STATE OF MICHIGAN

COURT OF APPEALS

DENISE M. PAGURA, Plaintiff/Counter-defendant-Appellant,	UNPUBLISHED February 23, 2010
v	No. 286574 Newaygo Circuit Court
DEPARTMENT OF ENVIRONMENTAL QUALITY, Defendant/Counter-plaintiff-Appellee.	LC No. 02-018423-CE

DENISE M. PAGURA, Plaintiff/Counter-defendant-Appellant,	
v	No. 291265 Newaygo Circuit Court
DEPARTMENT OF ENVIRONMENTAL QUALITY, Defendant/Counter-plaintiff-Appellee.	LC No. 02-018423-CE

Before: Donofrio, P.J., and Meter and Murray, JJ.

PER CURIAM.

In Docket No. 286574, plaintiff appeals as of right the trial court's order of June 23, 2008, authorizing a lien on her property in the amount of $95,127.50 for damages, costs, and fees pertaining to her violations of Parts 301 and 31 of the Natural Resources Environmental Protection Act (NREPA), MCL 324.30103 and MCL 324.3109. In Docket No. 291265, plaintiff appeals by leave granted the court's order of December 22, 2008, authorizing defendant to enter her land and remove a dam and pond constructed in violation of the NREPA and additionally permitting defendant to seek costs, fees, and fines secured by a lien on plaintiff's land. We vacate the order in Docket No. 286574 only insofar as it miscalculated attorney fees and remand for correction of that amount. In all other respects, we affirm both orders.

I. Background and procedural history

Plaintiff is an owner of the Northern Lights Tree Farm, located in Section 31 of Troy Township, Newaygo County. The farm contains a large wetland area that includes the headwaters of a non-navigable tributary to Freeman Creek – a trout stream that flows into the South Branch of the Pere Marquette River. During 1966 and 1967, the previous owner of plaintiff's property constructed an earthen dam across the tributary under the sponsorship of the United States Department of Agriculture's Soil Conservation Service. The dam created a four-acre pond, which plaintiff uses to irrigate Christmas trees. At the same time, another pond immediately downstream from the dam was also created.

Sometime before April 12, 1976, the previous owner modified the dam by raising the height of the riser pipe. As a consequence of this modification, the depth of the water in the pond was elevated, which in turn increased the risk that water would pour over the dam and cause the dam to fail. Periods of unusually high water precipitated just such a failure in the late 1970s and again in 1986, and as a result, sediment was released downstream. On July 11, 1989, the Michigan Department of Natural Resources (MDNR) sent a letter to plaintiff's husband[1] identifying deficiencies in the dam spillway and urged that the dam be modified to avoid liability for erosion caused by a future dam failure. Despite the letter, plaintiff took no corrective action.

In April 2001, a major flood caused the dam to fail again. Sediment flowed downstream into Freeman Creek killing fish in that area. Although plaintiff obtained a soil erosion and sedimentation permit and rebuilt the dam within a few months after this failure,[2] plaintiff failed to apply for a permit under the Inland Lakes and Streams Act, Part 301 of the NREPA, MCL 324.30101 *et seq*. Notably, in a letter dated August 2, 2001, plaintiff's engineer, David Schultz, identified problems with the dam reconstruction and opined that the dam was unsafe. Another letter from Schultz dated October 31, 2002, reiterated his concerns about the condition of the dam – noting that the "structure [had] about every problem a dam could possibly have" – and emphasized that the dam posed safety hazards to plaintiff's property and the general public. On January 14, 2002, defendant sent plaintiff a Notice of Violation demanding removal of the dam and pond in order to bring the site into compliance with Part 301 of the NREPA. The notice threatened a criminal investigation "if further unlawful activity occurs on the site."

On June 19, 2002, plaintiff filed a complaint seeking a declaration that no permit was required from the DEQ for work done on her dam because MCL 324.30103 exempts operation of a dam constructed prior to 1973 from the permit requirement and because MCL 324.30103(j) permits maintenance and repairs to such dams without a permit. Defendant answered that the maintenance and repair exemption was inapplicable because the dam was totally reconstructed.

