STATE OF MICHIGAN

COURT OF APPEALS

DAVID FORYSTEK,

Plaintiff,

v

CLIO AREA SCHOOLS BOARD OF EDUCATION and EILEEN KERR,

Defendants-Appellants,

and

LARRY EMMERLING and REBECCA FREIFELD,

Defendants,

and

JULIE KEYES and DIANE REED,

Defendants-Appellees.

UNPUBLISHED
January 20, 2011

No. 293028
Genesee Circuit Court
LC No. 06-083682-CZ

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

PER CURIAM.

Defendants Clio Area Schools Board of Education and Eileen Kerr appeal as of right from a circuit court order awarding defendants Julie Keyes and Diane Reed sanctions against Clio Schools, Kerr, and their attorney. We reverse and remand for further proceedings.

I. FACTS AND PROCEEDINGS

This case arises from an alleged defamatory statement concerning plaintiff. In a July 18, 2005, email to Fletcher Spears, assistant superintendent of Clio Schools, defendant Kerr (an elementary school principal) stated, amongst many other things, that plaintiff "has been reported for child abuse and spouse abuse." Spears forwarded Kerr's email to Fay Latture, the

superintendent of Clio schools. The email from Spears to Latture is identified as email "MsgID 250063."

Defendant Rebecca Freifeld admitted anonymously delivering copies of Latture's emails to various persons, including plaintiff. In statements to the police, Freifeld and defendants Keyes and Reed admitted accessing Latture's email account using Latture's password. Apparently, they disliked the way that matters were being handled in the Clio school system and wanted to access Latture's emails to obtain information. Freifeld admitted going to Latture's residence on several occasions and seizing the trash on the side of the road in front of her home. Keyes admitted forwarding some of Latture's emails to defendant Larry Emmerling, a school board member, which Emmerling admitted reading. Emmerling, Keyes, Reed, and Freifeld pleaded guilty to the misdemeanor charge of conspiracy to commit fraudulent access to computers.

On April 18, 2006, plaintiff filed a defamation action against Clio and Kerr. In an amended notice of nonparty fault, Clio and Kerr stated that defendant "Rebecca Freifeld and others" were responsible for breaking into Clio's email system and that Kerr's email to Spears was altered after Kerr sent it. Thereafter, plaintiff filed an amended complaint adding a joint enterprise claim against Freifeld, Emmerling, Keyes, and Reed for engaging in "the theft, review and/or alteration of certain e-mails."

On April 27, 2007, Clio filed a motion for summary disposition, arguing that governmental immunity barred plaintiff's claim against it. In response, plaintiff argued that Clio refused to produce a copy of the email that Kerr sent to Spears and refused to participate in discovery, thwarting plaintiff's efforts to proceed with his claims and constituting spoliation of evidence. Plaintiff relied on Kerr's deposition testimony and Clio's response to his request for production of each email that Kerr authored on July 18, 2005, where Clio responded, "[d]efendants have been and are continuing to search for each e-mail dated July 18, 2005 authored by Eileen Kerr and will produce same once they are in receipt of this information."

Plaintiff relied on other contradictory information that Clio and Kerr produced during discovery. For example, Clio's and Kerr's discovery responses stated that Kerr would testify that she did not send an email containing the alleged defamatory statement and that Spears would testify that he does not recall the alleged defamatory statement in any email that Kerr had sent him.[1] Other evidence also indicated that Kerr sent the defamatory email, including a "Plan of Improvement" to Kerr from Spears "warranted as a result of" Kerr's "[i]nappropriate statements contained in an email dated July 18, 2005." Kerr also received a written warning, stating as follows:

> This memorandum constitutes a written warning with regards to information contained in an email that you sent to me on July 18, 2005. Specifically, the comments made about Mr. Forsty[e]k and complaints allegedly

[1] During Spears's deposition, however, he testified that he recalled receiving an email from Kerr stating that plaintiff had been reported for child or spousal abuse.

> made concerning abuse. The comments are unsubstantiated and were not pertinent to the discussion about a second/third grade class split. Please be advised that further communications of this nature could warrant additional disciplinary action.

