STATE OF MICHIGAN

COURT OF APPEALS

INTEGRATED HEALTH GROUP, PC,

Plaintiff/Counterdefendant,

and

HUSSEIN HURAIBI, M.D.,

Plaintiff/Counterdefendant-Appellant,

v

INTEGRATED HEALTHCARE SYSTEMS, LLC, and INTEGRATED HCS PRACTICE MANAGEMENT, LLC,

Defendants/Counterplaintiffs-Appellees,

and

EDWARD CESPEDES, VINCENT CELENTANO, JOSEPH DESANTO, INTEGRATED HCS IMAGING SERVICES MANAGEMENT, LLC, BANYAN FINANCE, LLC, and BLUE RIVER FUNDING, LLC,

Defendants-Appellees.

UNPUBLISHED
November 24, 2020

No. 349696
Oakland Circuit Court
LC No. 2014-138231-CK

Before: O'BRIEN, P.J., AND BECKERING AND CAMERON, JJ.

PER CURIAM.

Plaintiff/counterdefendant, Hussein Huraibi, M.D., appeals the trial court's June 18, 2019 final judgment awarding damages of $67,792,227 to defendants/counterplaintiffs, Integrated Healthcare Systems, LLC ("IHCS") and Integrated HCS Practice Management, LLC ("IHPM").

This appeal also concerns a March 7, 2019 order, which dismissed the third amended complaint and entered a default against Dr. Huraibi with respect to the countercomplaint. We vacate the trial court's March 7, 2019 order and remand for further proceedings consistent with this opinion. We retain jurisdiction.

I. BACKGROUND

In April 2014, plaintiffs Dr. Huraibi and Integrated Health Group, PC ("IHG") filed a third amended complaint. In relevant part, the third amended complaint named Edward Cespedes, Vincent Celentano, Joseph DeSanto, Integrated HCS Imaging Services Management, LLC ("IHISM"), IHCS, and IHPM as defendants. Plaintiffs alleged several claims arising from an agreement to form a "super medical practice." As relevant to this appeal, IHCS and IHPM ("counterplaintiffs") filed a countercomplaint against Dr. Huraibi and IHG, seeking injunctive relief and an accounting, and alleging breach of the parties' contractual agreements, common-law and statutory conversion, fraud in the inducement, tortious interference with a contract, and wrongful eviction.

Early in the proceedings, from January 2014 through July 2014, a series of highly inflammatory and harassing e-mails were sent anonymously to counterplaintiffs, to counterplaintiffs' members and agents, and to other individuals and entities with whom counterplaintiffs did business. Counterplaintiffs commenced an investigation into the source of the e-mails, which were sent from various "hushmail" e-mail accounts. Information provided by Hushmail Communications in Vancouver, British Columbia, yielded the Internet Pathway ("IP") address for the various e-mails, which together with information from various Internet Service Providers, enabled counterplaintiffs to determine the locations from which the e-mails were sent. Based on Dr. Huraibi's deposition testimony, other documentary evidence, and Dr. Huraibi's association with the various locations from which the e-mails were sent, counterplaintiffs deduced that he was the person responsible for the anonymous hushmail e-mails. In the summer of 2018, more disparaging e-mails surfaced. In particular, one e-mail that was dated August 26, 2018, disparaged counsel for counterplaintiffs and counsel's involvement in a separate lawsuit. These additional inflammatory communications prompted counterplaintiffs to move for a preliminary injunction, for an order of contempt against Dr. Huraibi, and for dismissal. Dr. Huraibi denied that he was responsible for sending the e-mails.