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[1] Plaintiff's husband executed a durable power of attorney empowering plaintiff to act for him in all matters affecting their business. The court concluded that this power of attorney resolved any issue pertaining to the proper joinder of parties, and there is no issue on this matter before us on these appeals.

[2] The rebuilding process included excavation of a pond below the dam.

Defendant also filed a counterclaim alleging a violation of Part 301 of the NREPA, MCL 324.30103 due to plaintiff's reconstructing the dam and excavating a pond on bottomland without a permit. Defendant also claimed a violation of Part 31 of the NREPA, MCL 324.3109, due to plaintiff's discharging sediment into a waterway.

On October 6, 2003, the parties stipulated to administratively close the case to permit plaintiff to apply for an "after-the-fact" permit from defendant.[3] Defendant subsequently denied plaintiff's application for that permit, and an administrative referee dismissed plaintiff's appeal on the basis of lack of subject matter jurisdiction.[4] On May 19, 2005, the case was reinstated in circuit court upon plaintiff's failure to remove the case to federal court per her previous representation.

On September 30, 2005, defendant filed a motion to compel responses to discovery demands, and plaintiff was ordered to provide answers by November 4, 2005. With plaintiff having failed to timely file answers, on January 25, 2006, the court granted defendant's motion for partial summary disposition with respect to its claim that the dam was destroyed in April 2001, and that plaintiff's rebuilding did not satisfy the repair or maintenance exemption under MCL 324.30103. However, the court granted plaintiff leave to amend her complaint to allege that work done to the dam was actually done to the agricultural drain, and plaintiff amended her complaint accordingly. Trial was rescheduled for June 15, 2006.

Although plaintiff timely filed her amended complaint, she failed to appear at a May 30, 2006, settlement conference. Consequently, the trial court entered a default judgment against plaintiff on defendant's claims under Parts 301 and 31 and the trial date was recast for a remedy hearing. At the subsequent remedy hearing, the parties stipulated that the court rely on their written materials in fashioning a remedy.

Following the hearing, the court issued an opinion on February 9, 2007. Regarding the Part 301 violation, the court found that based on letters submitted to plaintiff – two of which plaintiff failed to disclose during discovery – plaintiff's dam was unsafe before failing in 2001 and remains unsafe, and concluded that the appropriate remedy was removal of the dam and the assessment of fines. Similarly, the court concluded that removal of the dam and the assessment of a fine and reasonable attorney fees was appropriate for the Part 31 violation in light of defendant's expert opinion that the discharge of sediment destroyed fish and fish spawning riffles, clogged sediment basins, and had a "dramatically negative effect" on aquatic insects. Notably, in reviewing the parties' materials, the court struck all affidavits from individuals not appearing on plaintiff's witness list due to the fact that plaintiff had filed a "tardy" motion to

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[3] MCL 324.30306(5) permits the DEQ to accept an application for the permit at issue "[i]f work has been done in violation of a permit requirement under this part and restoration is not ordered by the department . . . ."

[4] The administrative referee also noted that regardless of subject matter jurisdiction, defendant could not issue plaintiff an "after the fact" permit since the Notice of Violation had ordered restoration contrary to the requirements of MCL 324.30306(5).

extend the filing deadline.[5] Also, in light of the court's own viewing of the site, the court expressed its disagreement with the opinion of plaintiff's expert, Claire E. Schwartz, who claimed that sediment from the failed dam did not reach Freeman Creek.

Accordingly, on April 2, 2007, the court entered an order requiring plaintiff to remove the dam and pond below the dam within 180 days after obtaining the necessary permits. Should plaintiff fail to comply, the court would permit defendant to apply for a permit to enter plaintiff's land, remove the dam, and seek costs for the project as well as attorney fees and fines secured by a lien on the land where the dam was located. Also, the court required plaintiff to pay $5,000 for violating Part 301, $2,500 for violating Part 31, and $1,146 for fish killed in Freeman Creek in 2001 in addition to reasonable attorney fees and taxable costs.[6] Notably, the order indicated that under MCR 2.602(A)(3) the case was closed, but that "[t]he [c]ourt reserves jurisdiction to enforce its judgment and grant such other relief as may be appropriate."

