

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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CITY OF BLOOMFIELD HILLS,  
  
Plaintiff-Appellee,

UNPUBLISHED  
May 10, 2012

V

No. 299721  
Oakland Circuit Court  
LC No. 2008-088541-CE

MARILYN FROLING and WILLIAM P.  
FROLING,

Defendants-Appellants,

v

HUBBELL, ROTH & CLARK,  
  
Appellee.

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Before: DONOFRIO, P.J., and JANSEN and SHAPIRO, JJ.

PER CURIAM.

Defendants, Marilyn Froling and William P. Froling, appeal as of right the trial court's order awarding costs in favor of plaintiff, city of Bloomfield Hills ("the City"), in this nuisance abatement action. Defendants also challenge the trial court's award of sanctions in favor of nonparty Hubbell, Roth & Clark (HRC) and the City, and the court's order denying William Froling's motion for disqualification. Because the trial court did not err by requiring defendants to reimburse the City its costs incurred to abate the nuisance, defendants were not entitled to a jury determination regarding costs, the election of remedies doctrine was inapplicable, defendants were not denied their rights to due process, the trial court's factual determinations were not clearly erroneous, the award of \$20,367.81 was reasonable, the trial court did not abuse its discretion by awarding discovery sanctions, granting a protective order, and quashing certain subpoenas, and the court did not err by refusing to disqualify itself, we affirm.

This protracted and contentious litigation has spanned more than four years and involved multiple appeals to this Court. Defendants own residential property in the City on which they constructed a berm in violation of multiple city ordinances. The City filed a complaint against

defendants seeking removal of the berm and a judgment “for all costs, expenses and attorney fees incurred . . . in abating or being able to abate these violations.”<sup>1</sup> On September 17, 2008, the trial court entered an order in the City’s favor, stating:

IT IS HEREBY ORDERED that Defendants and their agents, servants, employees, or those persons that act in concert or participation with them that receive actual notice of this Order are enjoined from maintaining any berm without all required permits on the premises . . . known as the Froling Property.

IT IS FURTHER ORDERED that Defendants shall remove the unpermitted berm within (18) days of entry of this Order.

IT IS FURTHER ORDERED that Plaintiff is authorized, through its agents or employees, to enter upon the Froling Property to inspect the property to ascertain whether the berm has been removed at the end of those eighteen (18) days.

IT IS FURTHER ORDERED that if Defendants fail to remove the subject berm within the time required in this Order, Plaintiff, through its agents or employees, is authorized to remove the berm, and assess all costs incurred by the Plaintiff in doing so to Defendant[s].

Thereafter, on October 24, 2008, the trial court entered a stipulated order of judgment, which referenced and attached the September 17, 2008, order and purported to “dispose[] of all remaining claims and close[] this case.” Defendants appealed the October 24, 2008, order to this Court, which affirmed the trial court’s decision. *City of Bloomfield Hills v Froling*, unpublished opinion per curiam of the Court of Appeals, issued April 27, 2010 (Docket No. 288766).

Meanwhile, a few days before the trial court entered the October 24, 2008, order, the City ascertained that defendants had failed to completely remove the berm and that soil from that berm had been relocated to another area of their property, effectively creating a second berm. The City and its agents entered onto defendants’ property and removed the second berm and what remained of the original berm. The City then sought reimbursement in the amount of \$20,367.81 for its costs incurred in removing both berms. Defendants opposed the City’s motion in part on the basis that the October 24, 2008, order stated that it “dispose[d] of all remaining claims and close[d] this case[,]” and MCR 7.208(A) precluded the trial court from amending the October 24, 2008, order because defendants’ appeal of that order was currently pending before this Court. The trial court rejected defendants’ arguments, reasoning that the City’s motion was a post-judgment motion that did not fall within the purview of MCR 7.208(A) because, rather than seek to amend the October 24, 2008, stipulated judgment, the City sought to enforce the judgment. The trial court also reasoned that the September 17, 2008, order expressly allowed the

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<sup>1</sup> The City also sought to enjoin defendants’ illegal connection of their sump pump to the City’s sanitary sewer system, and the trial court granted the requested relief. Defendants do not challenge that ruling in this appeal, however, which involves only removal of the berm.

