

STATE OF MICHIGAN  
COURT OF APPEALS

---

LESLIE YOUNG, Personal Representative of the  
Estate of CHARLES HENRY YOUNG, Deceased,

Plaintiff-Appellant,

v

RONALD NICHOLS, M.D.,

Defendant-Appellee.

---

UNPUBLISHED  
January 29, 2002

No. 225534  
Ingham Circuit Court  
LC No. 99-090131-NH

Before: Gage, P.J., and Hoekstra and Meter, JJ.

PER CURIAM.

After plaintiff failed to file her expert witness list by the deadline, the trial court ruled that plaintiff would not be allowed to present her expert witness at trial and, accordingly, could not establish her claim for medical malpractice. The court therefore granted defendant's motion for summary disposition. Plaintiff appeals as of right. We reverse and remand.

We review the trial court's decision in this case for an abuse of discretion. See *Dean v Tucker*, 182 Mich App 27, 31; 451 NW2d 571 (1990). Although the court rules authorize a trial court to dismiss an action as a sanction for a party's failure to comply with a discovery order,<sup>1</sup> see MCR 2.313(B)(2)(c), "[t]he trial court should carefully consider the circumstances of the case to determine whether a drastic sanction such as dismissing a claim is appropriate." *Bass v Combs*, 238 Mich App 16, 26; 604 NW2d 727 (1999); see also *Dean, supra* at 32. "Severe sanctions are generally appropriate only when a party flagrantly and wantonly refuses to facilitate discovery, not when the failure to comply with a discovery request is accidental or involuntary." *Bass, supra* at 26; see also *Dean, supra* at 32-33. "The 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." *Bass, supra* at 26 (emphasis added); see also *Dean, supra* at 33-34. The factors to consider include:

---

<sup>1</sup> The sanction imposed by the trial court, while initially deemed an exclusion of expert testimony, was equivalent to a dismissal, given that expert testimony was essential to plaintiff's action. The lack of expert testimony was why defendant posited its motion as one brought under MCR 2.116(C)(10).

(1) [W]hether 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 [other party]; (4) actual notice to the [other party] of the witnesses and the length of time prior to trial that the [other 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. [*Bass, supra* at 26-27, quoting *Dean, supra* at 32-33.]

In the present case, it is apparent that the trial court did not consider these factors. Indeed, as in *Dean*, the court gave few reasons for its decision other than noting that plaintiff's expert witness list was filed approximately six weeks late. The court did not acknowledge that it had discretion to impose a lesser sanction for the untimely filing.

There is no indication in the record that the violation here was willful. More significantly, defendant concedes that it was not prejudiced by the delay because the only expert witness named in plaintiff's late witness list was the same person who signed the affidavit of merit attached to plaintiff's complaint. Thus, defendant had actual notice of the identity of this witness since the lawsuit was filed.<sup>2</sup>

Nor is there any indication that plaintiff otherwise violated the trial court's scheduling order. While we acknowledge that plaintiff did not attempt to show good cause for the six-week delay and *may* have been tardy in answering interrogatories and granting a medical record release,<sup>3</sup> in light of all the circumstances (particularly the lack of prejudice), a lesser sanction, such as assessing costs and fees against plaintiff's counsel, would have better served the interests of justice by punishing the person responsible for the delay. Under the circumstances, the sanction imposed, in essence a dismissal for failure to timely file an expert witness list, was an abuse of discretion. We therefore reverse the trial court's order dismissing this case and remand for imposition of a lesser, appropriate sanction in light of the *Dean* factors.<sup>4</sup> See *In re Caldwell*,

---

<sup>2</sup> We note that plaintiff attempted to add an additional expert witness on her lay witness list, filed on December 30, 1999. The propriety of this addition was not addressed by the trial court and is not before us on appeal, and therefore we do not address it.

<sup>3</sup> Defendant claims these additional violations on appeal, but the trial court made no findings with respect to them.

<sup>4</sup> Contrary to defendant's argument, we find that *LaCourse v Gupta*, 181 Mich App 293, 296-297; 448 NW2d 827 (1989), is factually distinguishable, given that the conduct involved here did not amount to the extreme willful and flagrant conduct involved in *LaCourse*. See *LaCourse, supra* at 294-295. Moreover, to the extent that *LaCourse* implies that an evaluation on the record regarding the propriety of dismissal as a sanction is not necessary in a case such as the instant one (where the court initially strikes an expert witness because of a discovery violation and then dismisses the case out of necessity), we regard *Dean, supra* at 32-33 (which requires such an evaluation) to be the better-reasoned case.

228 Mich App 116, 123-124; 576 NW2d 724 (1998) (providing that “this Court may remand a case for further consideration when . . . a lower court does not fully recognize the discretion it possesses”).

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Hilda R. Gage

/s/ Joel P. Hoekstra

/s/ Patrick M. Meter