On April 25, 2007, defendant submitted its itemized bill of costs and attorney affidavit requesting $6,715.75 in costs and $73,050 in attorney fees. The court clerk approved the bill of costs without objection on June 25, 2007.

When plaintiff apparently failed to comply with the court's order or make any payments, defendant filed a motion to show cause on April 16, 2008. At the motion hearing, the court indicated that although plaintiff had begun the process of dam removal, plaintiff was to submit monthly progress reports and authorized a lien on plaintiff's land for her failure to timely pay fines and costs. Accordingly, the court entered an order on June 23, 2008, authorizing a lien on defendant's land for $95,127.50, including fines totaling $7,500, damages of $1,146, outstanding costs of $6,715.75 and attorney fees of $79,765.75. This order is the subject of plaintiff's appeal in Docket No. 286574.

Although plaintiff had received a permit for removal of the dam on May 22, 2008, plaintiff failed to submit any progress reports, and defendant filed a renewed motion to show cause on September 29, 2008. At the motion hearing, defendant indicated that according to several recently filed progress reports, plaintiff would be unable to complete the dam removal within 180 days after the permit was issued. Plaintiff responded that the court should stay the requirement of dam removal pending her appeal before this Court.

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[5] One day before the discovery cut off date, plaintiff filed a motion to extend discovery. The trial court ruled that it would consider only plaintiff's brief and the attached affidavit of the witness provided in plaintiff's witness list, but not affidavits of other witnesses, whom plaintiff failed to include in her witness list.

[6] Defendant had requested the court award the following as sanctions: (1) $1,146 for fish killed; (2) $10,710 for the recreational value for the fishing days lost on Freeman Creek in 2001; (3) $2,315 to reimburse the United States Forest Service for cleaning sediment traps; (4) $20,000 to repair damaged riffle areas; and (5) $11,856 as restitution to the Michigan Department of Natural Resources Fish and Game Settlement Fund to support habitat improvement.

After hearing argument, the court ruled that plaintiff had taken "an untenable legal position that somehow this order to remove the dam is subject to appellate review and I believe it's not. And in the Court's viewpoint it's simply a continuation of a long history of stalling, delaying, and it's clear to me that [plaintiff's attorney] or his client have no intention of taking that dam out." Accordingly, on December 22, 2008, the court entered an order authorizing defendant to enter onto plaintiff's land to remove immediately the dam and pond. The court also permitted defendant to seek project costs as well as attorney fees and fines secured by a lien on plaintiff's land where the dam is located. That order is the subject of plaintiff's delayed application for leave to appeal in Docket No. 291265. This Court consolidated plaintiff's appeals on July 1, 2009.[7] *Pagura v Dep't of Environmental Quality*, unpublished order of the Court of Appeals, entered July 1, 2009 (Docket Nos. 286574 & 291265).

III. Analysis

A. Jurisdiction

As a preliminary matter we note that defendant argues at length that this Court is deprived of jurisdiction over both appeals because plaintiff failed to timely appeal the April 2, 2007, judgment, which was the final judgment in this case. Both appeals, however, are properly before this Court.

First, in Docket No. 286574, on July 14, 2008, plaintiff appealed the court's June 23, 2008, order awarding attorney fees, which constituted a final order under MCR 7.202(6)(a)(iv). Thus, plaintiff's appeal was by right under MCR 7.203(A)(1) and timely filed within the 21-day time limit of MCR 7.204(A)(1)(a). Despite defendant's claim that the clerk taxed costs under MCR 2.625(F) without objection over a year earlier on June 25, 2007, that rule is not controlling where Parts 31 and 301 provide the court, and not the clerk, authority to assess this relief. MCL 324.3115(1); *Maryland Cas Co v Allen*, 221 Mich App 26, 30-31; 561 NW2d 103 (1997); *Oscoda Chapter of PBB Action Committee, Inc v Dep't of Natural Resources*, 115 Mich App 356, 361-362; 320 NW2d 376 (1982).

Second, in Docket No. 291265, on April 2, 2009, plaintiff filed her delayed application for leave to appeal from the post-judgment order of December 22, 2008. That filing satisfied the time requirement of MCR 7.205(F)(3)(b), which provides that delayed applications may be filed within 12 months of the order or judgment to be appealed from. Additionally, MCR 7.205 places no limitation that an application must only be from a final order. Jurisdiction is proper.