In response to the warning, Kerr authored an "attachment" to be included in her personnel file with the warning. She stated that she sent the email only to her boss and that it was "copied" and "possibly cut and pasted" without her knowledge or consent. Plaintiff argued that Kerr's continued denials that she wrote the email in light of the overwhelming evidence to the contrary warranted denying Clio's motion for summary disposition and entering a default against Clio and Kerr.

On June 1, 2007, Clio filed a reply brief stating that, as promised, after a search of its computer system it produced a copy of the email from Kerr to Spears. Clio contended that plaintiff misrepresented the testimony of school district employees who indicated only that they could not attest to the veracity or accuracy of the email because other codefendants had invaded the email system. Clio denied failing to retain its computer records, as demonstrated by its production of the requested email.

On June 25, 2007, plaintiff filed a motion for entry of a default against Clio and Kerr, arguing that he amended his complaint to include Freifeld, Reed, Emmerling, and Keyes based on Clio and Kerr's representation that those defendants altered the content of the email that Kerr sent to Spears. Plaintiff argued that he sent numerous discovery requests and took multiple depositions in an effort to verify Clio and Kerr's claim that the added defendants had changed the email, but Clio and Kerr failed to provide any evidence substantiating their claim. Plaintiff contended that he and the added defendants had sought production of the email from Clio and Kerr throughout the litigation, but that Clio and Kerr did not produce the email until May 31, 2007. The email produced was identical to the email that plaintiff found on his porch, on which the parties had relied throughout the litigation.

Plaintiff further argued that, even after producing the email on May 31, 2007, Clio continued to maintain that it did not exist. Plaintiff relied on Keyes and Reed's second request for production of documents directed to Clio. They requested:

> A printed copy of an email maintained on the Clio Area Schools e-mail account of Fletcher Spears, **designated as "MsgID 250063."** This is an email that was received into the Clio Area Schools email system on July 18, 2005, at approximately 7:41 PM, addressed to Fletcher Spears and sent by Eileen Kerr, which was subsequently forwarded by Fletcher Spears to Fay Latture.

Clio responded, "[n]o such document exists and to the best of our knowledge no such email has been maintained on any Clio Area Schools email account." Plaintiff argued that this statement was false in light of Clio's previous production of the email.

In response, Clio and Kerr argued that they had a sufficient basis for their notice of nonparty fault because of the criminal activity that Keyes, Reed, Emmerling, and Freifeld admitted committing. Clio and Kerr further argued that plaintiff deceptively misrepresented

email MsgID 250063 in an effort to demonstrate that they were not cooperating with discovery. According to Clio and Kerr, the parties had been referring to two separate and distinct emails as one throughout the litigation. They contended that the email that Kerr sent to Spears was produced immediately upon its discovery and that that email was not email MsgID 250063, which Reed and Keyes had requested. Rather, the email that Spears sent to Latture, forwarding Kerr's email to Spears, was email MsgID 250063, a completely separate email that no longer existed as a result of the conspiracy to fraudulently access Latture's emails. Clio and Kerr argued that the parties had misrepresented the two emails by referring to them interchangeably.

At a July 9, 2007, hearing on the motion for default, Clio and Kerr reiterated their argument that two different email communications were involved in this case and that they produced the email from Kerr to Spears. They further argued that Kerr could not attest at her deposition that she wrote the exact words alleged to be defamatory because she was shown a copy of the email with different formatting. The trial court denied Clio's motion for summary disposition and granted plaintiff's motion for entry of a default against Clio and Kerr, stating:

> And I have searched the records for evidence the defendants that were added were by virtue of the notice of nonparty fault did more than access the emails. Specifically I was trying to find evidence that they tampered with the content of the email attached as exhibit A . . . .
>
> The content of the email appears to this Court verbally, identical. You can change the font. You can change the format. You can attach it as a – an exhibit, if you will, to another email. But the content still is the content, is the content, is the content. I don't know how I can repeat it any more times.
>
> I – I know they did wrong things. . . . I know they a – pled guilty. But I couldn't find any evidence that any of them tampered with the email in this record.
>
> And I think the School Board has taken everybody, probably me, too, mostly on a wild goose chase. But I can't draw that conclusion from any evidence.
>
> And, so, today it is an extreme measure but I think it's warranted that they both be found in default.

