuit court erred in assessing sanctions against her for a vexatious appeal. We disagree.

A circuit court's decision to assess sanctions under MCR 7.101(P) is reviewed for an abuse of discretion. *Wojas v Rosati*, 182 Mich App 477, 480; 452 NW2d 864 (1990). "An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes." *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008).

Before May 1, 2012, MCR 7.101(P) allowed a circuit court to assess sanctions when a case is appealed from a district court and the appeal is vexatious. MCR 7.101(P) provided:

> (1) The circuit court may, on its own initiative or the motion of a party, dismiss an appeal, assess actual and punitive damages, or take other disciplinary action when it determines that an appeal or any of the proceedings in an appeal was vexatious because
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> > (a) the appeal was taken for purposes of hindrance or delay or without any reasonable basis for belief that there was a meritorious issue to be determined on appeal; or
> >
> > (b) a pleading, motion, argument, brief, document, or record filed in the case or any testimony presented in the case was grossly lacking in the requirements of propriety, violated court rules, or grossly disregarded the requirements of a fair presentation of the issues to the court.
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> (2) Damages may not exceed actual damages and expenses incurred by the opposing party because of the vexatious appeal or proceedings, including reasonable attorney fees, and punitive damages in an added amount not exceeding actual damages.

In this case, the circuit court stated that the brief appellant submitted was grossly lacking in the requirements of propriety and fair presentation of the issues. The court also stated that sanctions were warranted against appellant because the purpose of the appeal was delay or hindrance, without any reasonable basis to believe that there were meritorious issues.

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[4] Both the federal district court and the circuit court found that appellant misrepresented defendant's status in the district court eviction action. These factual findings are afforded great deference because those courts were in a better position to examine the facts. *Hill v City of Warren*, 276 Mich App 299, 308; 740 NW2d 706 (2007).

The circuit court did not abuse its discretion in finding that appellant's brief was lacking in the requirements of propriety and fair presentation of the issues under MCR 7.101(P)(1)(b). Approximately 15 pages of the 19 page brief that appellant submitted to the circuit court contained a discussion of the federal lawsuit and how defendant had standing to sue under the FHA. Only one page of the brief was dedicated to the issue of res judicata and appellant again discussed the federal lawsuit and how defendant was not a party to that lawsuit, which implied that res judicata did not bar litigation of the civil rights claims. While appellant did include block quotes about res judicata and the new evidence exception, nowhere is there any discussion or analysis of the first circuit court case or its relationship to res judicata. Thus, the crux of the appeal, whether the first circuit court case triggered res judicata, was not addressed by appellant. Moreover, defendant's circuit court brief included an allegation that defendant was placed in an "unconscionable adjustable rate mortgage with a maximum interest rate of 18%." However, the mortgage agreement specifically states that defendant's interest rate "will never be greater than 11.125%." Thus, the circuit court's decision that the brief was lacking in the requirements of propriety and fair presentation of the issues was not a decision that fell outside the range of reasonable and principled outcomes. *Smith*, 481 Mich at 526.

Additionally, it was not an abuse of discretion for the circuit court to decide that the purpose of the appeal was hindrance or delay under MCR 7.101(P)(1)(a). *Wojas*, 182 Mich App at 480. A review of the exhaustive proceedings in this case reveals that despite defaulting on her mortgage in 2007 and failing to pay her association fees, defendant continued to live in the condominium in 2011. After litigating the validity of the foreclosure in the first circuit court case, defendant chose not to appeal. Instead, defendant waited for plaintiff to initiate eviction proceedings in district court to then raise new and complex civil rights claims while requesting a stay pending the outcome of a federal court case in which defendant was not a party. Then, despite the district court's ruling that res judicata barred these claims, appellant submitted a circuit court brief appealing the district court's ruling and failed to address the res judicata issue in any meaningful way. Hence, it cannot be said that the circuit court abused its discretion in finding that the purpose of the appeal was hindrance or delay. *Id*.

Appellant next claims that the dismissal of sanctions against defendant implies that the appeal was not undertaken for hindrance or delay and, thus, sanctions were no longer appropriate against appellant. We disagree.

In order to preserve an issue for appellate review, it must be raised before, addressed, and decided by the lower court. *Detroit Leasing Co*, 269 Mich App at 237. Appellant did not respond to defendant's motion for reconsideration of sanctions or argue that since sanctions were dismissed against defendant, sanctions should also be dismissed against appellant. Thus, this issue is unpreserved for appellate review. This Court reviews unpreserved claims for plain error affecting substantial rights. *Kloian*, 272 Mich App at 242. An error affects substantial rights when it is outcome determinative. *FMB-First Mich Bank*, 232 Mich App at 718.

Appellant claims that it was defendant's decision to pursue the appeal. It is true that according to the Michigan Rules of Professional Conduct, a lawyer is obligated to "seek the lawful objectives of a client through reasonably available means permitted by law and these rules." MRPC 1.2. However, it is also true that "[a] lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not

frivolous." MRPC 3.1. Moreover, an "attorney has an implied duty to exercise reasonable skill, care, discretion, and judgment in representing a client." *Estate of Mitchell v Dougherty*, 249 Mich App 668, 677; 644 NW2d 391 (2002). Thus, even if it was defendant's decision to pursue the appeal, this did not relieve appellant of her obligation to ensure that the appeal properly addressed legal issues and was not frivolous.

