STATE OF MICHIGAN

COURT OF APPEALS

VIRGINIA DIANE HASKELL,

Plaintiff/Counter-Defendant-Appellee,

v

PAUL P. TUROWSKI, and SHARON L. TUROWSKI,

Defendants/Counter-Plaintiffs/Third-Party Plaintiffs/Cross-Defendants-Appellants,

and

NEWAYGO COUNTY ROAD COMMISSION,

Defendant,

v

JOSEPH SELLA,

Third-Party Defendant/Cross-Plaintiff-Appellee.

UNPUBLISHED
May 13, 2014

No. 314043
Newaygo Circuit Court
LC No. 11-019670-CZ

Before: WILDER, P.J., and FITZGERALD and MARKEY, JJ.

PER CURIAM.

In this property dispute, defendants Paul and Sharon Turowski appeal by right the trial court's order granting plaintiff Virginia Diane Haskell's and third-party defendant Joseph Sella's motion to dismiss all of the Turowskis' remaining claims and defenses as a discovery sanction pursuant to MCR 2.313(D) and refusing to consider five motions the Turowskis filed. Previously, the trial court accepted a stipulated agreement regarding Haskell's motion for a

preliminary injunction and also had granted partial summary disposition in favor of Haskell. On appeal, the Turowskis assert the trial court erred regarding all these decisions. We affirm.

Haskell and Sella own lakefront property on Greening Lake. Haskell's property is in a platted subdivision known as Heldorf Acres. Sella owns land abutting Heldorf Acres to the south. The Turowskis own property situated to the west of Sella's property; their property does not border Greening Lake. This action arose after Haskell noticed that the Turowskis were using her property to access Greening Lake. Haskell requested that the Turowskis cease doing so, but the Turowskis refused. Haskell subsequently filed suit against the Turowskis and the Newaygo County Road Commission (NCRC) requesting that the trial court determine the interests in the land, declare that there was no public road that could be utilized by the Turowskis, and permanently enjoin the Turowskis from using her land for lake access. The Turowskis responded that they were using 13 Mile Road, which extended over Haskell's property to the shores of Greening Lake.

At a hearing for a preliminary injunction, a substitute judge heard the motion and allowed the parties to negotiate. The parties agreed to allow the Turowskis limited use of the lake access during litigation, and it was so ordered.

Shortly thereafter, the Turowskis added Sella to the suit as a third-party defendant, claiming that 13 Mile Road also existed over Sella's property. The Turowskis also alleged that if the road did not exist, then the Turowskis had established a prescriptive easement. Sella then sued the Turowskis, claiming that they had no right to use his land for lake access and claiming trespass and nuisance.

Later, Haskell moved the trial court for summary disposition regarding the issue of whether 13 Mile Road extended past the edge of Heldorf Acres to the shores of Greening Lake. Haskell and Sella argued that no road ever existed, and if it did, it was abandoned by nonuse. The Turowskis argued that a 1935 McNitt Act resolution adopting a road that allegedly ran to the shores of Greening Lake proved that there was a public road providing lake access. The trial court found that 13 Mile Road never reached the shores of Greening Lake and that the 1935 McNitt resolution could not adopt a road that did not exist. It granted Haskell's motion for summary disposition pursuant to MCR 2.116(C)(10), concluding there was no genuine issue of a material fact.

Afterward, the Turowskis' attorney withdrew, and they proceeded in propria persona. The Turowskis' depositions were scheduled twice, but they did not attend either. One of the times for the scheduled depositions ended up being when Mrs. Turowski was hospitalized, and Mr. did not feel he could leave her unattended. The depositions were never taken. It was also noted that during court proceedings, plaintiffs engaged in unusual procedures and exhibited intemperate conduct. Sella and Haskell moved to dismiss the Turowskis' remaining claims and defenses as a discovery sanction. The trial court granted that motion. The Turowskis now appeal.