Following a hearing on counterplaintiffs' motion, the trial court granted counterplaintiffs additional time to compile supporting documentation to corroborate their theory that Dr. Huraibi was responsible for the anonymous e-mails. Although counterplaintiffs submitted more than 800 pages of additional documents in September 2018 and Dr. Huraibi filed a responsive brief, the trial court did not revisit the issue until February 2019, after the case was reassigned to a new judge. Following a motion hearing on March 6, 2019, the trial court determined that Dr. Huraibi was indeed responsible for the anonymous e-mails and had committed perjury both in his deposition and in affidavits filed with the trial court. As a result, the trial court dismissed Dr. Huraibi's third amended complaint and entered a default against him with respect to the countercomplaint.[1] The

[1] It appears from the record that IHG was not a party to these proceedings because of a pending bankruptcy proceeding.

trial court later held a bench trial, which was limited to the issue of damages. Dr. Huraibi, who was no longer represented by counsel, did not appear at the trial. At the close of proofs, the trial court awarded counterplaintiffs $67,792,227 in damages, which included exemplary damages. Dr. Huraibi now appeals.

II. ANALYSIS

Dr. Huraibi first argues that the trial court abused its discretion by dismissing the third amended complaint and by entering a default against him on the countercomplaint. This Court reviews a trial court's exercise of its inherent authority for an abuse of discretion. *Baynesan v Wayne State Univ*, 316 Mich App 643, 651; 894 NW2d 102 (2016). "An abuse of discretion occurs when a court chooses an outcome outside the range of principled outcomes." *Id*. "An error of law necessarily constitutes an abuse of discretion." *Denton v Dep't of Treasury*, 317 Mich App 303, 314; 894 NW2d 694 (2016). A trial court's decision regarding discovery sanctions is also reviewed for an abuse of discretion. *Swain v Morse*, ___ Mich App ___, ___; ___ NW2d ___ (2020) (Docket No. 346850); slip op at 3 n 7, lv pending.

In *Maldonado v Ford Motor Co*, 476 Mich 372, 375; 719 NW2d 809 (2006), our Supreme Court "affirm[ed] the authority of trial courts to impose sanctions appropriate to contain and prevent abuses so as to ensure the orderly operation of justice." The *Maldonado* Court stated:

> We reiterate that trial courts possess the inherent authority to sanction litigants and their counsel, including the power to dismiss an action. *Banta v Serban*, 370 Mich 367, 368; 121 NW2d 854 (1963); *Persichini v Beaumont Hosp*, 238 Mich App 626, 639-640; 607 NW2d 100 (1999); *Prince v MacDonald*, 237 Mich App 186, 189; 602 NW2d 834 (1999). 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. See *Chambers v NASCO, Inc*, 501 US 32, 43; 111 S Ct 2123; 115 L Ed 2d 27 (1991). [*Maldonado*, 476 Mich at 376.]

In *Maldonado*, the Court concluded that the trial court properly exercised its discretion when it dismissed the plaintiff's case after the "plaintiff and her attorneys repeatedly and intentionally publicized inadmissible evidence so as to taint the potential jury pool, deny [the] defendants a fair trial, and frustrate the due administration of justice." *Id*. The *Maldonado* Court noted that the trial court had warned the plaintiff and her counsel that it would dismiss the plaintiff's case if the plaintiff and her counsel continued to flout a court order by publicizing evidence that the trial court had ruled was inadmissible. *Id*. The Court explained that the trial court's inherent authority to manage the proceedings before it stemmed from the doctrine requiring that those who appear before it have "clean hands" and was grounded in the desire to maintain the trial court's own integrity, and the integrity of the judicial process. *Id*. at 389. The *Maldonado* Court recognized that when misconduct occurs, "[t]he trial court has a gate-keeping obligation . . . to impose sanctions that will not only deter the misconduct [at issue] but also serve as a deterrent to other litigants." *Id*. at 392.

More recently, in *Swain*, ___ Mich App at ___; slip op at 3-4, this Court considered a plaintiff's argument that the trial court abused its discretion by dismissing her complaint as a

discovery sanction after the trial court determined that the plaintiff had been untruthful during a deposition. In that case, the trial court dismissed the plaintiff's cause of action on a motion of one of the defendants because of discrepancies between the plaintiff's bank records and her deposition testimony regarding monetary payments that she received from a male friend. *Id*. In *Swain*, this Court noted that the sanction of "[d]ismissal is a drastic step that should be taken cautiously," and that the sanction of dismissal for a discovery violation is generally "predicated on a flagrant or wanton refusal to facilitate discovery that typically involves repeated violations of a court order." *Id*. at ___; slip op at 4 (quotation marks and citation omitted). This Court recognized that false testimony during a deposition did not violate any court rule or an order of the trial court and held that sanctions were therefore not authorized under MCR 2.504(B)(1). *Id*. This Court also observed that "[t]he lack of a court rule addressing sanctions for that misconduct is understandable when one considers that there are several existing disincentives for untruthful deposition testimony." *Id*. at ___; slip op at 5. This Court noted the other options that are available if a defendant discovers that a plaintiff gave false testimony during a deposition:

> First and foremost, a party's credibility can be impeached at trial with deposition testimony. Also, a deponent may be charged with perjury for willfully false testimony on a material fact. See *In re Contempt of Henry*, 282 Mich App 656, 677-678; 765 NW2d 44 (2009). Further, if it is ultimately determined that the complaint lacked evidentiary support other than the plaintiff's false statements, the prevailing party may seek costs and attorney fees under MCL 600.2591(a)(*ii*) for a frivolous action on the grounds that "[t]he party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true." [*Swain*, ___ Mich App at ___; slip op at 5.]

Turning to the trial court's inherent authority to sanction litigant misconduct, this Court recognized that such power "must be exercised with restraint and discretion," given that it is not subject to "direct democratic controls[.]" *Id*., quoting *Cummings v Wayne Co*, 210 Mich App 249, 253; 533 NW2d 13 (1995) (quotation marks omitted). The *Swain* Court then examined two leading cases in Michigan addressing a trial court's inherent discretion to sanction litigant misconduct: *Cummings v Wayne Co* and *Maldonado v Ford Motor Co*. *Swain*, ___ Mich App at ___; slip op at 5-6. This Court noted that *Cummings* presented facts in which "the plaintiff threatened three of the defendant's witnesses with physical injury and committed acts of vandalism against them," which hindered the trial court's ability to hear the testimony of those witnesses. *Id*. at ___; slip op at 6. With respect to *Maldonado*, this Court noted that the plaintiff and her counsel engaged in conduct that reflected "a blatant disregard of the judicial process" and that was "directly aimed at frustrating the due administration of justice." *Id*. (quotation marks and citation omitted). This Court characterized *Cummings* and *Maldonado* as cases involving "serious misconduct" that undermined the trial court's ability to ensure a fair trial for the litigant and acknowledged that such circumstances involve " 'administration of justice' issues because they make it impossible for a jury to make a reliable decision." *Id*. Conversely, according to this Court, "untruthful deposition testimony does not threaten the integrity of the judicial *system*." *Id*.

In *Swain*, this Court also noted that, even if the failure to give truthful testimony under oath during a deposition would provide a basis for a trial court to exercise its inherent authority to dismiss an action as a sanction, the testimony in that case did not justify such a severe sanction. *Id*. at ___; slip op at 7-10. The *Swain* Court reached this conclusion after weighing the factors

outlined in *Vicencio v Ramirez*, 211 Mich App 501, 507; 536 NW2d 280 (1995). *Swain*, ___ Mich App at ___; slip op at 7-10. Therefore, the *Swain* Court reversed the trial court's "dismissal of [the] plaintiff's complaint" and remanded for further proceedings. *Id*. at ___; slip op at 1, 14.

Preliminarily, we note that it is not entirely clear what authority the trial court relied on to dismiss the third amended complaint and to enter the default against Dr. Huraibi with respect to the countercomplaint. While the trial court stated that it found that Dr. Huraibi was the individual who sent the harassing e-mails, it also stated that Dr. Huraibi had perjured himself on multiple occasions, either in averments in an affidavit or under oath in a deposition when he denied responsibility for the e-mails. However, the trial court did not indicate on the record whether it was dismissing the third amended complaint and defaulting Dr. Huraibi as a discovery sanction, or under its inherent authority to manage the court proceedings. In counterplaintiffs' brief below, counterplaintiffs argued that the trial court could take such action pursuant to its inherent authority, but they also cited MCR 2.313(B)(2)(c) and MCR 1.109(E)(6).

