STATE OF MICHIGAN

COURT OF APPEALS

JOSEPH W. STROUP and SALLY BATEMAN STROUP,

Plaintiffs,

v

SANDY K. DERBY,

Defendant-Appellee,

and

JENNIFER STROUP,

Defendant,

and

WALSH & WALSH, PC and RICHARD C. WALSH,

Appellants.

UNPUBLISHED
July 7, 1998

No. 195937
Kalamazoo Circuit Court
LC No. 95-002820 PD

Before: Markey, P.J., and Kelly and Whitbeck, JJ.

PER CURIAM.

Plaintiffs initiated this suit against defendant[1] with allegations of claim and delivery, slander and interference with advantageous and contractual relationships. After the trial court granted defendant's motion to compel discovery, appellants Walsh & Walsh, P.C. and Richard C. Walsh (collectively "Walsh") sought to withdraw. This case was marked by continued lack of cooperation by plaintiffs, who apparently resided in Arizona when suit was brought and thereafter essentially "disappeared," in the discovery process. Eventually, the trial court dismissed plaintiffs' case with prejudice and awarded sanctions in favor of defendant in the form of a judgment against plaintiffs and Walsh, jointly and

severally, for $8,771.60 in costs and attorney fees. We reverse on the ground that the trial court's decision to impose sanctions was unsupported by an appropriate legal rationale. We remand for a proper consideration of whether sanctions should be imposed on Walsh pursuant to any applicable court rule or statute.

MCR 2.114 provides in part:

> (D) Effect of Signature. The signature of an attorney or party, whether or not the party is represented by an attorney, constitutes a certification by the signer that
>
> (1) he or she has read the document;
>
> (2) to the best of his or her knowledge, information, and belief formed after reasonable inquiry, the document is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law; and
>
> (3) the document is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.
>
> (E) Sanctions for Violation. If a document is signed in violation of this rule, the court, on the motion of a party or on its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the document, including reasonable attorney fees. The court may not assess punitive damages.
>
> (F) Sanctions for Frivolous Claims and Defenses. In addition to sanctions under this rule, a party pleading a frivolous claim or defense is subject to costs as provided in MCR 2.625(A)(2). The court may not assess punitive damages.

The compliant filed by Walsh on behalf of plaintiffs alleged, in essence, (1) that Jennifer Stroup stole various items from plaintiffs' home in Arizona; (2) that defendant, with Jennifer Stroup's participation, used Rolodex cards to contact business associates of plaintiffs and told them that plaintiff Joseph Stroup "was a crook, that he cheated people out of a lot of money and that she was getting together a group to go after him in connection with said cheating" and that defendant told some of these business associates that Joseph Stroup was a convicted felon; and (3) that defendant's telephone calls to certain individuals interfered with plaintiffs' advantageous relationship with them, resulting in damages in excess of one million dollars. The amended complaint filed by Walsh for plaintiffs added the allegation that defendant made the remarks about Joseph Stroup in the alleged telephone calls knowing that they were untrue or with a reckless disregard for their truthfulness.

We review a trial court's finding that a claim is frivolous or vexatious for clear error. *Dillon v DeNooyer Chevrolet GEO,* 217 Mich App 163, 169; 550 NW2d 846 (1996). At the proceeding in which the trial court announced its decision to impose sanctions on Walsh ("the sanctions proceeding"),

the trial court, after referring to MCR 2.114 and making other comments, stated "considering all this – of these circumstances that the representation was frivolous, frivolously undertaken by plaintiffs' counsel and that they too shall be responsible for reasonable costs and attorney fees."

However, the trial court did not make findings of fact that justified imposing sanctions under MCR 2.114 on Walsh as counsel for bringing this case by filing the complaint and/or amended complaint. The claims set forth in the complaint and amended complaint were not on their face outside the realm of reasonable possibility. The trial court made no findings to justify a conclusion that:

> 1. Contrary to MCR 2.114(D), Walsh filed either the complaint or amended complaint without having read it;
>
> 2. Walsh did not make a reasonable inquiry to determine whether there was a good faith basis for the factual allegations in those pleadings or whether the claims in the pleadings were warranted by then existing law or a good-faith argument for the extension, modification or reversal of then existing law; or
>
> 3. The document was interposed for an improper purpose such as harassment or causing unnecessary delay or expense.[2]

Thus, the trial court's rationale for imposing sanctions based on the bringing of a frivolous claim was clearly erroneous. *Dillon*, *supra*.

Based on the trial court's remarks at the sanctions proceeding, the trial court apparently premised its decision to impose sanctions on Walsh only on MCR 2.114. However, prior to setting forth its specific justification for imposing sanctions, the trial court referred to other provisions of the Michigan Court Rules that may have been applicable to justify an award of sanctions. Indeed, the sanctions proceeding resulted from Jennifer Stroup's motion for sanctions under MCR 2.313(B)(2), based on plaintiffs' failure to provide discovery as ordered Accordingly, we conclude that the appropriate remedy is to vacate the award of sanctions being appealed, but to remand to the trial court for (1) consideration of whether sanctions were warranted based on any provision other than MCR 2.114 and (2) consideration of whether with further appropriate findings of fact, sanctions under MCR 2.114 are warranted.