City to recoup its costs incurred if it was required to remove the berm. Defendants challenged the trial court's ruling in this Court by filing a "Motion to Enforce MCR 7.208(A)" in their appeal involving the October 24, 2008, stipulated order of judgment. This Court denied defendants' motion.<sup>2</sup> *City of Bloomfield Hills v Froling*, unpublished order of the Court of Appeals, entered May 6, 2009 (Docket No. 288766).

Thereafter, the trial court held an evidentiary hearing to determine the amount to which the City was entitled as reimbursement for its nuisance-abatement expenditures. Following a two-day hearing, the trial court determined that the costs that the City incurred were reasonable and necessary and that the City was entitled to reimbursement in the requested amount of \$20,367.81. Defendants now appeal the trial court's order.

### I. LAW OF THE CASE DOCTRINE

Defendants first argue that the October 24, 2008, stipulated order of judgment was a final order that precluded the City from subsequently initiating a claim for monetary damages. The City, on the other hand, argues that the law of the case doctrine precludes this Court from revisiting this issue and that, alternatively, the trial court's decision to hold an evidentiary hearing and order defendants to reimburse the City for its costs incurred was proper. "Whether the law of the case doctrine applies is a question of law that we review de novo." *Shade v Wright*, 291 Mich App 17, 21; 805 NW2d 1 (2010).

Under the law of the case doctrine, this Court's determination on a legal question is binding in subsequent appeals and may not be decided differently in a subsequent appeal in the same case where the facts remain materially the same. *Grievance Administrator v Lopatin*, 462 Mich 235, 259; 612 NW2d 120 (2000). The doctrine "applies, however, only to issues actually decided, either implicitly or explicitly, in the prior appeal." *Id.* at 261. "The primary purpose of the doctrine is to maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit." *Ashker v Ford Motor Co*, 245 Mich App 9, 13; 627 NW2d 1 (2001). In accordance with this purpose, the law of the case doctrine applies regardless of the correctness of the prior decision. *Augustine v Allstate Ins Co*, 292 Mich App 408, 425; 807 NW2d 77 (2011).

Here, this Court previously rejected defendants' argument that the City could not seek to recoup its costs incurred to abate the nuisance after the trial court entered the October 24, 2008, stipulated order of judgment. Defendants raised this issue in their motion to enforce MCR 7.208(A), filed in this Court in their appeal of the October 24, 2008, order, and this Court denied defendants' motion. *City of Bloomfield Hills v Froling*, unpublished order of the Court of Appeals, entered May 6, 2009 (Docket No. 288766). Defendants argued that MCR 7.208(A) precluded reimbursement of the City's costs because granting such relief would have constituted

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<sup>2</sup> Judge Jansen dissented, stating that she would "on the Court's own motion, grant leave to appeal in this matter[.]" and opining that the trial court lacked authority and jurisdiction to enter a monetary award. *City of Bloomfield Hills v Froling*, unpublished order of the Court of Appeals, entered May 6, 2009 (Docket No. 288766).

an amendment of the October 24, 2008, judgment, which was pending on appeal before this Court.<sup>3</sup> In rejecting defendants' argument, this Court necessarily considered the argument on its merits. Although Judge Jansen disagreed with the majority's determination, the law of the case doctrine applies regardless of the correctness of this Court's previous decision. *Augustine*, 292 Mich App at 425. Thus, pursuant to the law of the case doctrine, we decline to revisit this Court's previous determination that ordering defendants to reimburse the City for its costs incurred to remove the berm did not constitute an improper amendment of the October 24, 2008, judgment.<sup>4</sup>

## II. DENIAL OF MOTION TO IMPANEL A JURY

Defendants next argue that the trial court erred by denying them their constitutional right to have a jury determine the amount of reimbursement owed to the City. We review constitutional issues de novo. *In re Ayers*, 239 Mich App 8, 10; 608 NW2d 132 (1999).

