

STATE OF MICHIGAN  
COURT OF APPEALS

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CAMBRIDGE LENDING FIRM, L.L.C., and  
GNM ENTERPRISE, d/b/a GRANITE  
FINANCIAL GROUP,

UNPUBLISHED  
January 25, 2011

Plaintiffs-Appellants,

v

JACQUELAND BOOKER, MILLENNIUM  
LOANS, L.L.C., and COMERICA BANK,

No. 290541  
Oakland Circuit Court  
LC No. 2007-088113-CH

Defendants-Appellees,

and

MICHAEL J. MCCARTHY, Independent  
Prosecutor.

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Before: MURPHY, C.J., and METER and SHAPIRO, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the circuit court's order of dismissal. We affirm.

Plaintiffs primarily argue that the circuit court erred in dismissing their action. We review this issue for an abuse of discretion. *Brenner v Kolk*, 226 Mich App 149, 160; 573 NW2d 65 (1997).

In *Banta v Serban*, 370 Mich 367, 368; 121 NW2d 854 (1963), the Michigan Supreme Court stated that a court has the inherent power to dismiss an action as a sanction. *Id.* For example, a court may dismiss an action based on the unexcused absence of the plaintiff and her counsel when the case is called for trial. *Id.* In addition, a circuit court has the inherent power to sanction a party for failing to preserve evidence, even before litigation has commenced, that it knows or should know is relevant. *Brenner*, 226 Mich App at 160.

Here, there were legitimate bases for the circuit court's dismissal of plaintiffs' action. Specifically, the circuit court found that Michael Josey, plaintiffs' counsel, engaged in a pattern of behavior designed to mislead and manipulate defense counsel and the court. The circuit court found that, on October 20, 2008, Josey purposely dated a so-called "true subpoena" seeking various financial records as issuing on October 23, 2008, even though it was actually executed

and faxed to an accountant on October 20, 2008, because Josey contemplated obtaining relief from the discovery deadline after October 20, 2008. Josey then filed, on October 21, 2008, an “emergency motion,” seeking relief from the discovery deadline. No notice of the “true subpoena” was given to defendant Comerica Bank, and the court found that, “[c]ontrary to Josey’s testimony, Josey never served [the accountant] with another subpoena” -- a second subpoena that was deemed “fake” by the court. The circuit court further concluded that Josey obtained certain requested financial documents from the accountant on November 3, 2008, and then, on November 5, 2008, generated and signed a proof of service, to which he attached the second, fake subpoena. The circuit court concluded that Josey added additional information in the fake subpoena (specifically, a production due date), even though the documents had already been produced, and that, in so doing, Josey was attempting to mislead Comerica Bank’s counsel and the court “into thinking that the Proof of Service was timely.” Essentially, the court found that Josey had obtained certain financial documents without notifying Comerica Bank and then later tried to manipulate the situation.

These conclusions by the circuit court were supported by the evidence, such as the two subpoenas themselves; their dates; the fax date of the first subpoena; the testimony of Brian Freeman, a certified public accountant with Complete Financial Services, P.C.; the evidence that Comerica Bank’s counsel never received the first subpoena; and the evasive, conflicting testimony of Josey. We give regard to the circuit court’s ability to judge the credibility of Josey; it had the exclusive opportunity to observe his testimony in person. See MCR 2.613(C). Because the evidence clearly supported the circuit court’s conclusion that Josey engaged in misconduct intended to mislead and manipulate opposing counsel and the circuit court, the circuit court did not abuse its discretion in imposing the normally severe sanction of dismissing plaintiffs’ action.

Plaintiffs also argue that the circuit court erred in imposing sanctions on them and Josey under MCR 2.114(E). We disagree.

The decision regarding the imposition of a sanction under MCR 2.114 is reviewed to determine if it is clearly erroneous. *Schadewald v Brulé*, 225 Mich App 26, 41; 570 NW2d 788 (1997). Findings of fact on which a circuit court bases an award of attorney fees are also reviewed for clear error, *Reed v Reed*, 265 Mich App 131, 164; 693 NW2d 825 (2005), but conclusions of law are reviewed de novo, *Heritage Resources, Inc v Caterpillar Fin Servs Corp*, 284 Mich App 617, 631; 774 NW2d 332 (2009) “A finding of fact is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made.” *Id.* at 631-632. Questions of court-rule interpretation are questions of law that are reviewed de novo on appeal. *Haliw v City of Sterling Hts*, 471 Mich 700, 704; 691 NW2d 753 (2005).