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[7] On August 25, 2009, the circuit court entered an order staying enforcement of the December 22, 2008, order, conditioned on plaintiff's posting a bond of $100,000. Plaintiff subsequently filed a motion in this Court to delete the bond requirement, which this Court denied on September 23, 2009. *Pagura v Dep't of Environmental Quality*, unpublished order of the Court of Appeals, entered September 23, 2009 (Docket No. 291265). Our Supreme Court denied plaintiff's application for leave to appeal on December 18, 2009. *Pagura v Dep't of Environmental Quality*, ___ Mich ___; 775 NW2d 747 (2009).

B. Docket No. 286574

Turning to plaintiff's appeal in Docket No. 286574, plaintiff first challenges the court's assessment of both expert witness costs and attorney fees. Plaintiff, however, failed to make any challenge to these assessments below and only contested the imposition of the lien on her property. And that objection was made in response to defendant's motion to show cause, not on a motion for attorney fees. Thus, we review this issue only for plain error affecting plaintiff's substantial rights, i.e., a clear or obvious error that was outcome determinative or seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000).

i. Expert witness costs

The Revised Judicature Act (RJA), MCL 600.2401 *et seq*., is the statutory authority for costs and fees. *JC Bldg Corp II v Parkhurst Homes, Inc*, 217 Mich App 421, 429; 439 NW2d 378 (1989). "Under MCL 600.2405(2), 'costs' include matters specially made taxable elsewhere in the statutes or court rules." *Michigan Citizens for Water Conservation v Nestlé Waters North America Inc*, 269 Mich App 25, 107; 709 NW2d 174 (2005), aff'd in part and rev'd in part 479 Mich 280 (2007). Here, costs were awarded under Part 31 of the NREPA, which permits a court to "award reasonable attorney fees and costs to the prevailing party." MCL 324.3115(1). Accordingly, as Part 31 does not alter the statutory authority for costs found in the RJA, costs allowed under Part 31 are identical to costs allowed under the RJA. See *Id*. at 108 (finding that because Part 17 of the NREPA[8] did not alter the ordinary definition of costs, "the costs allowed under [Part 17] are the same as the costs allowed under the Revised Judicature Act.")

MCL 600.2164 of the RJA provides for taxation of expert costs and fees. That section provides in relevant part:

> (1) No expert witness shall be paid, or receive as compensation in any given case for his services as such, a sum in excess of the ordinary witness fees provided by law, unless the court before whom such witness is to appear, or has appeared, awards a larger sum, which sum may be taxed as a part of the taxable costs in the case. Any such witness who shall directly or indirectly receive a larger amount than such award, and any person who shall pay such witness a larger sum than such award, shall be guilty of contempt of court, and on conviction thereof be punished accordingly.
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> (3) The provisions of this section shall not be applicable to witnesses testifying to the established facts, or deductions of science, nor to any other specific facts, but only to witnesses testifying to matters of opinion.

[8] See MCL 324.1703(3).

Under § 2164, "experts are properly compensated . . . for court time and the time required to prepare for their testimony as experts, i.e., as individuals whose specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue."[9] *Detroit v Lufran Co*, 159 Mich App 62, 67; 406 NW2d 235 (1987). "However, an expert is not automatically entitled to compensation for all services rendered . . . ." *Hartland v Kucykowicz*, 189 Mich App 591, 599; 474 NW2d 306 (1991). Thus, this Court has determined that § 2164 does not permit "conferences with counsel for purposes such as educating counsel about expert appraisals, strategy sessions, and critical assessment of the opposing party's position to be properly compensable as expert witness fees." *Lufran*, 159 Mich App at 67.

