

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PLAY CARE LEARNING CENTER L.L.C., and  
GRIFFIN REAL ESTATE L.L.C.,

Plaintiffs-Appellants,

and

CLYDE GRIFFIN, and  
JOANN GRIFFIN,

Plaintiffs,

v

ENBRIDGE ENERGY LP,  
ENBRIDGE PIPELINES (LAKEHEAD) L.L.C.,  
and ENBRIDGE PIPELINES (WISCONSIN),  
INC.,

Defendants-Appellees.

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UNPUBLISHED  
April 11, 2013

No. 309656  
Calhoun Circuit Court  
LC No. 2010-003983-CE

Before: M. J. KELLY, P.J., and CAVANAGH and MURRAY, JJ.

PER CURIAM.

Plaintiffs Play Care Learning Center LLC and Griffin Real Estate LLC appeal by right the trial court's opinion and order dismissing their claims with prejudice as a sanction for discovery violations. Given the repeated violations and the potential prejudice to defendants Enbridge Energy LP, Enbridge Pipelines (Lakehead) LLC and Enbridge Pipelines (Wisconsin), Inc. (collectively Enbridge), we conclude that the trial court's decision to sanction the Learning Center and Griffin Real Estate by dismissing their claims was within the range of reasonable and principled outcomes. For that reason, we affirm.

**I. BASIC FACTS**

Clyde Griffin and his wife, JoAnn Griffin (collectively the Griffins), owned two businesses that they operated in Marshall, Michigan: the Learning Center, which was a child care business, and Griffin Real Estate, which leased its building to the Learning Center. The Griffins established these businesses using funds borrowed from Chemical Bank. Chemical Bank

secured repayment of its loan through a mortgage on Griffin Real Estate's property and through various repayment guarantees. In July 2010, the Griffins caused Griffin Real Estate and the Learning Center to enter into a loan modification with Chemical Bank because they were in default.

Enbridge owns and operates a petroleum pipeline system that runs through Michigan. In July 2010, the pipeline ruptured and leaked oil.

In December 2010, the Griffins closed the Learning Center. The Griffins, the Learning Center, and Griffin Real Estate sued Enbridge in December 2010. They alleged that, when Enbridge's pipeline ruptured and released chemicals into the air, their clients became concerned and removed their children from the Learning Center. For that reason, they further maintained, Enbridge was directly responsible for their businesses' failures.

Chemical Bank foreclosed on the real property and purchased it at a foreclosure sale in March 2011 for \$575,000.

In March 2011, Enbridge served discovery requests on plaintiffs. However, plaintiffs did not timely reply. In May 2011, the trial court entered a stipulated order regarding discovery, which stated that plaintiffs shall "provide complete responses to [Enbridge's] first set of Discovery Requests" and produce all requested documents.

In June 2011, Enbridge's lawyer sent plaintiffs a letter asserting various deficiencies in their responses and plaintiff's lawyer responded that some, but not all, of these deficiencies could be resolved. On June 16, 2011, Enbridge's lawyer sent a second set of discovery requests and, in a letter dated June 20, 2011, Enbridge's lawyer complained that no supplemental materials had been received.

On June 23, 2011, Enbridge subpoenaed Chemical Bank's records pertaining to the Learning Center, but the bank did not provide all the records it possessed.

On June 28, 2011, Enbridge asked the trial court to order plaintiffs to provide more complete answers. The trial court granted Enbridge's motion and entered an order enumerating 20 deficiencies that plaintiffs had to correct by July 25, 2011.

On July 19, 2011, plaintiffs' lawyer provided supplemental answers and documents to "all but two of" Enbridge's requests, indicating that because plaintiffs resided in Florida, it would be overly burdensome for them to examine the files stored in Michigan by July 25, 2011. Enbridge then notified plaintiffs by letter that it had still not received responses to the second set of discovery requests.

In August 2011, Chemical Bank sued the Griffins, the Learning Center, and Griffin Real Estate for the deficiency remaining after it foreclosed.