Defendants argue that they were entitled to a jury trial pursuant to Const 1963, art 1, § 14. Defendants' argument lacks merit. "The constitutional right to trial by jury under Const 1963, art 1, § 14 applies to civil actions at law that were triable by a jury at the time the constitutional guarantee was adopted." *In re Forfeiture of \$1,159,420*, 194 Mich App 134, 154; 486 NW2d 326 (1992). "Because there was no right to a jury trial in equitable matters, matters in equity are not entitled to jury trials unless so preserved or created by the Legislature." *Id.* at 154-155. It is undisputed that nuisance abatement actions are equitable in nature. MCL 600.2940(5); *Capitol Prop Group, LLC v 1247 Ctr Street, LLC*, 283 Mich App 422, 430; 770 NW2d 105 (2009);

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<sup>3</sup> MCR 7.208(A) provides:

After a claim of appeal is filed or leave to appeal is granted, the trial court or tribunal may not set aside or amend the judgment or order appealed from except

- (1) by order of the Court of Appeals,
- (2) by stipulation of the parties,
- (3) after a decision on the merits in an action in which a preliminary injunction was granted, or
- (4) as otherwise provided by law.

<sup>4</sup> We note that this Court also denied defendants' motion for peremptory reversal, which raised the same issue. *City of Bloomfield Hills v Froling*, unpublished order of the Court of Appeals, entered November 1, 2010 (Docket No. 299721). Defendants' motion for peremptory reversal, however, was filed in this appeal, and the law of the case doctrine applies only to legal questions raised in *subsequent* appeals. *Grievance Administrator*, 462 Mich at 259. Moreover, the doctrine applies only to decisions on the merits, see *id.* at 261, and a determination that an issue does not warrant peremptory relief is not a decision on the merits.

*Fredal v Forster*, 9 Mich App 215, 228; 156 NW2d 606 (1967). As such, there is no right to a jury trial in an action to abate a nuisance. *Id.* Moreover, defendants fail to identify any statutory provision entitling them to a jury trial and we are unaware of any such provision. Accordingly, defendants' argument fails.

Further, we note that, contrary to defendants' argument, the City did not seek monetary damages in its amended complaint. Defendants rely on the following paragraph, included under the heading "Request for Declaratory Judgment, and Injunctive Relief:"

i) Authorize and order that a lien in favor of Plaintiff, in the amount of its damages, be placed on the Premises with the amount thereof to be assessed by placement on the tax rolls, for collection as provided by law for general City real property taxes.

Contrary to defendants' argument, this paragraph was not a request for money damages. Rather, as expressly stated, the City sought to place a lien on the property, if necessary. Unlike monetary damages, a lien is equitable in nature. See *Ypsilanti Charter Twp v Kircher*, 281 Mich App 251, 284; 761 NW2d 761 (2008).

### III. ELECTION OF REMEDIES DOCTRINE

Defendants next argue that the "election of remedies" doctrine barred the City from asserting a claim against them for constructing a second berm in violation of the trial court's September 17, 2008, order. Specifically, defendants argue that the concurrent civil infraction action against them in the 48<sup>th</sup> District Court precluded the City from pursuing relief in the instant case with respect to the second berm. Because the election of remedies doctrine is "merely a procedural rule," *Riverview Co-Op, Inc v First Nat'l Bank & Trust Co of Mich*, 417 Mich 307, 311; 337 NW2d 225 (1983), this issue presents as a question of law that we review de novo. *Hamed v Wayne Co*, 490 Mich 1, 8; 803 NW2d 237 (2011).

The election of remedies doctrine "is merely a procedural rule which precludes one to whom there are available two inconsistent remedies from pursuing both." *Riverview Co-op, Inc*, 417 Mich at 311. The purpose of the doctrine "is not to prevent recourse to alternate remedies, but to prevent double redress for a single injury." *Id.* at 312.

In order for the doctrine to apply, three prerequisites must exist: (1) at the time of the election, there must have been two or more remedies available; (2) the alternative remedies must be inconsistent rather than consistent and cumulative; and (3) the party must have chosen and pursued one remedy to the exclusion of the other(s)." [*Prod Finishing Corp v Shields*, 158 Mich App 479, 494; 405 NW2d 171 (1987).]