Clio and Kerr then filed with this Court a claim of appeal with respect to the trial court's July 18, 2007, order embodying this ruling. On August 30, 2007, this Court dismissed for lack of jurisdiction the portion of the appeal challenging the entry of a default. *Forystek v Clio Area Schs Bd of Ed*, unpublished order of the Court of Appeals, entered August 30, 2007 (Docket No. 279647). Thereafter, the trial court dismissed Clio, Kerr, Freifeld, and Emmerling from this action pursuant to a stipulation of the parties. On October 29, 2008, this Court dismissed the appeal pursuant to a stipulation of the parties. *Forystek v Clio Area Schs Bd of Ed*, unpublished order of the Court of Appeals, entered October 29, 2008 (Docket No. 279647).

Meanwhile, on December 10, 2007, Keyes and Reed had filed with the trial court a motion for sanctions against Clio, Kerr, and their attorney. They argued that plaintiff filed an

amended complaint asserting claims against them as a result of Clio and Kerr's amended notice of nonparty fault, which falsely alleged that Keyes and Reed altered Kerr's email to Spears. Keyes and Reed contended that Clio and Kerr failed to produce evidence substantiating their allegation that Keyes and Reed altered the email and that Kerr and Spears denied any personal knowledge of whether Keyes and Reed had altered the email. Keyes and Reed argued that, as a result of Clio and Kerr's amended notice of nonparty fault falsely implicating them, they incurred attorney fees exceeding $62,000. On December 11, 2007, plaintiff filed a motion for sanctions against Clio and Kerr asserting the same arguments.

After the parties exchanged several additional response and supplemental briefs, the trial court denied Keyes and Reed's motion for sanctions. The trial court apparently initially indicated an intent to grant the motion, but declined to do so because of precedent indicating that a notice of nonparty fault was not a proper basis for imposing sanctions.

On April 27, 2009, Keyes and Reed filed another motion for sanctions pursuant to MCR 3.302(G). They contended that they served Clio with a request for production of documents in January 2007, seeking to obtain a copy of the email that Kerr sent to Spears. They also served Kerr with requests for admissions of fact, intending to establish that she authored the email. Keyes and Reed asserted that, in response to those requests, Clio maintained that the email could not be found on its server and Kerr denied authoring the email. Keyes and Reed argued that Spears subsequently found a copy of the email on Clio's computer system even though Clio had previously maintained that it no longer existed on the server. The copy of the email produced contained the statement that Kerr denied making. Keyes and Reed contended that Clio and Kerr violated MCR 2.302(G)(3)(b) and (c) by failing to produce the email in January 2007, rather than May or June 2007, and that the email produced demonstrated that Kerr failed to conduct a reasonable inquiry before answering her discovery requests. Keyes and Reed contended that the same "gross litigation misconduct" that led the trial court to enter a default against Clio and Kerr must compel the court to grant their motion for sanctions.

In response, Clio and Kerr argued that they had fully complied with discovery while Keyes and Reed refused to provide the most basic discovery. Clio and Kerr also argued that Keyes and Reed sought production of email MsgID 250063 in January 2007 and that Clio and Kerr correctly responded that the email no longer existed, but that they subsequently produced the email on May 30, 2007. Clio and Kerr further argued that Kerr did not deny authoring the email, but was unsure because of the passage of time whether she used the exact words stated in the email.

Clio and Kerr also contended that Keyes and Reed's motion should be denied because it was untimely. They argued that the motion was filed two years after they allegedly failed to produce the email and after the deadline for filing dispositive motions had passed. Clio and Kerr contended that a party must bring a motion for sanctions within a reasonable time after discovering a violation.

After hearing oral argument, the trial court awarded Keyes and Reed $73,000 in attorney fees and $4,249.95 in costs. Thereafter, the trial court dismissed them from the action pursuant to a stipulation of the parties. This appeal followed.