MCR 2.313 provides, in pertinent part:

> **(B) Failure to Comply With Order**.
>
> * * *
>
> (2) *Sanctions by Court in Which Action Is Pending*. *If a party* or an officer, director, or managing agent of a party, or a person designated under MCR 2.306(B)(5) or 2.307(A)(1) to testify on behalf of a party, *fails to obey an order to provide or permit discovery*, including an order entered under subrule (A) of this rule or under MCR 2.311, the court in which the action is pending may order such sanctions as are just, including, but not limited to the following:
>
> * * *
>
> (c) an order striking pleadings or parts of pleadings, staying further proceedings until the order is obeyed, *dismissing the action or proceeding or a part of it, or rendering a judgment by default against the disobedient party*[.] [Emphasis added.]

MCR 1.109 provides, in pertinent part:

> **(E) Signatures.**
>
> * * *
>
> (5) *Effect of Signature*. The signature of a person filing a document, whether or not represented by an attorney, constitutes a certification by the signer that:
>
> (a) he or she has read the document;

> (b) 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
>
> (c) 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.
>
> (6) *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.

Thus, MCR 2.313(B)(2)(c) authorizes a trial court to dismiss an action or "render[ ] a judgment by default" against a party for failure to comply with a discovery order, and MCR 1.109(E)(6) permits a trial court to "impose . . . an appropriate sanction" when a document is signed in violation of MCR 1.109(E)(6).

In their brief in the trial court, counterplaintiffs claimed that Dr. Huraibi had violated a September 24, 2014 court order by failing to disclose his hushmail e-mail accounts, or messages related to those accounts. However, the trial court made no reference to that order, or an alleged violation of it by Dr. Huraibi, in its bench ruling. The court also did not make any reference to MCR 1.109, or identify any violation of that court rule. Instead, the trial court focused on its belief that Dr. Huraibi committed perjury, which leads us to conclude that the court relied on its inherent authority to control court proceedings to dismiss the third amended complaint and to enter a default against Dr. Huraibi on the countercomplaint.

As this Court recently observed in *Swain*, ___ Mich App at ___; slip op at 5, "[n]o Michigan appellate court has held that the court's inherent authority extends so far as to dismiss a case based on the court's conclusion that a party did not tell the truth in deposition." However, the alleged misconduct at issue involves not only the claim that Dr. Huraibi committed perjury in his affidavits and deposition, but that he engaged in a concerted course of conduct to harass counterplaintiffs, their agents, and their members in a deliberate effort to undermine their ability to do business in the medical community. This alleged conduct arguably impaired counterplaintiffs' ability to pursue redress against Dr. Huraibi and to defend themselves against any legal action initiated by him or IHG. Undoubtedly, such conduct would constitute "serious misconduct" that implicates a trial court's ability to ensure a fair trial and would also interfere with the administration of justice and with the fact-finder's ability to render a reliable decision. See *id.* at ___; slip op at 6. Therefore, we are of the view that such misconduct qualifies as the type of conduct for which a trial court, in the exercise of its inherent authority, would have discretion to sanction a litigant by dismissing a complaint or by entering a default. What is problematic here, however, is that the trial court did not weigh all the relevant factors before deciding to dismiss the third amended complaint and enter a default against Dr. Huraibi with respect to the countercomplaint.

The relevant factors that a trial court must weigh before imposing a sanction of dismissal are:

> (1) whether the violation was wilful or accidental; (2) the party's history of refusing to comply with previous court orders; (3) the prejudice to the opposing party; (4) whether there exists a history of deliberate delay; (5) the degree of compliance with other parts of the court's orders; (6) attempts to cure the defect; and (7) whether a lesser sanction would better serve the interests of justice. [*Swain*, ___ Mich App at ___; slip op at 7, quoting *Vicencio*, 211 Mich App at 507.]