A plaintiff may, however, simultaneously pursue all available remedies regardless of their legal consistency, if the plaintiff does not obtain a double recovery. *Jim-Bob, Inc v Mehling*, 178 Mich App 71, 92; 443 NW2d 451 (1989). To determine inconsistency, courts apply the following test:

For one proceeding to be a bar to another for inconsistency, the remedies must proceed from opposite and irreconcilable claims of right and must be so inconsistent that a party could not logically assume to follow one without renouncing the other. Two modes of redress are inconsistent if the assertion of one involves the negation or repudiation of the other. In this sense, inconsistency may arise either because one remedy must allege as fact what the other denies, or because the theory of one must necessarily be repugnant to the other. More particularly, where the election of a remedy assumes the existence of a particular status or relation of the party to the subject matter of litigation, another remedy is inconsistent if, in order to seek it, the party must assume a different and inconsistent status or relation to the subject matter. [25 Am Jur 2d, Election of Remedies, § 11, pp 653-654.]<sup>5</sup>

Here, the election of remedies doctrine was inapplicable. The City initiated this litigation in 2008 seeking declaratory and injunctive relief, including removal of the unauthorized berm on defendants' property. While this matter was pending, the City became aware that defendants had relocated soil from the berm to another area on their property, effectively creating a second berm. The City ticketed defendants for violating a stop work order and constructing a berm without a permit. Thus, while this action is a nuisance abatement action, the district court matter involved a ticket and a fine rather than abatement. Thus, the two remedies were not inconsistent or mutually exclusive.

Defendants contend that the City's allegations in the district court action acknowledged the deconstruction of the original berm, which was contrary to the City's position in this action that defendants failed to remove the original berm. Contrary to defendants' argument, the City's assertions in the district court action and in this action were not inconsistent. In this action, the City acknowledged that defendants had removed a significant portion of the original berm, but maintained that three to six inches of that structure remained. This is not inconsistent with the City's assertion in the district court action that defendants created a new berm from the remnants of the original berm. Accordingly, defendants' argument lacks merit.<sup>6</sup>

#### IV. DUE PROCESS

Defendants next argue that the trial court violated their rights to due process when it permitted the scope of the evidentiary hearing to expand beyond the original berm and include

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<sup>5</sup> See also *Prod Finishing Corp*, 158 Mich App at 494-495.

<sup>6</sup> To the extent that defendants seek to assert the doctrines of claim and issue preclusion, they have abandoned appellate review of those issues by simply announcing those concepts in their statement of questions presented and failing to offer any legal argument. An appellant may not simply announce a position and leave it to this Court to discern and rationalize the basis for a claim. *Houghton v Keller*, 256 Mich App 336, 339; 662 NW2d 854 (2003). "An appellant's failure to properly address the merits of his assertion of error constitutes abandonment of the issue." *Id.* at 339-340.

evidence regarding the second berm. Whether an individual has been provided sufficient notice to satisfy due process requirements is a legal question that we review de novo. *Vicencio v Jaime Ramirez, MD, PC*, 211 Mich App 501, 503-504; 536 NW2d 280 (1995). “Generally, due process in civil cases requires notice of the nature of the proceedings and an opportunity to be heard in a meaningful time and manner by an impartial decisionmaker.” *By Lo Oil Co v Dep’t of Treasury*, 267 Mich App 19, 29; 703 NW2d 822 (2005) (quotation marks and citations omitted).

Defendants’ due process rights were not violated because they had ample notice that the evidentiary hearing would pertain to the second berm as well as the original berm. In the City’s brief in support of its amended motion for entry of judgment for costs incurred, filed almost one year before the evidentiary hearing, the City stated:

UNBELIEVABLY, THE DEFENDANTS ATTEMPTED TO CIRCUMVENT JUDGE MESTER’S RULING BY PARTIALLY REMOVING THE BERM BEFORE THE CITY’S CONTRACTORS ARRIVED AND CONSTRUCTING A TOTALLY NEW ILLEGAL BERM WITHOUT A GRADING PERMIT ALONG THE SOUTH OF THEIR PROPERTY WHICH BERM WAS PRESUMABLY INTENDED TO DIVERT WATER AWAY FROM THEIR PROPERTY AND ON TO THE COUNTRY CLUB PROPERTY. THIS ILLEGAL BERM WAS ALSO REMOVED BY THE CITY’S CONTRACTORS.