In its bill of costs, defendant claimed a total of $6,470.75 in expert witness fees for the affidavits of environmental consultant, David Cozad, and DEQ employees James Pawloski and Charles Dodgers. However, notwithstanding that an expert may recover fees under § 2164 where a case is dismissed before that expert can testify at trial, *Herrera v Levine*, 176 Mich App 350, 357-358; 439 NW2d 378 (1989), it is impossible to determine from the experts' itemized lists of expenses the degree to which the expert activity was compensable under § 2164. For example, Cozad's list included categories such as time spent meeting at the DEQ office and reviewing files and data; Pawloski's list included the categories "conduct site inspection" and "[p]repare inspection report"; and Dodgers's list references categories such as "[c]oordination with AG Office" and "Refute of Claire Schwarz Affidavit."

References to such vague categories may very well constitute the conferences with counsel, strategy sessions, or critical assessments of plaintiff's positions for which § 2164 does not allow compensation. *Lufran*, 159 Mich App at 67. However, it is because of plaintiff's failure to raise this issue below that we are unable to make such a determination at this juncture. And the very fact that the propriety of these awards is unclear means also that error on this point is neither clear nor obvious. *Kern*, 240 Mich App at 336. Reversal, therefore, is not warranted.[10]

ii. Attorney fees

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[9] Although *Lufran* specifically analyzed the witness fee provision of MCL 213.66, the Court noted that "the only difference between amounts properly paid experts under [MCL 600.2164] of the RJA and § 6 of the Uniform Condemnation Procedures Act is that the award of expert witness fees for trial preparation time is discretionary under § 2164." *Detroit v Lufran Co*, 159 Mich App 62, 66; 406 NW2d 235 (1987).

[10] While plaintiff challenges the expert costs on the grounds that their affidavits provided information beyond expert opinion and included specific facts, we cannot determine whether there was clear or obvious error in awarding fees simply on this basis alone. Additionally, by failing to cite any authority in support of her position that Pawloski and Dodgers may not recover fees because as DEQ employees, their fee was really their salary and employee benefits, she has abandoned this issue on appeal. *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999). Regardless, the plain language of MCL 600.2164 provides no refuge for such an argument.

Initially, plaintiff claims that since salaried assistant attorneys general represented defendant, attorney fees under Part 31 constituted an impermissible windfall or double punishment. This argument is nonsensical in view of the plain language of Part 31. Specifically, Part 31 expressly vests power to enforce its provisions only with "[a]n employee of the department of natural resources or an employee of another governmental agency appointed by the department . . . with the concurrence of the department[,]" MCL 324.3114, and permits the department "to request the attorney general to commence a civil action for appropriate relief . . . [,]" MCL 324.3115(1). Appropriate relief includes "reasonable attorney fees and costs to the prevailing party." MCL 324.3115(1).

This language is clear and unambiguous and must, therefore, be enforced as written. *Woodard v Custer*, 476 Mich 545, 598; 719 NW2d 842 (2006). To hold as plaintiff maintains that awarding defendant attorney fees would permit an impermissible windfall or double punishment would violate the rule of statutory construction that the Court should not interpret a statute in a way that renders part of it nugatory or mere surplusage. *Grimes v Dep't of Transportation*, 475 Mich 72, 89; 715 NW2d 275 (2006). Indeed, under the plain language of Part 31, it is impossible for any party other than the party enforcing Part 31 – i.e., defendant – to recover attorney fees for a violation of that part.[11] Thus, it was well within the trial court's authority to award attorney fees in this case.

Plaintiff next challenges the attorney fee award on the grounds that defendant's itemized invoice of attorney fees fails to adequately delineate between fees incurred for pursuing the Part 31 claim and the Part 301 claim, which allows only the assessment of fines but not attorney fees under MCL 324.30112. However, setting aside that defendant's claims were interrelated, plaintiff's failure to raise this issue below leaves us no way of determining whether defendant's attorney fees could be allocated between the two claims. Regardless, we have no reason to second guess the trial court's award where it expressly indicated in the April 2, 2007, order that its award was premised on Part 31. Furthermore, the mere fact that the trial court did not expressly acknowledge its discretion to award attorney fees under Part 31 does not compel the conclusion that the court believed the award was mandatory as plaintiff maintains. Indeed, plaintiff fails to cite and certainly would be unable to cite any case in our jurisprudence requiring a court to expressly acknowledge its discretion before rendering a discretionary decision. We can find no plain error.