II. ANALYSIS

We review for an abuse of discretion a trial court's determination whether to impose sanctions for a discovery violation. *Linsell v Applied Handling, Inc*, 266 Mich App 1, 21; 697 NW2d 913 (2005). "An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes." *Moore v Secura Ins*, 482 Mich 507, 516; 759 NW2d 833 (2008). For two reasons we hold that the trial court abused its discretion in awarding sanctions against Clio Schools, Kerr, and their attorney. First, we hold that the trial court erred when it failed to articulate any consideration of the factors generally considered before issuing sanctions. Second, we hold that the motion for sanctions was untimely, as it was filed more than two years after discovery of the alleged violation and almost seven months after Clio Schools and Kerr were dismissed from the litigation.

Keyes and Reed relied on the trial court's inherent authority and on MCR 2.302(G) in support of their motion for sanctions. "Trial courts possess the inherent authority to sanction litigants and their counsel . . . ." *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). "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. In addition, MCR 2.302(G) provides:

> (G) Signing of Discovery Requests, Responses, and Objections; Sanctions.
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> (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.
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> (2) If a request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response, or objection, and another party need not take any action with respect to it until it is signed.
>
> (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.

This Court has articulated the following nonexhaustive list of factors for a trial court to consider when determining an appropriate discovery sanction:

> (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; (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).]

"The record should reflect that the trial court gave careful consideration to the factors involved and considered all its options in determining what sanction was just and proper in the context of the case before it." *Bass v Combs*, 238 Mich App 16, 26; 604 NW2d 727 (1999), rev'd on other grds, *Dimmitt & Owens Financial, Inc v Deloitte & Touche, LLC*, 481 Mich 618, 628; 752 NW2d 37 (2008).

Here, the trial court did not examine its options on the record prior to granting these significant sanctions. The most likely rationale supporting the award was that articulated by the court almost two years earlier, when it defaulted Clio Schools and Kerr on July 9, 2007. But, even that record is devoid of any articulation that the trial court considered options other than a default in 2007 and later, in 2009, a large monetary sanction. And, the absence of any indication that the court considered lesser sanctions in 2007 is particularly troubling since the court recognized that the sanction of default was an "extreme measure." Of course, the default sanction is not before us, but at the May 11, 2009, hearing the trial court referenced its prior findings, stating that "I don't know if I used the word egregious at the time, but litigation misconduct occurred in the ways that it was made so extremely difficult *for the plaintiff* to ferret out the emails." Hence, there is nothing in the trial court's findings – either those in 2007 or those in 2009 – that reflect a consideration of issues such as intent, prejudice as to these parties, timeliness, and the other *Dean* factors noted above. This was error. *Bass*, 238 Mich App at 26.[2]

Clio Schools and Kerr also contend that the trial court should have denied Keyes and Reed's motion for sanctions because it was untimely filed more than two years after May 31, 2007, the date on which Clio Schools and Kerr produced the email that Kerr sent to Spears. A trial court has discretion to determine whether a motion for sanctions is timely, *In re Costs & Attorney Fees*, 250 Mich App 89, 107; 645 NW2d 697 (2002), and to be timely, a request for sanctions should be filed before the action's or a party's dismissal. *Maryland Cas Co v Allen*,

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[2] Although neither Reed nor Keyes filed a brief with this Court, we note that a trial court's inherent authority to sanction attorneys or parties does not alter our conclusion. *Maldonado*, 476 Mich at 372 did not involve sanctions for a discovery abuse, and did not in any way impugn the validity of the *Dean* factors.

221 Mich App 26, 30; 561 NW2d 103 (1997), citing *Antonow v Marshall*, 171 Mich App 716, 719; 430 NW2d 768 (1988).

Keyes and Reed's motion for sanctions was not timely filed. Although Keyes and Reed filed a motion for sanctions on December 10, 2007, it was ultimately denied and the motion at issue in this appeal, which was based on entirely different authority, was filed almost seven months after the dismissal of Clio and Kerr. The filing was untimely and the trial court's grant of the motion was an abuse of discretion. *Id*.

Reversed and remanded. We do not retain jurisdiction.

No costs to either party. MCR 7.219(A).

/s/ Karen M. Fort Hood
/s/ Christopher M. Murray
/s/ Deborah A. Servitto