Thereafter, inasmuch as the City had incurred \$20,367.81, pursuant to the Court’s October 24, 2008 Judgment and the September 17, 2008 Order which was incorporated therein the City demanded the Defendants<sup>[1]</sup> payment of said sum as costs incurred in removing the illegal berm from the Defendants’ property. The Defendants consistently refused not only to honor the promise their children had made to the City Commission but also refused to comply with Judge Mester’s Order and therefore the City proceeded to record a Judgment Lien against the Defendants’ property. This Judgment Lien for \$20,367.81 was recorded in Liber 40802, Page 820, Oakland County Records. Thereafter, the Defendants’ attorney complained that they wanted the opportunity to have a hearing and wished to contest the amounts claimed by the City in the Judgment Lien. Rather than to create an issue over the Propriety of the Judgment Lien, counsel for the City agreed that it would discharge without prejudice the lien in favor of an evidentiary hearing before this Honorable Court to determine the amount that the City is entitled to pursuant to Judge Mester’s ruling for the removal of the illegal berm.

Thus, defendants were aware approximately one year before the evidentiary hearing began that the hearing would involve both berms. The City expressly stated in its brief that defendants only partially removed the original berm and that its contractors removed the second berm, incurring \$20,367.81 for the removal of both berms. Further, in granting the City’s amended motion for entry of judgment for costs incurred, trial court stated that “[a]n evidentiary hearing shall be scheduled forthwith to determine the validity of the amounts incurred and sought by Plaintiff City.” Defendants were aware that the amount that the City requested included costs for the removal of both berms. Therefore, the record demonstrates that defendants were provided ample

notice that the evidentiary hearing would pertain to both berms. As such, their due process rights were not violated.

## V. TRIAL COURT'S FACTUAL FINDINGS REGARDING ORIGINAL BERM

Defendants next challenge the trial court's factual determination that they failed to remove the original berm and contend that they were denied due process when the City's contractors did not inform them that the work being performed to remove the original berm was unacceptable. We review a trial court's findings of fact for clear error. *Madison Dist Pub Schs v Myers*, 247 Mich App 583, 588; 637 NW2d 526 (2001). "Clear error exists where, after a review of the record, the reviewing court is left with a firm and definite conviction that a mistake has been made." *Marshall Lasser, PC v George*, 252 Mich App 104, 110; 651 NW2d 158 (2002).

The trial court did not clearly err in determining that defendants failed to completely remove the original berm. Following the evidentiary hearing, the trial court determined that defendants failed to remove three to six inches of the original berm and constructed a second berm, approximately 29 inches tall, on the south end of their property. The testimony of HRC engineer, James Burton, supported the trial court's determination and was based on his personal observation. David Harris, the owner of the company that performed the work for the City, also testified regarding the amount of soil removed from the original berm and the stockpiled soil. Defendants rely on the testimony of code enforcement officer, Michael Krease, who testified that the original berm had been substantially removed. Krease also testified, however, that "there's still some of it there." Defendants also offered the testimony of Albert Hawley, who asserted that he fully removed the original berm and denied any intention to create a second berm with the stockpiled soil. Hawley acknowledged, however, that he merely relocated soil from the original berm to another location and did not remove the soil from the property. Giving due regard to the trial court's special opportunity to judge witness credibility, we are not left with a firm and definite conviction that the trial court erred by determining that defendants failed to completely remove the original berm. MCR 2.613(C); *Marshall Lasser, PC*, 252 Mich App at 110.

Defendants also assert that because any soil that remained as part of the original berm did not violate a city ordinance, the City was not justified in entering the property and removing the soil. This argument lacks merit given that the trial court's September 17, 2008, order, which was incorporated into the October 24, 2008, stipulated order of judgment, expressly directed that defendants "shall remove the unpermitted berm[.]" It did not direct defendants to "substantially remove" the berm, bring the height of the berm within that allowed by ordinance, or otherwise indicate that anything short of full compliance was acceptable. The term "shall" is a mandatory rather than a permissive term. *Ligons v Crittenton Hosp*, 490 Mich 61, 72; 803 NW2d 271 (2011). Therefore, defendants' argument that they could have disregarded the trial court's order and merely brought the height of the berm within that allowed by ordinance lacks merit.