Michigan follows the American rule, which is that a party losing in a court action is not required to pay the winning side’s attorney fees, unless the contrary is provided for by a statute, court rule, or a common-law exception. See, e.g., *Nemeth v Abonmarche Dev*, 457 Mich 16, 37-38; 576 NW2d 641 (1998). In this case, MCR 2.114(E) provides for the imposition of attorney fees.

MCR 2.114(D) provides the guidelines for evaluating a signed document:

(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. [Italics added.]

Then, subsection MCR 2.114(E) provides for sanctions when a violation has been found:

(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 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.

If there is a finding that subrule (D) was violated, the imposition of a sanction under subrule (E) is mandatory. *Schadewald*, 225 Mich App at 41. Indeed, we note that the word “shall” is employed in MCR 2.114(E). See, generally, *Nuculovic v Hill*, 287 Mich App 58, 62; 783 NW2d 124, 127 (2010).

The issue is whether Josey filed or interposed a document “for *any* improper purpose.” MCR 2.114(D)(3) (emphasis added). “Michigan courts construe court rules in the same way that [we] construe statutes.” *Snyder v Advantage Health Physicians*, 281 Mich App 493, 501; 760 NW2d 834, 839 (2008). “This Court gives effect to the rule maker’s intent as expressed in the court rule’s terms, giving the words of the rule their plain and ordinary meaning.” *Id.* “If the language poses no ambiguity, this Court need not look outside the rule or construe it, but need only enforce the rule as written.” *Kloian v Domino’s Pizza, LLC*, 273 Mich App 449, 458; 733 NW2d 766 (2006). “This Court does not interpret a court rule in a way that renders any language surplusage.” *Id.*

The word “any” implies breadth. See, generally, *Skotak v Vic Tanny, Int’l, Inc.*, 203 Mich App 616, 619; 513 NW2d 428 (1994), mod on other grounds by *Patterson v Kleiman*, 447 Mich 429; 526 NW2d 879 (1994). “[A]ny improper purpose” suffices for sanctions under MCR 2.114, whether it be the improper purpose of committing a fraud upon the circuit court (e.g., deceiving the court into believing that a subpoena had been served on opposing counsel), or a fraud upon opposing counsel (deceiving him into believing that there had been no prior subpoena).

The pertinent factual findings by the court were, as noted earlier, supported by the evidence. We note that the court made express findings of fact regarding believability. The

court found Comerica Bank's counsel strongly credible and his testimony entitled to great weight, found Josey "utterly incredible" and his testimony entitled to "no weight whatsoever," and found that Freeman was "forthright and believable," with his testimony entitled to "significant weight." Again, we give regard to "the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." MCR 2.613(C). Because the circuit court's findings of fact were supported by the evidence, they were not clearly erroneous.

The evidence supported the conclusion that Josey engaged in conduct intended to defraud the circuit court and opposing counsel, and the circuit court did not clearly err in concluding that Josey interposed litigation documents for an improper purpose, contrary to MCR 2.114(D)(3). Therefore, the circuit court did not clearly err in imposing sanctions against plaintiffs and Josey under MCR 2.114.<sup>1</sup>

Plaintiffs, in the course of their occasionally confusing appellate brief, argue that the accountant, Freeman, did not actually receive the first subpoena by fax. However, even if Freeman did not receive the first subpoena by fax, this would not impeach the circuit court's findings listed above (i.e., in sum, that Josey engaged in a pattern of misconduct intended to mislead opposing counsel and the circuit court). In connection with this argument, plaintiffs also assert that the circuit court erred by "admitting into evidence," at the evidentiary hearing regarding sanctions, a transcript of a prior oral argument regarding a different motion. Plaintiffs cite no authority indicating that, when a court is ruling on a motion for sanctions, it cannot consider prior hearing transcripts. In fact, plaintiffs cite no applicable authority at all. As such, their argument has been waived. *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999). Moreover, any error in connection with this issue was harmless. Reversal is unwarranted.

Given our rulings on the foregoing issues, the remaining issue, regarding the circuit court's refusal to allow oral argument on plaintiffs' motion to compel discovery, is moot. This Court is not obliged to decide moot questions. See *American Trust Co v Casselman*, 248 Mich 76; 231 NW 139 (1930). At any rate, the court did not err in connection with this issue, given that plaintiffs failed to cite authority for their position in their motion. MCR 2.119(E)(3) states that "[a] court may, in its discretion, dispense with or limit oral arguments on motions . . . ."

Affirmed.

/s/ William B. Murphy

/s/ Patrick M. Meter

/s/ Douglas B. Shapiro

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<sup>1</sup> In light of our conclusions, we need not address the additional instances of misconduct discussed by the court.