In this regard, we note that the trial court might be justified in imposing sanctions, likely of a lesser amount than the $8,771.60 it previously awarded, if it concludes that Walsh should be sanctioned for conduct in the course of their representation of plaintiffs in this suit, other than bringing the suit in the first place. For example, there may be a good argument that Walsh acted improperly by filing answers to interrogatories on behalf of plaintiffs that were facially and substantially deficient and improper.[3] Sanctions based on a failure to participate in discovery properly may have been justified under MCR 2.313 for appellants' role in filing improper answers to interrogatories. See *Nelson v American Sterilizer Co*, 212 Mich App 589, 599; 538 NW2d 80 (1995), vacated in part on other grounds, 453 Mich 946 (1996) (granting of discovery sanctions, including for inadequate response to interrogatories, is in the discretion of the trial court).

We also note that at the sanctions proceeding, the trial court stated with regard to the ability of appellants to contact plaintiffs:

> I have to a degree [sic] with [defendant's counsel], that I think the behavior of the plaintiffs' law firm in this case is certainly unusual, and surprising to say the least. To have absolutely no contact with somebody, to say, allegedly of being able to be in touch with them, being dependent on being contacted by the client. And then to take that client's cause of action and submit it to the court and to cause somebody to come in and respond to it, I think, irresponsible behavior [sic].
>
> And I am taking as much time on this I am [sic] because I am so reluctant to say anything like that on the record, but it is an irresponsible, abusive thing to do to a court and to the people who come to a court and people who are summoned into a court, usually at enormous expense.

It is greatly troubling if a law firm, or an individual lawyer, institutes or continues litigation knowing that it is unable to contact its client. During discovery for example, numerous occasions arise where a defendant has the right to have a plaintiff respond to interrogatories within the proper time limit or appear for a deposition on proper notice. If a plaintiff 's counsel, having been properly served with such discovery requests, is unable to contact the plaintiff, this could impose a serious burden on a defendant and on the defendant's counsel.

The circumstances of this case are particularly instructive as to the mischief that may result when a plaintiff, lacking substantial connection to Michigan, uses counsel to initiate litigation in a Michigan court, thereby imposing a substantial burden on the targeted defendant, and then refuses to seriously take part in the litigation. To the extent that Walsh continued to file adversarial pleadings against defendant after it should have become clear to Walsh that plaintiffs would not meaningfully participate in this litigation, the trial court may well properly determine that such pleadings were interposed by Walsh for an improper purpose under MCR 2.114(D)(3) even if the trial court cannot find that Walsh violated MCR 2.114 by filing the complaint or amended complaint in this case. See *Morris v City of Detroit*, 189 Mich App 271, 281; 472 NW2d 43 (1991) (MCR 2.114 "implicitly requires reasonable inquiry to prevent a pleading or other document from being interposed for an improper purpose, such as to harass or cause unnecessary delay.")

We remand this case to the trial court for further proceedings as set forth above. In this regard, we instruct the trial court that, if it awards sanctions on remand, it should explicitly state any statute or subrule of the Michigan Court Rules under which it decides to impose sanctions and should explicitly analyze each factor required by the pertinent statute or subrule to justify an award of sanctions. We do not retain jurisdiction. Walsh, being the prevailing party, may tax costs under MCR 7.219.[4]

/s/ Jane E. Markey
/s/ William C. Whitbeck

[1] While plaintiffs named Jennifer Stroup as a defendant in their complaint, they never served her. In this opinion, "defendant" refers only to Sandy K. Derby.

[2] We do not preclude the trial court on remand from conducting further fact-finding, including holding appropriate evidentiary hearings, that might produce information that could conceivably justify an imposition of sanctions under MCR 2.114 on Walsh for improperly filing a frivolous complaint and/or amended complaint in this case.

[3] Rather than stating an objection and an arguably valid rationale for refusing to answer many interrogatory questions, the response was "refused." Many of these questions appear to have been rather basic questions that were quite clearly asking for relevant information or information that could reasonably be expected to assist in the discovery of relevant evidence.

[4] The separate opinion dissents from our decision to remand, apparently based on a belief that we should not remand for reconsideration of whether sanctions are warranted without an express request from the appellee, defendant Derby, that we take this step or the filing of a cross-appeal by Derby. We respectfully disagree. We believe that reversing and remanding for reconsideration of the sanctions matter, as opposed to an outright reversal that would presumably preclude reconsideration of this matter, is an appropriate exercise of our authority to grant any relief that may be required in a given case. MCR 7.216(A)(7). Where a determination that a trial court has erred in taking a particular action leaves open the possibility that, but for that error, the trial court may properly have taken the same or substantially similar action on another, appropriate ground, it is proper to remand for reconsideration. In an analogous situation, when this Court reverses a criminal defendant's conviction (other than on grounds such as a double jeopardy violation where retrial is barred), it generally reverses and remands for a new trial even absent a request for remand by the prosecution as opposed to simply reversing the defendant's conviction and putting an end to the case.