Defendants also contend that the City was required to obtain new authorization to enter onto their property and remove the second berm because the September 17, 2008, order authorized the City to remove only the original berm if defendants failed to do so. Reading the language of the September 17, 2008, order, as incorporated in the stipulated order of judgment, we conclude that the City was authorized to enter onto defendants' property and remove the

second berm. The September 17, 2008, order authorized the City to enter onto defendants' property "to inspect the property to ascertain whether the berm has been removed[.]" The order further states that, if defendants failed to remove the berm, the City "is authorized to remove the berm, and assess all costs incurred" to defendants. The City complied with the order and removed the berm that defendants, rather than removing themselves, had simply relocated. To suggest that the City was required to seek new authorization to do so would effectively promote gamesmanship as defendants could have simply continued to relocate the berm whenever the City obtained an order to remove it.

Similarly, defendants' argument that they were denied their rights to due process when the City failed to inform them that their efforts to remove the berm were unacceptable is without merit. The trial court's September 17, 2008, order did not require the City to inform defendants whether their removal efforts were acceptable. Moreover, the order expressly enjoined defendants from "maintaining any berm without all required permits[.]" Therefore, the order gave defendants sufficient notice that merely relocating the berm was unacceptable. Thus, defendants were not denied due process.

## VI. REASONABLENESS OF COSTS AWARDED

Defendants next argue that the trial court's award of costs in the amount of \$20,367.81 was unreasonable and excessive. We review for an abuse of discretion the propriety and reasonableness of expenses incurred to abate a nuisance. See *Ypsilanti Charter Twp*, 281 Mich App at 275.

The trial court did not abuse its discretion by ordering defendants to reimburse the City \$20,367.81 for its costs incurred to abate the nuisance. At the evidentiary hearing, the City presented testimony and documentary evidence detailing the costs that it incurred to remove the berms on defendants' property. The City's exhibits consisted of detailed billings and photographs documenting each service performed and the costs of the services, including the hourly rates. The use of contractors to perform the work was appropriate, and the City accepted bids for the work to be performed and hired the lowest bidder. As the trial court recognized, hiring third-party contractors was reasonable and necessary in light of the contentious relationship between the parties and the litigious history of this case. Further, defendants do not dispute that the work was performed. Rather, they argue that it could have been performed in a more cost effective manner. Defendants could have avoided the expenses that they deem unnecessary, however, by complying with the trial court's September 17, 2008, order and completely removing the berm without creating a second berm. Defendants' failure to do so necessitated the expenditures that they now challenge. Therefore, the trial court's decision requiring defendants to reimburse the City its expenditures totaling \$20,367.81 was within the range of reasonable and principled outcomes.

## VII. PROTECTIVE ORDER, SANCTIONS, AND ADMISSION OF EVIDENCE

Defendants next argue that the trial court erred by granting HRC's motion for a protective order, by awarding both HRC and the City \$500 in sanctions, and by denying defendant Marilyn Froling's request for the production of certain witnesses and records at the evidentiary hearing. We review a trial court's decision whether to grant a protective order for an abuse of discretion.

*Bloomfield Charter Twp v Oakland Co Clerk*, 253 Mich App 1, 35; 654 NW2d 610 (2002). We also review for an abuse of discretion a trial court's decision regarding the admission of evidence, *Barnett v Hidalgo*, 478 Mich 151, 158-159; 732 NW2d 472 (2007), and a trial court's decision whether to award sanctions, *Local Area Watch v Grand Rapids*, 262 Mich App 136, 147; 683 NW2d 745 (2004).

Defendants argue that the trial court erroneously denied Marilyn Froling's motion to require the attendance of HRC engineer James Burton on April 13, 2010, the second day of the evidentiary hearing. Burton had already appeared on the first day of the hearing, on March 3, 2010, and was the primary witness questioned that day. Both Marilyn Froling's attorney and William Froling, proceeding in propria persona, questioned Burton. The trial court determined that Burton's second appearance was unnecessary, reasoning that defendants already had an adequate opportunity to question him. The trial court's determination did not constitute an abuse of discretion.

