

STATE OF MICHIGAN
COURT OF APPEALS

MARGARET MANRY HOSKINS,

Plaintiff-Counterdefendant-Appellee,

v

LULA MAE ROLFE,

Defendant-Counterplaintiff-Appellant.

UNPUBLISHED

May 28, 1999

No. 207113

Berrien Circuit Court

LC No. 94-005988-GC

Before: Sawyer, P.J., and Murphy and Talbot, JJ.

PER CURIAM.

Defendant Lula Mae Rolfe appeals as of right the court's October 1, 1997, order granting plaintiff's motion for directed verdict. We reverse.

Plaintiff sued defendant in small claims court for damages arising from an automobile accident. Defendant counterclaimed and requested removal to district court, then to circuit court because her counterclaim exceeded the jurisdiction of the district court (a removal order was never signed; however, on April 25, 1996, the circuit, district, and probate courts in Berrien County were consolidated for a two-year pilot program on court consolidation. See Administrative Order No. 1996-5). On March 24, 1995, the trial court entered a pretrial order directing the parties to exchange witness lists by the scheduled mediation date, August 25, 1995. The order also provided that any witness not identified or exhibit exchanged in compliance with the order would not be admitted at trial. Defendant did not provide a list of witnesses or exhibits. On September 18, 1995, plaintiff filed a motion in limine asking that defendant be prohibited from introducing witnesses or exhibits. The court granted plaintiff's motion. A jury was impaneled on September 9, 1997, and plaintiff's motion for directed verdict was granted.

Defendant contends that the trial court abused its discretion in prohibiting her from introducing any witnesses or exhibits. We agree. MCR 2.313(B)(2)(b) authorizes the exclusion of evidence as a sanction for failure to comply with a discovery order. The power to exclude or allow evidence is discretionary with the court, as is the power to assess any of the sanctions authorized by MCR 2.313. See *Dean v Tucker*, 182 Mich App 27, 32; 451 NW2d 571 (1990). The fact that this action is discretionary rather than mandatory necessitates a consideration of the circumstances of each case to

determine whether a drastic sanction is appropriate. *Id.* In considering whether a drastic sanction is appropriate, the court should consider a number of factors, including the following:

(1) whether the violation was wilful or accidental; (2) the party's history of refusing to comply with discovery requests; (3) the prejudice to the [opposing party]; (4) actual notice to the [opposing party] of the witness and the length of time prior to trial that the [opposing party] received such actual notice; (5) whether there exists a history of [the party] engaging in deliberate delay; (6) the degree of compliance by the [party] with other provisions of the court's order; (7) an attempt by the [party] to timely cure the defect, and (8) whether a lesser sanction would better serve the interests of justice. [*Id.*, 32-33]

Witness lists are an element of discovery. See *Stepp v Dep't of Natural Resources*, 157 Mich App 774, 778; 404 NW2d 665 (1987). The purpose of witness lists is to avoid trial by surprise. *Id.*, 779. When a party is prevented from testifying because of the failure to provide a witness list, the court's ruling is the equivalent of a dismissal. See *Grubor Enterprises v Kortidis*, 201 Mich App 625, 628; 506 NW2d 614 (1993). Allowing a court to routinely dismiss an action when a witness list is stricken is inconsistent with the various discretionary sanction options available to the court. *Id.*, 628-629.

Defendant argues that the trial court failed to consider the specific circumstances of the case. We agree. A review of the record shows that the trial court failed to consider the factors listed in *Dean, supra*, 32-33. Instead of considering the specific facts of the case, the court discussed the purpose behind witness lists generally. It did not make any finding as to whether defendant's conduct was willful or accidental. It also said nothing concerning defendant's history of refusing to comply with discovery requests. See *id.*, 32. Moreover, from an examination of the record, there is nothing that shows that defendant failed to comply or cooperate with any other discovery requests or orders. Indeed, defendant did provide a listing of witnesses in response to an interrogatory. Further, the court did not touch on the issue of actual notice to plaintiff; this could have been an issue since the parties had already participated in mediation and an exchange of exhibits had occurred. Most important, the court gave no indication that it had considered the possibility of a lesser sanction such as limiting defendant to use of witnesses already deposed by plaintiff or those listed in response to the interrogatories, a monetary sanction, or some other lesser sanction. Failing to consider whether lesser sanctions would be more appropriate can constitute an abuse of discretion. See *Hanks v SLB Management, Inc*, 188 Mich App 656, 658; 471 NW2d 621 (1991). We acknowledge that the pretrial order clearly warned the parties that witnesses or exhibits not listed could not be used at trial. However, this does not excuse the trial court's failure to consider the specific circumstances of the case and to make a record on its considerations. Furthermore, while defendant did violate the court rules, we fail to see any significant prejudice to plaintiff in light of the disclosure of the witnesses in the interrogatory. For these reasons, we conclude that the trial court abused its discretion.

Reversed and remanded with instructions to the trial court to conduct a hearing on plaintiff's motion in limine in which it shall consider the factors enumerated in *Dean, supra*, 32-33, together with any other factors it considers relevant to its determination. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ William B. Murphy
/s/ Michael J. Talbot