As this Court acknowledged in *Kalamazoo Oil Co v Boerman*, 242 Mich App 75, 86; 618 NW2d 66 (2000), citing *Dean v Tucker*, 182 Mich App 27, 32; 451 NW2d 571 (1990), "[t]he 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." The record here gives no such indication. Arguably, the trial court may have considered the first factor, that being whether Dr. Huraibi's conduct was willful and deliberate, *Swain*, ___ Mich App at ___; slip op at 7, because the court noted "the length and the extent and degree" that Dr. Huraibi allegedly went "in promoting [his] agenda" of vilifying counterplaintiffs, their agents, and their members, and casting aspersions on them. However, the trial court did not address Dr. Huraibi's history of complying with previous court orders, or the nature and extent of the prejudice to counterplaintiffs flowing from the harassing e-mail campaign and Dr. Huraibi's alleged perjury. *Id*. There is no indication from the trial court's ruling how the harassing e-mail campaign, or Dr. Huraibi's statements in his affidavits and deposition disavowing any involvement in sending the e-mails, impaired counterplaintiffs' ability to defend against allegations in the third amended complaint, or to pursue their counterclaims against Dr. Huraibi and IHG. It is noteworthy that counterplaintiffs did not pursue sanctions for the harassing e-mail campaign until the August 26, 2018 e-mail, in which the sender made disparaging remarks about counsel for counterplaintiffs to other clients and business associates. In addition, the trial court did not consider whether a less drastic sanction would serve the interests of justice in this case. *Id*. Consequently, we conclude that it is appropriate to vacate the March 7, 2019 order and remand the matter so that the trial court can consider the factors on the record and evaluate other available options on the record.

In so holding, we note that the Court in *Swain* rejected the defendant's invitation to affirm the trial court's dismissal order for providing false deposition testimony on the basis that such a decision would serve as a deterrent to other litigants. *Swain*, ___ Mich App at ___; slip op at 9. Instead, this Court recognized that deterrence can be accomplished through a lesser sanction than dismissal, explaining:

> We are also mindful that permitting dismissal or default as a sanction for deposition testimony would invite parties to bait or lead the opposing party into making false or contradictory statements at deposition, a result plainly at odds with the purpose of discovery. See *People v Burwick*, 450 Mich 281, 298; 537 NW2d 813 (1995) ("A primary purpose of discovery is to enhance the reliability of the fact-finding process by eliminating distortions attributable to gamesmanship."). *If we were to affirm dismissal in this case, it would open the door for motions to dismiss as a sanction for false deposition testimony in many, if not nearly all, contested cases. Ultimately, the determination of credibility would become one for*

> *the court rather than one for the jury and would result in a fundamental change to the judicial process*. [*Swain*, ___ Mich App at ___; slip op at 9 (emphasis added).]

Next, Dr. Huraibi argues that the trial court erred by failing to hold an evidentiary hearing on the issue of perjury before dismissing the third amended complaint and entering a default. In so arguing, however, Dr. Huraibi fails to acknowledge that the issue was waived at the March 6, 2019 hearing.

A waiver is the "intentional and voluntary relinquishment of a known right." See *Walters v Nadell*, 481 Mich 377, 384 n 14; 751 NW2d 431 (2008). "A party who waives a right is precluded from seeking appellate review based on a denial of that right because waiver eliminates any error." *Hodge v Parks*, 303 Mich App 552, 556; 844 NW2d 189 (2014) (quotation marks and citation omitted). Waiver occurs when a party stipulates to a matter before the trial court. *Id*. (stating that a party cannot stipulate to a matter before the trial court "and then argue on appeal that the resulting action was erroneous" and holding that the agreement amounted to a waiver that extinguished any error).

Oral argument on counterplaintiffs' motion for a preliminary injunction, contempt, and sanctions was held on September 12, 2018. At the end of oral argument, the trial court indicated that the court would permit Dr. Huraibi and counterplaintiffs "to submit anything [they] want[ed]" within a certain time frame and that the court would "go from there." Thereafter, Dr. Huraibi and counterplaintiffs submitted briefs and a significant number of exhibits. Although Dr. Huraibi argued that due process required a hearing, an evidentiary hearing was not held. The case was transferred to a different judge in January 2019.