Marilyn Froling also sought to compel the attendance of the City's attorney, William Hampton, as a witness on the second day of the evidentiary hearing. Such a request runs contrary to Michigan Rule of Professional Conduct (MRPC) 3.7(a), which precludes an attorney from acting "as advocate at a trial in which the lawyer is likely to be a necessary witness." Because Marilyn Froling failed to demonstrate that Hampton's testimony was necessary and that the issues to be addressed could not be obtained through another source, the trial court did not abuse its discretion by denying Marilyn Froling's motion to compel Hampton's attendance at the April 13, 2010, evidentiary hearing.

Defendants also argue that Corey Borton was a necessary witness and that the trial court improperly admitted Borton's testimony through the testimony of James Burton, contrary to the Michigan Rules of Evidence. Defendants' argument lacks merit. Borton worked for HRC under Burton's supervision. Borton prepared a daily field report that was admitted into evidence premised on Burton's testimony that he was Borton's supervisor and that the report was consistent with those prepared in the ordinary course of business. Thus, the report fell within the hearsay exception under MRE 803(6), pertaining to "[a] memorandum, report, record, or data compilation, in any form, of acts, transactions, occurrences, events, conditions, opinions . . . made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity. . . ." Defendants also challenge Burton's testimony pertaining to photographs of the property because Burton did not take the photographs and had no "first-hand knowledge" of the photographs. Notably, however, Burton testified that the photographs were consistent with his observations of the property when he was present at the site. Further, because Burton was Borton's immediate supervisor, Burton was competent to testify regarding his subordinate's work and requiring Borton's testimony would have been unnecessarily repetitive and cumulative.

Defendants also contend the trial court erred by refusing to allow them to subpoena all correspondence between the City attorney's office, the City, and the City's engineers involving defendants' property. Again, defendants' argument lacks merit. The documents requested spanned a time period from September 18, 2008, to May 5, 2009. Defendants failed to identify how the documents would have provided information regarding the matter at hand, i.e., the City's costs incurred to abate the nuisance. In addition, some of the requested documents fell

within the attorney-client privilege. “MCR 2.302(B)(1) limits discovery to matters that are not privileged. The attorney-client privilege attaches to direct communication between a client and his attorney as well as communications made through their respective agents.” *Augustine*, 292 Mich App 408, 420; 807 NW2d 77 (2011) (quotation marks and citation omitted). Although “[t]he scope of the attorney-client privilege is narrow, attaching only to confidential communications by the client to his advisor that are made for the purpose of obtaining legal advice[.]” *id.* (quotation marks and citation omitted), it can reasonably be assumed that correspondence of the City’s attorney pertaining to defendants’ property contains confidential communications. In addition, the common-law privilege protecting the disclosure of an attorney’s work product “protects from discovery the notes, working documents, and memoranda that an attorney prepares in anticipation of litigation.” *Id.*; see also MCR 2.302(B)(3)(a).

Further,

It is well settled that Michigan follows an open, broad discovery policy that permits liberal discovery of any matter, not privileged, that is relevant to the subject matter involved in the pending case. This is true whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of another party. However, Michigan’s commitment to open and far-reaching discovery does not encompass fishing expeditions. Allowing discovery on the basis of conjecture would amount to allowing an impermissible fishing expedition. [*Augustine*, 292 Mich App at 419–420 (quotation marks, brackets, and citations omitted).]

Defendants failed to demonstrate a need for the material sought because they had in their possession the bills for services performed on the property and the issue before the trial court was limited to a determination regarding the costs that the City incurred to abate the nuisance. Defendants failed to demonstrate that the documentation requested would not be duplicative of materials already disclosed. In addition, defendants request that, regardless of the outcome of this appeal, the requested documents should be turned over to this Court for an *in camera* inspection is groundless. It appears that defendants’ request is based at least in part on their speculative assertion that HRC’s reluctance to turn over the documents sought stems from some sort of wrongdoing. Nothing in the record supports such a assertion.

As sanctions for defendants’ burdensome and untimely discovery requests, the trial court entered a protective order and awarded the City and HRC each sanctions in the amount of \$500. “Trial courts possess the inherent authority to sanction litigants and their counsel[.]” *Maldonado*, 476 Mich at 388. “This power is not governed so much by rule or statute, but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.” *Id.* at 376. Further, MCR 2.302(G), provides:

(G) Signing of Discovery Requests, Responses, and Objections; Sanctions.