Before moving on, it appears the court made a clerical error in awarding a total amount of $79,765.75 in attorney fees where defendant only requested $73,050. Defendant concedes this error, which apparently resulted from adding the total taxable costs of $6,715.75 to the actual amount of requested attorney fees. We therefore vacate that portion of the order and remand for correction in this respect.

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[11] In this respect, the attorney fee provision under Part 31 stands in stark contrast to *Laracey v Financial Institutions Bureau*, 163 Mich App 437, 441-446; 414 NW2d 909 (1987), addressing attorney fees for pro se litigants in the Michigan Freedom of Information Act, MCL 15.231 *et seq*., and *Watkins v Manchester*, 220 Mich App 337, 341-343; 559 NW2d 81 (1996), addressing attorney fees as mediation sanctions. Plaintiff's reliance on those cases is unavailing.

C. Docket No. 291265

Plaintiff's assignments of error in Docket No. 291265 concern the court's exclusion and consideration of witness testimony as well as the court's alleged misapprehension of the record supporting the conclusion that removal of plaintiff's dam was necessary. Although we have jurisdiction over the appeal, plaintiff's arguments do not pertain to the order of December 22, 2008, that is the subject of this appeal. Rather, each argument amounts to an impermissible collateral attack on the merits of the court's judgment of April 2, 2007, which plaintiff did not appeal, *People v Howard*, 212 Mich App 366, 369; 538 NW2d 44 (1995) ("a collateral attack occurs whenever a challenge is made to a judgment in any manner other than through a direct appeal"), and so we cannot review any assertions of error related to the decision contained in the April 2, 2007, judgment, *Kosch v Kosch*, 233 Mich App 346, 353; 592 NW2d 434 (1999) ("Defendant's failure to file an appeal from the original judgment . . . pursuant to MCR 7.205(A) or (F), precludes a collateral attack on the merits of that decision.").[12] Notwithstanding, we note that each assignment of error in this appeal is without merit.

i. Exclusion of plaintiff's witnesses

Plaintiff first argues that the trial court erred in failing to consider the affidavits of witnesses identified in her interrogatory answers.[13] Having failed to challenge the trial court's ruling on this issue below on the grounds asserted on appeal, our review is for plain error affecting substantial rights. *Kern*, 240 Mich App at 336.

A trial court may order sanctions for failure to comply with a discovery order. MCR 2.313(B). Sanctions range from prohibiting a party from introducing witnesses to outright dismissal of the entire action. MCR 2.313(B)(2)(b) and (c). Severe sanctions, such as dismissal, "should be employed only when there has been a flagrant and wanton refusal to facilitate discovery and not when failure to comply with a discovery request is accidental or involuntary." *Traxler v Ford Motor Co*, 227 Mich App 276, 286; 576 NW2d 398 (1998). We consider the following non-exhaustive list of factors to evaluate whether a discovery sanction is appropriate:

> (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, (4) actual notice to the defendant of the witness and the length of time prior to trial that the defendant received such actual notice,

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[12] The April 2, 2007, judgment is a final judgment under MCR 2.602(A)(3) and MCR 7.202(6)(a)(i) because the trial court only retained jurisdiction to enforce the terms of the judgment. Plaintiff's contention that the additional language that the court could "grant such other relief as may be appropriate" is simply more general language allowing enforcement of the judgment.

[13] Specifically, plaintiff points to the affidavits of the Oceana and Newyago County drain commissioners, who averred respectively that no sediment from plaintiff's land entered Freeman Creek and that removal of the dam would exacerbate flooding and sedimentation problems in the area.

> (5) whether there exists a history of plaintiff engaging in deliberate delay, (6) the degree of compliance by the plaintiff with other provisions of the court's order, (7) an attempt by the plaintiff to timely cure the defect, 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 evaluating these factors, the arduous history of this case makes clear plaintiff's consistent failure to meet discovery deadlines and provision of incomplete discovery to defendant, at times in violation of the court rules. This resulted in defendant filing two motions to compel discovery and the court granting appropriate relief.[14] Further, it was not until the day before the final discovery deadline that plaintiff submitted a motion to extend that deadline. Despite the court's acknowledgment that it had declined plaintiff's request for a longer discovery period when originally setting the final discovery deadline, the court permitted plaintiff to submit the affidavit of the witness contained in her witness list. Still, the only sanction plaintiff faced was the exclusion of the two witnesses noted previously. In view of plaintiff's habitual lack of compliance with discovery orders, deficient attempts to timely cure the defects, and complete lack of notice in her witness list of the additional affidavits, the court's sanction was lenient considering the remedies available to it. *Traxler*, 227 Mich App at 286.