During a February 2019 hearing regarding pretrial matters, counsel for counterplaintiffs noted that the motion for a preliminary injunction, contempt, and sanctions was still unresolved. Counsel for counterplaintiffs noted that both sides believed that the previous judge was "going to rule on [the motion]" before the judge retired. Counsel for Dr. Huraibi agreed that counsel's "representations [were] accurate as it relate[d] to the motion itself[.]" Counsel for Dr. Huraibi further indicated:

> We're happy to have you hear it if you desire to hear it, but we're going to trial on the 25th of February, so I don't know if there's gonna be time for you to review all eight hundred pages. We did respond to it and I think it's asking for dispositive relief, so that's within your discretion, your Honor.

Thereafter, counsel for counterplaintiffs reiterated that the parties believed that the previous judge was going to rule on the motion and that counsel did not want the court to "waste" time by holding a trial if the matter could be disposed of before trial. The trial court agreed to adjourn trial and instructed counterplaintiffs to notice and praecipe the motion for oral argument.

At the March 6, 2019 hearing, the trial court noted that review of the record established that an evidentiary hearing had not been held on the issue of perjury. The trial court asked Dr. Huraibi's counsel if counsel "want[ed] to say anything[.]" Counsel responded as follows:

> Your Honor, no, we've submitted I believe all of our proofs in contravention of their proofs and I believe the arguments already had. I think at this point we're just waiting of the Court's ruling on the matter.[2]

Thereafter, the trial court ruled on the motion, dismissing Dr. Huraibi's complaint and entering a default on the countercomplaint.

We conclude that Dr. Huraibi, who was put on notice of the substance of counterplaintiffs' allegations against him and who was able to submit evidence to contradict counterplaintiffs' allegations of perjury, agreed that all of the evidence that was necessary for the trial court to make a decision had already been submitted. Because Dr. Huraibi unequivocally indicated through his counsel that he wanted the trial court to rule on the motion based on the evidence that had been submitted, Dr. Huraibi waived any right to an evidentiary hearing on the issue of whether he had engaged in perjury during the proceeding. Because any error was extinguished by Dr. Huraibi's waiver, we need not analyze whether the trial court erred by failing to hold an evidentiary hearing.

In sum, while we agree that the conduct alleged against Dr. Huraibi with regard to the harassing e-mail campaign is reprehensible and cannot be condoned under any circumstances, we must remand the matter so that the trial court can weigh the relevant factors on the record. Therefore, we vacate the trial court's March 7, 2019 order dismissing the third amended complaint and entering a default against Dr. Huraibi and remand for further proceedings consistent with this opinion.[3] We retain jurisdiction.

/s/ Colleen A. O'Brien
/s/ Jane M. Beckering
/s/ Thomas C. Cameron

---

[2] At the time the trial court ruled on the motion, Dr. Huraibi was still represented by counsel. It was not until after the motion was decided that the trial court considered and granted counsel's motion to withdraw.

[3] We acknowledge that Dr. Huraibi also makes arguments on appeal relating to the June 18, 2019 order, which awarded damages to counterplaintiffs. In the event that it is necessary to do so, we will consider those arguments after the proceedings on remand are complete.

Court of Appeals, State of Michigan

ORDER

Integrated Health Group, PC v Integrated Healthcare Systems, LLC

Docket No. 349696

LC No. 2014-138231-CK

Colleen A. O'Brien
Presiding Judge

Jane M. Beckering

Thomas C. Cameron
Judges

Pursuant to the opinion issued concurrently with this order, this case is REMANDED for further proceedings consistent with the opinion of this Court. We retain jurisdiction.

Proceedings on remand in this matter shall commence within 56 days of the Clerk's certification of this order, and the proceedings shall be given priority on remand until they are concluded. As stated in the accompanying opinion, we remand to the trial court so that the court can weigh the relevant factors on the record before deciding on the sanctions of dismissal and a default. The proceedings on remand are limited to this issue.

The parties shall promptly file with this Court a copy of all papers filed on remand. Within seven days after entry, appellant shall file with this Court copies of all orders entered on remand.

The transcript of all proceedings on remand shall be prepared and filed within 21 days after completion of the proceedings.

Colleen A. O'Brien

Presiding Judge

A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

November 24, 2020
Date

Jerome W. Zimmer Jr.
Chief Clerk