Moreover, when granting defendant's motion for reconsideration of sanctions, the circuit judge specifically stated that defendant should not have to bear the responsibility for the fees appellant incurred. Thus, the circuit judge failed to conclude that the appeal was not vexatious, but rather simply allocated responsibility for the vexatious appeal. Nothing in MCR 7.101(P) implied that a court is not allowed to decide that it was the attorney, not the client, who was responsible for the vexatious appeal. Thus, appellant failed to establish that the circuit court's decision to dismiss the sanctions against defendant amounted to plain error affecting appellant's substantial rights. *Kloian*, 272 Mich App at 242.

Lastly, appellant argues that the circuit court's extensive mortgage relationship with plaintiff created an appearance of impropriety necessitating his disqualification. We disagree.

This Court reviews a decision regarding the disqualification of a judge for an abuse of discretion. *Meagher v Wayne State Univ*, 222 Mich App 700, 725; 565 NW2d 401 (1997). "An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes." *Smith*, 481 Mich at 526.

Appellant argues that the circuit judge should have been disqualified because his mortgage relationship with plaintiff gave rise to an appearance of impropriety. According to MCR 2.003(D)(1)(a), "all motions for disqualification must be filed within 14 days of the discovery of the grounds for disqualification." Moreover, "[i]f a motion is not timely filed in the trial court . . . untimeliness is a factor in deciding whether the motion should be granted." MCR 2.003(D)(1)(d). Appellant alleges she discovered the judge's mortgages on March 1, 2011. According to the register of actions, appellant filed her motion to disqualify the circuit judge on March 15, 2011, within 14 days of March 1, 2011. Thus, appellant's motion was timely.[5]

The motion to disqualify the circuit judge was properly denied. When moving for the disqualification of a judge based on the appearance of impropriety, proof of actual bias or prejudice is not required. *Armstrong v Ypsilanti Charter Twp*, 248 Mich App 573, 598-600; 640

[5] Chief Judge Smith held that appellant's motion was untimely because appellant did not file it within 14 days of the alleged bias at the settlement conference on November 12, 2009, or within 14 days of the hearing on December 3, 2010. However, the ground for disqualification was the appearance of impropriety created by the mortgage relationship. While appellant mentioned the settlement conference and hearing in her motion, presumably implying that Judge Colombo was also biased, MCR 2.003(D)(2) specifically states that "the moving party must include all grounds for disqualification that are known at the time the motion is filed." Thus, simply because appellant referenced other grounds for disqualification that fell outside of the 14 day time period did not transform the motion into one that was untimely.

NW2d 321 (2001). MCR 2.003(C)(1) states that a judge may be disqualified if the "judge, based on objective and reasonable perceptions," has "failed to adhere to the appearance of impropriety standard set forth in Canon 2 of the Michigan Code of Judicial Conduct." Canon 2 of the Michigan Code of Judicial Conduct states:

> **A.** Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. A judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly.
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> **B.** A judge should respect and observe the law. At all times, the conduct and manner of a judge should promote public confidence in the integrity and impartiality of the judiciary. Without regard to a person's race, gender, or other protected personal characteristic, a judge should treat every person fairly, with courtesy and respect.
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> **C.** A judge should not allow family, social, or other relationships to influence judicial conduct or judgment. A judge should not use the prestige of office to advance personal business interests or those of others. A judge should not appear as a witness in a court proceeding unless subpoenaed.
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> **D.** A judge may respond to requests for personal references.
>
> **E.** A judge should not allow activity as a member of an organization to cast doubt on the judge's ability to perform the function of the office in a manner consistent with the Michigan Code of Judicial Conduct, the laws of this state, and the Michigan and United States Constitutions. A judge should be particularly cautious with regard to membership activities that discriminate, or appear to discriminate, on the basis of race, gender, or other protected personal characteristic. Nothing in this paragraph should be interpreted to diminish a judge's right to the free exercise of religion.

The circuit judge's tenuous financial relationship with Charter One Bank, a subsidiary of plaintiff, did not give rise to an appearance of impropriety. Judicial Canon 5(C)(4)(b) specifically states that a judge may accept "a loan from a lending institution in its regular course of business on the same terms generally available to persons who are not judges." Moreover, Judicial Canon 5(C)(6) states that a judge is not required to disclose the existence of such "income, debts, or investments." There was nothing improper arising from the circuit judge's financial transactions. While appellant claims that the real problem was that the circuit judge was refinancing the mortgage during the case, it is unclear why this is distinguishable from obtaining a mortgage, as both actions require a certain amount of negotiation and interaction. As the chief judge noted, appellant provided no evidence that the presiding judge received benefits not generally available to non-judges, that the presiding judge even knew of Charter One's

connection with plaintiff, or that the mortgages would cause an objective observer to question the presiding judge's impartiality. Thus, it was not an abuse of discretion to find that the judge's mortgage relationship with a subsidiary of plaintiff did not create an appearance of impropriety.[6]

Affirmed.

/s/ Deborah A. Servitto
/s/ Patrick M. Meter
/s/ Karen M. Fort Hood

[6] We also note that appellant did not raise the issue of impropriety at the start of the March 1, 2011 hearing wherein the circuit judge ruled that the district court appeal was vexatious. Curiously, the issue of impropriety was only raised *after* the circuit court ruled against appellant, not at the start of the hearing. After the issue was raised, the circuit court directed appellant to file a formal motion for disqualification. The circuit judge denied the motion, noting that appellant did not challenge his fairness when he ruled in her favor or when he adjourned matters for her in light of a family emergency. The judge also presented proof that his mortgage was sold to another entity. Appellant's brief fails to include all material facts, both favorable and unfavorable, contrary to MCR 7.212(C)(6).