We first note that the Turowskis have submitted a large, fact-intensive brief; however, a majority of the facts within the brief were not part of the lower court record. Because we are an appellate court and we cannot retry a matter, our review is limited to the record in the trial court,

Kent Co Aeronautics Bd v Dep't of State Police, 239 Mich App 563, 579-580; 609 NW2d 593 (2000). We cannot consider anything that was not entered into evidence in the trial court.

The Turowskis first argue that the trial court erred by not requiring the parties to submit to alternative dispute resolution (ADR). The lower court record reveals that the Turowskis did not raise the issue of ADR at the trial court level. Because the issue was "not raised before, and addressed and decided by, the trial court," it is unpreserved for review. *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 443; 695 NW2d 84 (2005). Because no unusual circumstances are present in this case, we will not consider this argument. See *Peterman v Dep't of Natural Resources*, 446 Mich 177, 183; 521 NW2d 499 (1994).

Next, the Turowskis' argue that the trial court committed multiple errors during the preliminary injunction hearing, including allowing a substitute judge to preside over the hearing, allowing too much time for negotiation, and failing to enter a written order. Once again, however, these claims are unpreserved. See *Hines*, 265 Mich App at 443. The Turowskis did not challenge the proceedings below. Indeed, they expressly agreed to the outcome of the hearing. Consequently, we do not need to consider this issue. See *Peterman*, 446 Mich at 183. Nevertheless, we have considered the arguments and find them to be without merit.

The Turowskis also argue that the trial court expressed bias and partiality throughout the proceedings, such that he should have been disqualified from hearing the case. "A trial judge is presumed to be impartial and the party who asserts partiality has a heavy burden of overcoming that presumption." *In re MKK*, 286 Mich App 546, 566; 781 NW2d 132 (2009). MCR 2.003(C) provides a list of grounds for disqualification of a judge, including when (1)(a), "[t]he judge is biased or prejudiced for or against a party or attorney," and (1)(c), "[t]he judge has personal knowledge of disputed evidentiary facts concerning the proceeding." The Court Rules also provide that "all motions for disqualification must be filed within 14 days of the discovery of the grounds for disqualification." MCR 2.003(D)(1)(a). The fact that a disqualification motion is untimely is a factor that may be considered in deciding whether the motion should be granted. MCR 2.003(D)(1)(d).

In this case, the Turowskis allege bias because of claimed legal work performed by the trial judge for them in the past and the trial judge's comments about his childhood experiences near the lake and knowledge of the area. The record reveals that the Turowskis were aware of the trial judge's alleged bias on October 31, 2011, when he first commented about his childhood experiences at Greening Lake. Yet, the Turowskis did not move to disqualify the trial judge until October 8, 2012, which is well outside the timeframe required by MCR 2.003(D)(1)(a). Further, legal work *for* the Turowskis and general familiarity with the area are not evidence of bias sufficient to support that there was an abuse of discretion in the denial of the motion for disqualification. Certainly, on the record before us, the Turowskis have not surmounted the heavy burden of overcoming the presumption of judicial impartiality. *In re MKK*, 286 Mich App at 566.

Next, the Turowskis assert that the trial court wrongly decided Haskell's motion for summary disposition pursuant to MCR 2.116(C)(10), because the 1935 McNitt Act resolution proves that 13 Mile Road extends to Greening Lake. We disagree. A trial court's decision regarding a motion for summary disposition is reviewed de novo. *Jimkoski v Shupe*, 282 Mich

App 1, 4; 763 NW2d 1 (2008). A motion for summary disposition pursuant to MCR 2.116(C)(10) tests the factual sufficiency of a claim. *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 206; 815 NW2d 412 (2012). Summary disposition is properly granted when the documentary evidence submitted by the parties, viewed in the light most favorable to the nonmoving party, establishes that there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Jimkoski*, 282 Mich App at 4.