(1) In addition to any other signature required by these rules, every request for discovery and every response or objection to such a request made by a party represented by an attorney shall be signed by at least one attorney of record. A

party who is not represented by an attorney must sign the request, response, or objection.

\* \* \*

(3) The signature of the attorney or party constitutes a certification that he or she has read the request, response, or objection, and that to the best of the signer's knowledge, information, and belief formed after a reasonable inquiry it is:

(a) consistent with these rules and warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law;

(b) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and

(c) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation.

Factors to consider in determining an appropriate discovery sanction include:

(1) whether the violation was wilful or accidental, (2) the party's history of refusing to comply with discovery requests (or refusal to disclose witnesses), (3) the prejudice to the defendant . . . (5) whether there exists a history of . . . engaging in deliberate delay, . . . and (8) whether a lesser sanction would better serve the interests of justice. [*Dean v Tucker*, 182 Mich App 27, 32-33; 451 NW2d 571 (1990) (footnotes omitted).]

In awarding sanctions, the trial court noted the long and protracted history of litigation and that the amount of discovery "probably felled a whole forest of trees." Moreover, the record shows that, after the trial court refused to sign certain subpoenas that William Froling presented, Marilyn Froling's attorney effectively attempted to circumvent the trial court's decision by signing the subpoenas himself. Defendants also sought privileged documents and documents that fell within the work-product doctrine, and their discovery requests were untimely given that the parties were in the midst of the evidentiary hearing. Accordingly, under the circumstances presented in this case, the trial court did not abuse its discretion by awarding discovery sanctions and granting a protective order.

## VIII. MOTION FOR DISQUALIFICATION

Finally, defendants argue that the trial court erred by denying William Froling's request for disqualification based on defendants' prior contentious relationship with the trial court's husband in an unrelated matter. "In reviewing a motion to disqualify a judge, this Court reviews the trial court's findings of fact for an abuse of discretion and reviews the court's application of those facts to the relevant law de novo. *In re Contempt of Henry*, 282 Mich App 656, 679; 765 NW2d 44 (2009).

Judge Anderson was appointed to replace Judge Gorcyca in this matter on January 1, 2010. William Froling filed his motion to disqualify Judge Anderson on February 17, 2010, contrary to MCR 2.003(D)(1)(a), which states that “all motions for disqualification must be filed within 14 days of the discovery of the grounds for disqualification.” As a substantive basis for his motion, William Froling asserted that there existed a contentious relationship between defendants and Judge Anderson’s husband, who served as a “discovery master” in a different case. Thus, the conduct on which William Froling relied in support of his motion occurred at least three years before this action was filed and was not directly attributable to Judge Anderson. Rather, defendants merely assume that any antagonism between them and Judge Anderson’s husband has negatively impacted her ability to fairly and objectively preside over this matter. Notably, defendants point to no specific action or behavior on the part of Judge Anderson as demonstrating her alleged bias or prejudice.

Both Judge Anderson and the chief judge below correctly determined that the motion for disqualification was untimely pursuant to MCR 2.003(D)(1)(a). The events underlying defendants’ presumption of Judge Anderson’s bias were known to them at the time that Judge Anderson was assigned to this case. Yet, despite this knowledge, defendants did not seek her disqualification until almost 47 days later, notably after she had made a ruling adverse to defendants. As noted by the chief judge:

Defendant [William Froling] did not, however, file his motion until February 17, 2010 – nearly two months after the case was reassigned, and nearly three weeks after Judge Anderson’s January 27, 2010 ruling on Defendants’ Amended Motion for Summary Disposition and Motion to Impanel a Jury. This suggests that the motion is based not so much on concerns regarding Judge Anderson’s impartiality, but rather on the fact that Judge Anderson ruled against Defendant on his motions.

This Court has recognized that, “rulings against a litigant . . . are not grounds for disqualification. The court must form an opinion as to the merits of the matters before it. This opinion, whether pro or con, cannot constitute bias or prejudice.” *Armstrong v Ypsilanti Charter Twp*, 248 Mich App 573, 597-598; 640 NW2d 321 (2001). Accordingly, the record fails to establish error with respect to the denial of the motion for disqualification.

Affirmed. Plaintiff, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Pat M. Donofrio  
/s/ Kathleen Jansen  
/s/ Douglas B. Shapiro