Plaintiff maintains defendant cannot show prejudice where she disclosed in interrogatories the witnesses at issue. However, this argument ignores that the only witness defendant sought to depose was the one contained on plaintiff's witness list. In any event, while we cannot determine from the record whether plaintiff's violations were willful, they were definitely reckless at best. And certainly the public interest was not impaired, as plaintiff claims, where the affidavit the court did examine merely reiterated points the other witnesses apparently would have made. On this record, error is neither clear nor obvious, and therefore not plain. *Kern*, 240 Mich App at 336.

ii. Evidence supporting dam removal

Plaintiff's last claim is that the court "misapprehended" evidence presented by defendant, which did not support the order requiring plaintiff to remove the dam. We review this challenge to the court's factual findings for clear error. *Harbor Park Market, Inc v Gronda*, 277 Mich App 126, 130; 743 NW2d 585 (2004).[15] "A trial court's findings are clearly erroneous only when the appellate court is left with a definite and firm conviction that a mistake has been made." *Id*.

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[14] Plaintiff also failed to appear at a settlement conference and delayed the proceedings by indicating that a removal petition to federal court would be filed, but it never was.

[15] Plaintiff cites *Harbor Park Market* in support of the proposition that no deference should be afforded to a trial court's findings based exclusively on written submissions. However, *Harbor Park Market* expressly declined to address that issue. *Harbor Park Market, Inc*, 277 Mich App at 130 n 1.

In making her argument,[16] plaintiff first attacks the court's consideration of Schultz's letters to her on the grounds that the second letter, which excoriated plaintiff's representations concerning the condition of her dam, was "blatantly self-serving" to justify charging plaintiff higher consulting fees. The court, however, merely found that Schultz's letters supported the conclusion that the dam was unsafe – a point forcefully made in *both* of Schultz's letters. More importantly, it was in the first letter that Schultz suggested the dam's removal as potentially the more viable and preferable option. And it is this letter that plaintiff now argues was Schultz's "actual report" on the dam's condition. Thus, plaintiff's argument on this score actually undercuts her claim of error.

Next, plaintiff claims that letters written by the local Soil Conservation District in 1976 and MDNR in 1989 were not probative because they were out of date. However, this argument ignores the fact that these letters referenced the most recent modifications to the dam before the 2001 flood. As such, the court's finding that the dam was not structurally safe before its failure was undoubtedly based on a fact of consequence and therefore relevant. *Woodard,* 476 Mich at 568 n 14 (Under MRE 401, "[e]vidence is only relevant if it has a 'tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.'").

Finally, plaintiff takes issue with defendant's affiants, claiming that none expressly testified that removal of the dam was necessary. But while it is true that the most any affiant indicated with respect to remedies was that defendant had previously urged plaintiff to modify her dam, we are not "left with a definite and firm conviction that a mistake has been made" where plaintiff's own engineering consultant extolled the prudence of removing the dam. *Harbor Park Market, Inc,* 277 Mich App at 130. In short, the facts supported removal of the dam as an appropriate remedy.

III. Conclusion

Our jurisdiction over the challenged orders is proper in this case. In Docket No. 286574, we affirm all aspects of the court's June 23, 2008, order with the exception of its award of attorney fees. That portion is vacated, and on remand should be corrected to reflect the amount requested by defendant. In Docket No. 291574, despite plaintiff's improper collateral attack on the court's prior order of April 2, 2007, we find all claims baseless and affirm the challenged order of December 22, 2008. We do not retain jurisdiction.

/s/ Pat M. Donofrio
/s/ Patrick M. Meter
/s/ Christopher M. Murray

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[16] As we previously noted, plaintiff cannot collaterally attack the April 2, 2007, judgment, which embodied the decision contained in the February 9, 2007, opinion. We only address this issue for completeness sake.