On August 8, 2011, Enbridge moved for dismissal as a sanction for plaintiffs' failure to comply with the discovery orders. The trial court held a hearing on the motion on August 15, 2011; plaintiffs orally argued that dismissal was not an appropriate sanction. The trial court declined to dismiss plaintiffs' claims, but granted Enbridge's motion to compel discovery and

ordered plaintiffs to pay Enbridge's expenses under MCR 2.313(A)(5). The trial court also warned plaintiffs that Enbridge's "arguments for a dismissal as a Discovery sanction did carry some weight . . . ."

On August 17, 2011, plaintiffs provided Enbridge with the Learning Center's tax returns for 2005 to 2007. And, in September 2011, plaintiffs provided their second set of supplemental responses to Enbridge's discovery requests.

In November 2011, Enbridge deposed the Griffins in Florida.

On January 5, 2012, Enbridge again moved to dismiss on the basis of plaintiffs' failure to comply with the trial court's discovery orders. After hearing the parties' arguments on January 23, 2012, the trial court granted Enbridge's motion and dismissed plaintiffs' claims as a sanction for failing to comply with discovery.

After the trial court denied plaintiffs' motion for reconsideration, plaintiffs appealed to this Court.

## II. DISCOVERY SANCTIONS

### A. STANDARD OF REVIEW

On appeal, plaintiffs note that they ultimately provided Enbridge every document that it requested except for one, a "bill book" referenced by JoAnn Griffin at her deposition. Because Enbridge had the requested discovery and any harm caused by the delay could have been cured with a less severe sanction, plaintiffs argue that the trial court abused its discretion when it resorted to the extreme sanction of dismissal. This Court reviews a trial court's decision to order discovery sanctions for an abuse of discretion. *Dean v Tucker*, 182 Mich App 27, 32; 451 NW2d 571 (1990). "[A]n abuse of discretion occurs only when the trial court's decision is outside the range of reasonable and principled outcomes." *Saffian v Simmons*, 477 Mich 8, 12; 727 NW2d 132 (2007). This Court reviews the factual findings underlying a decision to order sanctions for clear error. *Traxler v Ford Motor Co*, 227 Mich App 276, 284-285; 576 NW2d 398 (1998).

### B. ANALYSIS

"Michigan has long espoused a liberal discovery policy that permits the discovery of any matter, not privileged, that is relevant to the subject matter involved in the pending case." *Hamed v Wayne Co*, 271 Mich App 106, 109; 719 NW2d 612 (2006). "Because the imposition of sanctions [for discovery violations] is discretionary, the trial court should carefully consider the circumstances of the case to determine whether a drastic sanction, such as dismissing a claim, is appropriate." *Richardson v Ryder Truck Rental, Inc*, 213 Mich App 447, 451; 540 NW2d 696 (1995). Factors that should be considered in determining the appropriate sanction include:

- (1) whether the violation was willful 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's 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*, 182 Mich App at 32-33.]

As to the first factor, dismissal is generally appropriate only when a party's failure to comply with discovery orders is flagrant, wanton, or willful, not merely accidental or involuntary. *Frankenmuth Mut Ins Co v ACO, Inc*, 193 Mich App 389, 396-397; 484 NW2d 718 (1992). However, "[t]o be willful, the failure need not be accompanied by wrongful intent. It is sufficient if it is conscious or intentional, not accidental or involuntary." *Edge v Ramos*, 160 Mich App 231, 234; 407 NW2d 625 (1987).

In response to Enbridge's first set of discovery requests after the first order to comply, plaintiffs failed to note or provide documentation showing that the Learning Center had guaranteed Griffin Real Estate's debt; it failed to disclose this despite the fact that Enbridge asked the Learning Center to provide documents related to any contingent liabilities that it may have had. In addition, plaintiffs failed to submit documents relating to the loan modification agreement even though Enbridge asked for "[c]opies of any financing agreements secured by or related to any real property you owned or possessed in Calhoun County, Michigan from July 24, 2010, to the present."

After the second order, plaintiffs' lawyer sent Enbridge a letter indicating that it would be overly burdensome for plaintiffs to examine the files stored in Michigan and concluded that plaintiffs may arrange for "access to the boxes and find what you request." At their depositions, the Griffins made it clear that, by November, not only had the files in storage not been fully searched, but also that those files might still contain potentially responsive documents. Plaintiffs have not shown that their repeated failure to examine the documents held in storage was "accidental or involuntary." *Edge*, 160 Mich App at 234. As such, the trial court did not clearly err when it found that plaintiffs' failure to provide these documents was willful. *Traxler*, 227 Mich App at 282, 284-285.

The trial court also noted plaintiffs' history of non-compliance and delay, which weighed in favor of dismissal under the second and fifth factors. The record shows that plaintiffs failed to timely respond to Enbridge's initial discovery requests. They then failed to respond to Enbridge's letter claiming that many of the responses were inadequate and failed to fully comply with the deadline given in the July 2011 discovery order. These actions led to another order compelling discovery and monetary sanctions. Even after those sanctions, plaintiffs again failed to fully search their files in storage for potentially responsive documents. Thus, the trial court's finding that plaintiffs had a history of noncompliance and delay was not clearly erroneous. See *Traxler*, 227 Mich App at 282, 284-285.

The trial court's finding under the third factor that plaintiffs' actions prejudiced Enbridge was also not clearly erroneous. Despite the fact that the discovery requests sought production of "all documents relating to profit and loss projections, forecasts, budgets, or business plans" for the Learning Center, it became clear at the Griffins' depositions that the documents provided up to that point were inadequate to fully account for their businesses' profits. Likewise, Enbridge learned of the possible existence of other documents, including the "bill book" that JoAnn

Griffin indicated was a “budget,” which may have been stored in plaintiffs’ Michigan storage facility. On appeal, plaintiffs minimize the importance of the “bill book,” but ignore the deposition testimony that suggested that there might be still more potentially responsive documents of unknown evidentiary value, which they never bothered to look for or produce. Moreover, we cannot agree that the “bill book” had no evidentiary worth in assessing whether the Learning Center had value as a going concern prior to the rupture. Thus, the trial court did not clearly err when it found that Enbridge suffered some prejudice as a result of plaintiffs’ failure to provide the requested discovery prior to the Griffins’ depositions. See *Traxler*, 227 Mich App at 282, 284-285.

Plaintiffs’ argument that the fourth factor does not weigh in favor of dismissal because Enbridge ultimately had access to the entire store of records held by Chemical Bank is unavailing. Even if Enbridge had gotten all of the documents held by Chemical Bank, plaintiffs still would have retained an unknown number of other documents, with an unknown amount of potentially responsive information, which may not have been available from any other source. And, as plaintiffs’ lawyer later determined, Enbridge did not receive all of the bank’s documents. Plaintiffs continued failure to search their own records causes the seventh factor to weigh in favor of dismissal as well.

The trial court had already imposed a monetary sanction and warned plaintiffs about the potential for dismissal for their continued failure to comply with discovery. Nevertheless, although the earlier sanction and warning seemed to induce some compliance, plaintiffs still failed to provide adequate discovery. Given these facts, we cannot conclude that the trial court abused its discretion when it determined that dismissal was the appropriate sanction.

### III. CONCLUSION

Plaintiffs repeatedly failed to comply with Enbridge’s discovery requests even after the trial court ordered them to comply, sanctioned them, and warned them that dismissal was potentially an appropriate sanction. Despite this warning, plaintiffs only took minimal steps to comply with Enbridge’s requests. As a result, Enbridge did not have evidence that was relevant to determining causation and damages and, accordingly, could not explore these issues during the Griffins’ depositions. Under these circumstances, the trial court’s decision to resort to dismissal as a sanction was not outside the range of reasonable and principled outcomes. *Saffian*, 477 Mich at 12.

Affirmed.

/s/ Michael J. Kelly  
/s/ Mark J. Cavanagh  
/s/ Christopher M. Murray