

STATE OF MICHIGAN
COURT OF APPEALS

MICHAEL H. POOLE, PH.D.,

Plaintiff-Appellant/Cross-Appellee,

v

FERRIS STATE UNIVERSITY,

Defendant-Appellee/Cross-Appellant.

UNPUBLISHED

January 21, 1997

No. 186675

Mecosta County

LC No. 92-009707-CL

Before: Neff, P.J., and Smolenski and D. A. Roberson,* JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). Defendant cross-appeals from the same order. We affirm.

I

Plaintiff responded to defendant's advertisement for a humanities instructor and was subsequently identified as one of defendant's top three candidates for the position. At defendant's invitation, plaintiff visited the university for an interview and was afforded the opportunity to present a lecture to assist defendant in making its evaluation. Plaintiff claimed that when defendant discovered that he was blind, it decided not to hire him and instead hired a less qualified, non-handicapped candidate.

In his complaint, plaintiff alleged that defendant had refused to hire him because of his blindness and in violation of Michigan's Handicappers' Civil Rights Act, MCL 37.1101 *et seq.*; MSA 3.550(101) *et seq.* Defendant responded that it did not hire plaintiff because of his poor lecture performance and because it determined that plaintiff lacked the qualifications necessary for the position.

During pretrial discovery, defendant filed a motion to compel plaintiff to respond to its interrogatories and requests for the production of documents. The trial court granted this motion, but plaintiff again failed to comply. Consequently, the trial court sanctioned plaintiff by excluding all evidence relating to the matters about which defendant had requested discovery. Because this evidence

* Recorder's Court judge, sitting on the Court of Appeals by assignment.

was excluded, plaintiff was unable to establish that he had incurred damages, a necessary element of his cause of action. At the hearing on defendant's motion for summary disposition, the trial court determined that although an issue of fact existed regarding defendant's reasons for refusing to hire plaintiff, plaintiff had failed to establish a genuine issue of material fact regarding the element of damages. Therefore, the court granted defendant's motion for summary disposition.

II

Plaintiff argues that the trial court abused its discretion when it sanctioned plaintiff for failing to comply with the court's discovery order. If a party fails to obey a discovery order, the court may order any just sanctions, including an order prohibiting the party from introducing designated evidence. MCR 2.313(B)(2)(b). Among the factors that should be considered in determining the appropriate sanction are the following:

(1) whether the violation was wilful 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 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 v Tucker*, 182 Mich App 27, 32-33; 451 NW2d 571 (1990) (footnotes omitted)]

We review a trial court's decision to impose sanctions for violations of discovery requirements for an abuse of discretion. *Beach v State Farm Mutual Auto Ins Co*, 216 Mich App 612, 618; 550 NW2d 580 (1996).

A

On appeal, plaintiff challenges several of the findings that the court made in deciding to impose sanctions.

First, plaintiff states that his refusal to comply was not willful and that he failed to respond because his attorney erroneously told him that he was not required to produce the requested documents. However, the trial court correctly determined that plaintiff's failure to comply was willful because, when plaintiff listened to counsel and weighed his options, he acted consciously or intentionally, as opposed to accidentally or involuntarily. See *Houston v Southwest Detroit Hospital*, 166 Mich App 623, 628; 420 NW2d 835 (1987). The fact that plaintiff did not act with wrongful intent is irrelevant. *Id.*

Plaintiff next contends that the trial court erred in finding that plaintiff had a history of failing to comply with other discovery requests and orders. In fact, plaintiff had not only failed to comply with the court's discovery order, but had also given evasive or incomplete answers to defendant's

interrogatories, failed to respond when defendant issued a demand for compliance, and missed the deadline for filing witness and exhibit lists. Therefore, the trial court's determination was proper.

Plaintiff also argues that the trial court erroneously determined that his failure to comply had prejudiced defendant since defendant gave no indication of how it was prejudiced by the delay. To the contrary, defendant asserted that it would suffer prejudice because plaintiff's delay prevented defendant from determining the nature and extent of plaintiff's alleged injuries and from preparing a complete defense. Plaintiff did not rebut these assertions. Thus, the court's finding is supported by the record.

Plaintiff insists that the trial court abused its discretion in concluding that the matter would not be resolved by a lesser sanction. We disagree. After plaintiff failed to comply with the court's first discovery order, defendant requested that the trial court impose one of the following sanctions: (1) dismiss the case with prejudice; (2) exclude plaintiff's evidence of economic and psychological damages and extend time for discovery; or (3) extend time for discovery and compel plaintiff's compliance. The trial court imposed the second sanction, finding that it was not inclined to dismiss plaintiff's case at that time, and that the third sanction would merely reward plaintiff for dilatory tactics. The court had no reason to expect that plaintiff would comply with yet another discovery order. Accordingly, the court did not abuse its discretion in imposing the second sanction.

B

Plaintiff also argues that, because the trial court had previously determined that dismissal was too harsh a sanction, the trial court necessarily erred in concluding that the exclusion of evidence was appropriate, as this sanction had the same effect as a dismissal. In fact, the trial court did not conclude that dismissal was too harsh a sanction. Rather, the court stated that it was not inclined to exercise that option at that time. While the court acknowledged that the sanctions imposed could have the effect of dismissing plaintiff's case, it also noted that the real effect would not be known until the dispositive motions were argued. Plaintiff's argument regarding an inconsistency between the trial court's reasoning and its resultant decision is without merit.

The trial court carefully considered the relevant factors and determined that the appropriate sanction was to prohibit plaintiff from introducing evidence of damages. Our review of the record leads us to conclude that the trial court's decision was not an abuse of discretion.

II

Because we conclude that the sanction was properly imposed, we also conclude that summary disposition was properly granted in defendant's favor. MCR 2.116(C)(10). Accordingly, we need not address defendant's assertion on cross-appeal that the trial court erred in finding that a question of fact existed on the issue of whether defendant's reasons for refusing to hire plaintiff were pretextual.

Affirmed.

/s/ Janet T. Neff

/s/ Michael R. Smolenski

/s/ Dalton A. Roberson