STATE OF MICHIGAN

COURT OF APPEALS

EFFIE LIADIS,

Plaintiff-Appellee,

v

SUBURBAN MOBILITY AUTHORITY FOR REGIONAL TRANSPORTATION, also known as SMART,

Defendant-Appellant,

and

VIVIAN RICE RUPERT,

Defendant.

UNPUBLISHED
January 28, 2021

No. 351205
Oakland Circuit Court
LC No. 2017-157333-NI

Before: FORT HOOD, P.J., and CAVANAGH and TUKEL, JJ.

PER CURIAM.

Defendant, Suburban Mobility Authority for Regional Transportation ("defendant"), appeals by leave granted[1] the trial court's order denying defendant's motion to dismiss on the basis of spoliation of evidence.[2] On appeal, defendant argues that the trial court abused its discretion when it denied defendant's motion to dismiss because the trial court ignored the evidence of spoliation that dictated dismissal of plaintiff's complaint. Defendant also argues that the trial court abused its discretion when it denied defendant's motion to dismiss because plaintiff violated two discovery orders. Lastly, defendant argues that even if the trial court did not err in declining to

[1] *Liadis v Suburban Mobility Auth for Regional Transp*, unpublished order of the Court of Appeals, entered February 13, 2020 (Docket No. 351205).

[2] Defendant Vivian Rice Rupert was dismissed from the case after the trial court granted Rupert's motion for summary disposition.

dismiss the case, it nevertheless abused its discretion by failing to impose some other sanction short of dismissal. For the reasons set forth below, we disagree and affirm.

I. UNDERLYING FACTS

This case arises out of a motor vehicle accident when a bus, owned by defendant and driven by Vivian Rice Rupert, struck plaintiff's vehicle while it was stopped in traffic. Plaintiff claimed that, as a result of the accident, she sustained head trauma and was unable to continue to work as a pharmacist or lead a normal life.

During the course of litigation, defendant sought production of plaintiff's personal laptops, claiming they were likely to contain evidence that would either support or refute plaintiff's claims. The trial court ordered plaintiff to produce her laptops to defendant's computer forensic expert. In the days leading up to and including the trial court's entry of the order compelling production of the laptops, approximately 41,000 unidentified files were deleted by a computer program on plaintiff's laptop which was called "CCleaner."

Defendant moved to dismiss plaintiff's complaint on the basis of the destruction of evidence and discovery violations. A four-day evidentiary hearing was held by the trial court, after which the trial court denied defendant's motion to dismiss. This appeal followed.

II. DELETION OF FILES FROM PLAINTIFF'S COMPUTER

Defendant first argues that the trial court abused its discretion when it denied defendant's motion to dismiss because it ignored the volume and timing of the deletions, found plaintiff's computer forensic expert to be more credible than defendant's computer forensic expert, and, most importantly, found the deletions to be unintentional. We disagree.

A. STANDARD OF REVIEW

This Court reviews a trial court's decision to sanction a party on the basis of spoliation of evidence for an abuse of discretion. *Brenner v Kolk*, 226 Mich App 149, 160; 573 NW2d 65 (1997) ("An exercise of the court's 'inherent power' may be disturbed only upon a finding that there has been a clear abuse of discretion."). This Court also "review[s] a trial court's imposition of discovery sanctions for an abuse of discretion." *Hardrick v Auto Club Ins Ass'n*, 294 Mich App 651, 659; 819 NW2d 28 (2011). "An abuse of discretion occurs when the decision results in an outcome falling outside the range of principled outcomes." *Barnett v Hidalgo*, 478 Mich 151, 158; 732 NW2d 472 (2007). "[I]n a case involving the failure of a party to preserve evidence, a trial court properly exercises its discretion when it carefully fashions a sanction that denies the party the fruits of the party's misconduct, but that does not interfere with the party's right to produce other relevant evidence." *Brenner*, 226 Mich App at 161.

Factual findings made by the trial court after an evidentiary hearing are reviewed for clear error. *Beach v Lima Twp*, 283 Mich App 504, 524 n 7; 770 NW2d 386 (2009). "A finding is clearly erroneous where, after reviewing the entire record, this Court is left with a definite and firm conviction that a mistake has been made." *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003).

B. ANALYSIS

"Even when an action has not been commenced and there is only a potential for litigation, the litigant is under a duty to preserve evidence that it knows or reasonably should know is relevant to the action." *Brenner*, 226 Mich App at 162. "Generally, where a party deliberately destroys evidence, or fails to produce it, courts presume that the evidence would operate against the party who destroyed it or failed to produce it." *Hamann v Ridge Tool Co*, 213 Mich App 252, 255; 539 NW2d 753 (1995). "[A] court's authority to sanction litigant misconduct, even when there is no statute or court rule addressing the particular form of misconduct, [is] based on a court's fundamental interest in protecting its integrity and that of the judicial system." *Brenner*, 226 Mich App at 160. "In cases involving the loss or destruction of evidence, a court must be able to make such rulings as necessary to promote fairness and justice." *Id*. "[R]egardless of whether evidence is lost as the result of a deliberate act or simple negligence, the other party is unfairly prejudiced because it is unable to challenge or respond to the evidence even when no discovery order has been violated." *Id*. "An appropriate sanction may be the exclusion of evidence that unfairly prejudices the other party or an instruction to the jury that it may draw an inference adverse to the culpable party from the absence of the evidence." *Id*. at 161 (footnotes omitted). Finally, "[d]ismissal is a drastic step" and "[b]efore imposing such a sanction, the trial court is required to carefully evaluate all available options on the record and conclude that the sanction of dismissal is just and proper." *Id*. at 163.

Brenner is instructive as to the issue of spoliation. In that case, the plaintiff sued the defendants asserting they lent her a vehicle with a defective seatbelt and tires. *Id*. at 152-153. The defendants moved for summary disposition under MCR 2.116(C)(10), seeking dismissal of the plaintiff's complaint as a result of the plaintiff's failure to preserve the vehicle. *Id*. at 154. The trial court granted the defendants' motion and dismissed the plaintiff's complaint. *Id*.

In reversing the trial court, this Court reaffirmed the principle that the trial court possesses the inherent authority to dismiss a case even if the offending party has not violated a discovery order. *Id*. at 160-162. Stating that "[d]ismissal is a drastic step that should be taken cautiously," however, this Court concluded that "the trial court's decision was an abuse of discretion because the record does not demonstrate the egregious conduct that would warrant such an extreme measure." *Id*. at 163. "Before imposing such a sanction, the trial court is required to carefully evaluate all available options on the record and conclude that the sanction of dismissal is just and proper," and "the trial court should have considered lesser sanctions, including the exclusion of evidence that is unfairly prejudicial to defendants because of plaintiff's failure to preserve" it. *Id*. at 163-164 (citation omitted).

Defendant relies heavily on *Gillett v Mich Farm Bureau*, unpublished opinion of the Court of Appeals, issued December 22, 2009 (Docket No. 286076), in support of its position that the trial court abused its discretion when it denied defendant's motion to dismiss.[3] In that case, the plaintiff

[3] Unpublished opinions from this Court "may be of persuasive interest but have no binding authority." *Eddington v Torrez*, 311 Mich App 198, 203; 874 NW2d 394 (2015); see also MCR

brought suit, alleging sexual harassment in the workplace. *Gillett*, unpub op at 1. Although the defendant sent the plaintiff a letter asking him to preserve his personal e-mails and laptop, the plaintiff admitted to deleting those e-mails and thousands of files from his laptop before turning them over to the defendant. *Id*. The trial court dismissed the plaintiff's complaint as a sanction for his spoliation of evidence and he appealed. *Id*. at 1-2.

This Court affirmed the trial court's order dismissing the plaintiff's complaint. *Id*. at 3. First, this Court concluded the trial court did not abuse its discretion by dismissing plaintiff's complaint because the "plaintiff deleted on average 2,000 files each month through September 2007, but . . . in October 2007 the deletions increased to more than 200,000 files, with an additional 28,000 files deleted in the first six days of November." *Id*. This Court also concluded that although the trial court did not expressly recite alternative sanctions on the record, "the record clearly establishe[d] that [the trial court] was fully aware of [its] options and that [it] employed the sanction of dismissal with due care." *Id*.

Gillett has numerous factual differences from the case before us and, therefore, is only marginally persuasive authority. For example, in *Gillett* the plaintiff admitted to intentionally destroying the evidence in question, *id*., but here the trial court found that "Plaintiff did not willingly destroy evidence," and "There is simply nothing to suggest Plaintiff willingly [sic] and knowingly destroyed relevant evidence." Moreover, the trial court found it unlikely that any evidence in fact was destroyed: "Defendant's expert was able to recover some of the files which had been deleted. None of the recovered files contained any relevant evidence."

Defendant asserts that the trial court could not have properly found the deletion of files on plaintiff's computer to be unintentional because plaintiff was a "sophisticated" computer user. Contrary to defendant's arguments, however, the record supports the trial court's factual finding that plaintiff did not intentionally destroy evidence, which finding cannot be overturned absent clear error. See *Beach*, 283 Mich App at 524 n 7. The trial court found it "compelling that both experts agree the program at issue, CCleaner, was installed before the instant action was filed," and that "The experts also agree the program was installed in such a manner as to be run automatically. Each time the computer was switched on, the program would automatically delete certain files and clean the hard drive."

These facts amply support the trial court's decision. The trial court's finding that plaintiff did not knowingly destroy evidence is supported by the record and thus not clearly erroneous. The trial court's ruling in that regard is strengthened by its finding that based on forensic analysis, it is unlikely than any relevant evidence was lost, let alone lost intentionally. And finally, the trial court properly considered alternative sanctions, stating that "At the time of trial, the Court will consider a request for a jury instruction regarding an adverse inference if requested by Defendant." Thus, there is simply no basis for finding an abuse of discretion on the part of the trial court.

7.215(C)(1) ("An unpublished opinion is not precedentially binding under the rule of stare decisis.")

Defendant also argues that the trial court erred by concluding that plaintiff's expert, John Stott Matthews, was a more credible witness than defendant's expert, Larry Dalman. "This Court gives special deference to a trial court's findings when they are based on the credibility of the witnesses." *Seifeddine v Jaber*, 327 Mich App 514, 516; 934 NW2d 64 (2019) (quotation marks and citation omitted); MCR 2.613(C). Plaintiff argues that the trial court erred by finding that Matthews was more credible than Dalman because of apparent inconsistencies in Matthews's testimony and the methodology Matthews used when reviewing the evidence in this case. But inconsistencies in testimony and critiques of an expert's methodology, without more, are insufficient for this Court to overturn a trial court's credibility determination. Moreover, although the trial court found plaintiff's expert testimony more credible in a general sense, the experts were in agreement as to some of the most critical issues, and thus the trial court's conclusion did not turn entirely on the credibility determinations. The trial court, as the finder of fact, was in the best position to assess the credibility of Matthews and Dalman, and we defer to its assessment, as we are required to do. See *Seifeddine*, 327 Mich App at 516; MCR 2.613(C).[4]

[4] We note that although not cited by the trial court, MCR 2.302(B)(5), provides that "A party has the same obligation to preserve [electronically stored information] as it does for all other types of information." Prior to January 1, 2020, that rule further provided "Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system." The second sentence was identical to former FR Civ P 37(e), which had been adopted in 2006 (as Rule 37(f), but was later codified as Rule 37(e)), and was termed a "safe harbor provision." See FR Civ P Committee Notes on Rules—2006 Amendment, Rule 37(f). That rule was significantly amended in 2015 and the safe harbor was eliminated because "This limited rule has not adequately addressed the serious problems resulting from the continued exponential growth in the volume of such information." See Committee Notes on Rules—2015 Amendment, Rule 37(e). Michigan repealed our safe harbor provision for similar reasons, and in the same 2019 package of amendments which repealed the safe harbor provision enacted new MCR 2.313(D). That rule provides that "If ESI that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery," and the adverse party is prejudiced, MCR 2.313(D), the court is authorized to use a range of sanctions as governed by the rule. See *id*. For a history of the Michigan Supreme Court's review and receipt of recommendations for amendment of the rules, see Bolyea and Fields, *Effective January 1, 2020: Adopted Amendments to the Michigan Court Rules*, 39-2 The Michigan Business Law Journal 15 (2019).

Neither the current version nor the previous version of the court rule is at issue here, because the trial court did not rely on either one. Nevertheless, the trial court did not apply the wrong legal standard, as it applied the standards set forth in various appellate decisions, which are similar to the rule-based standards. And in any event, reliance on the current version of the rule may not be permissible in a given case, because "A newly adopted court rule will not be applied to pending actions if a party acts, or fails to act, in reliance on the prior rules and the party's action or inaction

III. PLAINTIFF'S COMPLIANCE WITH DISCOVERY ORDERS

Defendant argues that dismissal was appropriate because plaintiff failed to comply with two court orders regarding discovery. According to defendant, these violations were independent reasons for the trial court to dismiss plaintiff's complaint. We disagree.

A. PRESERVATION AND STANDARD OF REVIEW

As an initial matter, plaintiff argues that this issue is unpreserved because defendant first raised this issue in its motion for reconsideration. Plaintiff is mistaken, however, as defendant raised the issue in its posthearing brief. Thus, the issue is preserved. See *Peterman v Dep't of Natural Resources*, 446 Mich 177, 183; 521 NW2d 499 (1994) (holding that an issue raised in the trial court and pursued on appeal is preserved even if the trial court failed to address or decide the issue). Consequently, we review this preserved issue for an abuse of discretion. *Hardrick*, 294 Mich App at 659.

B. ANALYSIS

This Court has set forth various factors to consider when determining whether to dismiss a complaint as a sanction for failure to comply with a court order:

> (1) whether the violation was wilful [sic] 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. [*Zantop Int'l Airlines, Inc v Eastern Airlines*, 200 Mich App 344, 360; 503 NW2d 915 (1993), citing *Dean v Tucker*, 182 Mich App 27, 32-33; 451 NW2d 571 (1990).]

Defendant argues that plaintiff violated two discovery orders. First, defendant argues that plaintiff violated an August 8, 2018 order, which provided:

> [Plaintiff] shall provide prism glasses to defense counsel [within] 14 days; [plaintiff] shall provide answers to [defendant's] discovery requests as indicated in its motion to compel within 14 days; [plaintiff] shall allow [defendant] to obtain [plaintiff's] phone records 1 [hour] before and 1 [hour] post-incident; [and plaintiff] shall be produced for her deposition on August 23, 2018 at 10:00 a.m. . . . .

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has consequences under the new rules that were not present under the old rules." *Ligons v Crittendon Hosp*, 490 Mich 61, 88; 803 NW2d 271 (2011). We have no occasion to determine whether that limitation on a newly adopted rule is applicable here because, as noted, the trial court did not invoke the new rule. However, the new rule certainly will become relevant in other cases involving electronically stored information, in which trial courts have ruled or will rule after the amendments' effective dates of January 1, 2020.

Defendant claims that plaintiff did not comply with this order because plaintiff admitted during the evidentiary hearing she had thousands of responsive files she did not produce to defendant. Second, defendant claims plaintiff violated the trial court's September 13, 2018 order compelling production of her computers because the production occurred late and the laptops were not sent directly from plaintiff to defendant's expert. Specifically, on September 13, 2018, the trial court ordered plaintiff to "ship to Computer Forensic Expert Larry Dalman at Dalman Investigations . . . her TWO personal computers within seven (7) days or on or before September 19, 2018."

Contrary to defendant's arguments, the trial court did not abuse its discretion by denying defendant's motion to dismiss on the basis of the purported violations of these orders. As discussed earlier, dismissal of plaintiff's complaint is a "drastic" form of relief, warranted only in the most extreme cases. *Brenner*, 226 Mich App at 163.

While plaintiff appears to admit she did not fully comply with the August 8, 2018 order, the files she did not produce in response to that order were patient files she prepared in connection with her medical work as a pharmacist. Plaintiff informed defendant's expert before producing the laptop that she was very concerned about patient privacy and, therefore, she maintained those files in her computer in encrypted form, with passwords. Given the limited record concerning this issue, we cannot conclude that the trial court abused its discretion when it refused to dismiss plaintiff's complaint on the basis of this violation.

With respect to the September 13, 2018 order, plaintiff also admits the first laptop was not sent by her directly to the expert, and that she sent it after the date specified in the order. Dalman received the laptop on September 24, 2018, five days late. Furthermore, plaintiff's second laptop was in Florida at the time the trial court entered its order and, therefore, plaintiff could not send it to defendant at that time. These appear to be *de minimis* violations of the order for which defendant did not articulate any prejudice that resulted. See *Zantop Int'l Airlines*, 200 Mich App at 360. It was, therefore, not an abuse of discretion for the trial court to deny defendant's motion to dismiss plaintiff's complaint. See *Hardrick*, 294 Mich App at 659; *Zantop Int'l Airlines*, 200 Mich App at 360.

IV. WHETHER OTHER SANCTIONS WERE APPROPRIATE

Defendant argues that even if the trial court did not err by failing to dismiss the case, it nevertheless abused its discretion by failing to impose some other sanction short of dismissal. We disagree.

A. PRESERVATION AND STANDARD OF REVIEW

Defendant sought dismissal of plaintiff's complaint in the trial court and did not seek any alternative forms of relief. Consequently, the issue was not raised before, addressed by, or decided by the trial court. This issue, therefore, is unpreserved. See *Peterman*, 446 Mich at 183.

Unpreserved issues are reviewed for plain error. *Hogg v Four Lakes Ass'n, Inc*, 307 Mich App 402, 406; 861 NW2d 341 (2014). "To avoid forfeiture under the plain error rule, three requirements must be met: 1) the error must have occurred, 2) the error was plain, i.e., clear or

obvious, 3) and the plain error affected substantial rights." *Kern v Blethen-Coluni*, 240 Mich App 333, 335-336; 612 NW2d 838 (2000) (quotation marks omitted), citing *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). "[A]n error affects substantial rights if it caused prejudice, i.e., it affected the outcome of the proceedings." *Lawrence v Mich Unemployment Ins Agency*, 320 Mich App 422, 443; 906 NW2d 482 (2017) (alteration in original, citation and quotation marks omitted). The appellant bears the burden of persuasion with respect to prejudice. See *Carines*, 460 Mich at 763 ("It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice.") (quotation marks and citation omitted).

B. ANALYSIS

Defendant argues that the trial court erred by failing to impose any sanctions against plaintiff for deleting 41,000 files and for violating two court orders regarding discovery. Given that defendant sought dismissal of plaintiff's complaint, and did not seek any lesser sanctions, it cannot be said the trial court plainly erred in limiting its ruling to the only relief defendant sought. See *Duray Dev, LLC v Perrin*, 288 Mich App 143, 161; 792 NW2d 749 (2010) (quotation marks and citation omitted; alteration in original) ("[A] party may not remain silent in the trial court, only to prevail on an issue that was not called to the trial court's attention."). Indeed, for us to conclude that the trial court plainly erred would require us to find that it should have sua sponte granted relief that defendant did not request and that plaintiff did not have an opportunity to oppose. We decline to do so. The trial court ruled on the motion before it; it did not err by not awarding relief that defendant failed to request. Moreover, the trial court did hold open the possibility of alternative, less drastic relief in the form of an adverse instruction to the jury at trial, if defendant requested one. Thus, the trial court properly measured the range of possible alternative sanctions, and determined that no sanction was justified against plaintiff, save possibly for an adverse jury instruction. Again, we find no abuse of discretion in the trial court's actions

V. CONCLUSION

The trial court concluded that plaintiff did not intentionally destroy evidence, nor was it likely than any evidence in fact was lost. The trial court considered its range of options, and determined that neither dismissal nor a lesser sanction was appropriate other than a possible adverse jury instructions. We find those decisions well-supported and within the trial court's discretion. Accordingly, we affirm the trial court's order denying the motion to dismiss.

Plaintiff, as the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Karen M. Fort Hood
/s/ Mark J. Cavanagh
/s/ Jonathan Tukel