The McNitt Act, 1931 PA 130, MCL 247.1 *et seq.*, repealed by 1951 PA 51, in pertinent part stated:

> On or before April first, nineteen hundred thirty-two, the board of county road commissioners in each of the several counties of the state shall take over and incorporate into the county road system, twenty per cent of the total township highway mileage so determined and fixed by the state highway commissioner in each township of their respective counties. Thereafter each such board of county road commissioners shall, on April first of each succeeding year, take over and incorporate into their county road system, an additional twenty per cent of such township highway mileage until the entire township highway mileage in all of the townships of each of such counties has been taken over and made a part of the county highway systems. In the year next following the taking over of all such highways all dedicated streets and alleys in recorded plats and outside of incorporated cities and villages shall be taken over and become county roads. [See also *Marx v Dep't of Commerce*, 220 Mich App 66, 71; 558 NW2d 460 (1996).]

The plain language of the McNitt Act requires that counties take over township roads. See *Missaukee Lakes Land Co v Missaukee Co Rd Comm*, 333 Mich 372, 376; 53 NW2d 297 (1952). Because the McNitt Act requires a county to adopt township roads, we conclude that it is clear that the 1935 McNitt Act resolution relied upon by the Turowskis could not create a nonexistent road. Therefore, 13 Mile Road must have physically existed and actually extended to Greening Lake before 1935 in order for the McNitt Act resolution to have actually adopted such a road.

A road may be dedicated to the public by "(a) a statutory dedication and an acceptance on behalf of the public, (b) a common-law dedication and acceptance, or (c) a finding of highway by public user." *2000 Baum Family Trust v Babel*, 488 Mich 136, 147; 793 NW2d 633 (2010). All three forms of creating a public road require some action by public officials. A statutory dedication requires "'acceptance by the proper public authority.'" *Id.* at 149 (citation omitted). Common-law dedication requires not only the "intent by the property owner to offer the land for public use," but "an acceptance by, and maintenance of the road by, public officials[.]" *Id.* at 147. Last, establishing a highway by public user under MCL 221.20 requires as one of its elements "that the road was used and worked on by public authorities." *Kalkaska Co Rd Comm v Nolan*, 249 Mich App 399, 401-402; 643 NW2d 276 (2001). The Turowskis did not provide the lower court with any evidence that the disputed property ever became a public road by way of statutory dedication, common-law dedication, or the highway by user statute as discussed above. The party opposing a motion for summary disposition may not rest upon mere allegations or denials in the pleadings, but must, by affidavit or other documentary evidence, set forth specific facts showing that there is a genuine issue for trial. MCR 2.116(G)(4). This, the

Turowskis did not do, so, summary disposition was proper because there was no genuine issue of material fact regarding whether 13 Mile Road ran to Greening Lake.

Finally, the Turowskis argue that the trial court erred by dismissing their remaining claims and defenses as a discovery sanction. After carefully reviewing the Turowskis' argument and the record below, we must discern no cognizable legal claim nor support with legal authority regarding the dismissal of an action as a discovery sanction or with regard to their various motions. "An appellant may not merely announce its position or assert an error and leave it to this Court to discover and rationalize the basis for its claims, unravel or elaborate its argument, or search for authority for its position." *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 499; 668 NW2d 402 (2003). When an issue is inadequately briefed without citation to legal authority the issue is deemed abandoned. *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999). Despite the fact that we could deem the issues abandoned, we have nonetheless again reviewed the trial court's dismissal as a discovery sanction. We conclude it to be within the trial court's broad discretion. MCR 2.313(D)(1)(a); MCR 2.313(B)(2)(c) (allowing for dismissal of an action as a sanction when a party fails to attend his own deposition); *Maldonado v Ford Motor Co*, 476 Mich 372, 389; 719 NW2d 809 (2006) (commenting that trial court's possess an inherent power to sanction litigants, including by dismissing claims, in order to protect the integrity of the court and the judicial process).

We affirm.

/s/ Kurtis T. Wilder
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey