

STATE OF MICHIGAN
COURT OF APPEALS

ROBERT T. SNOW,

Plaintiff-Appellant,

v

HAROLD A. TOBEY and COMMUNITY
RESOURCE VOLUNTEERS,

Defendants-Appellees.

UNPUBLISHED

April 5, 2005

No. 251599

Clinton Circuit Court

LC No. 02-009519-NI

Before: Kelly, P.J., and Sawyer and Wilder, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court order that granted defendants' motion for summary disposition. We reverse and remand. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

This case involves an alleged automobile-pedestrian accident in which plaintiff maintains he was hit twice by a commuter bus driven by defendant Harold Tobey as plaintiff attempted to cross a street. Plaintiff filed suit on December 12, 2002. The trial court's scheduling order contained a discovery close date of September 15, 2003. The order further stated that the parties' witness lists were to be furnished no later than sixty days prior to the close of discovery, or July 17, 2003, and that "failure to comply with this paragraph will bar the introduction of the testimony or evidence at trial."

Plaintiff did not file a witness list by the date specified in the order. He filed an initial witness list on August 7, 2003. Absent from this list was plaintiff's newest treating physician, Dr. James Parker, a chiropractor who first treated plaintiff on or about August 11, 2003. Dr. Parker was added as a witness on plaintiff's amended witness list. This list was filed on August 18, 2003.

Defendants moved for summary disposition. They sought to strike Dr. Parker's testimony pursuant to MCR 2.313(B)(2)(b) due to the fact that plaintiff had not disclosed Dr. Parker's name on his witness list in violation of the court's discovery order. They also maintained that plaintiff had not suffered a serious impairment of body function and sought to dismiss plaintiff's complaint for failure to show that he met the no-fault injury threshold for non-economic damages. The trial court held that, without the affidavit of Dr. Parker, plaintiff could not meet the statutory requirement of an "objectively manifested impairment." See MCL

500.3135(7). The trial court further held that it would not consider the affidavit of Dr. Parker because he was not listed as a witness.

On October 6, 2003, the court granted defendants' motion for summary disposition. Plaintiff moved for reconsideration, asserting that Dr. Parker had, in fact, been added to his amended witness list. On October 9, 2003, the trial court affirmed the grant of summary disposition on the ground that the amended witness list was not timely pursuant to the Court's scheduling order.

On appeal, plaintiff argues the trial court abused its discretion by striking his expert witness and thus dismissing the case. Parties are subject to sanctions for failure to comply with a discovery order. MCR 2.313(B). The imposition of sanctions may include taking facts as established, barring claims or defenses, striking pleadings, staying proceedings, default or dismissal, citation for contempt of court and imposition of costs. *Id.* However, the trial court should act cautiously before imposing the sanctions of dismissal, default or the barring of an expert witness that will result in dismissal. *North v Dep't of Mental Health*, 427 Mich 659, 670; 397 NW2d 793 (1986); *Hanks v SLB Management, Inc.*, 188 Mich App 656, 658; 471 NW2d 621 (1991); *Dean v Tucker*, 182 Mich App 27, 32; 451 NW2d 571 (1990); *Equico Lessors, Inc v Original Buscemi's, Inc.*, 140 Mich App 532, 534-535; 364 NW2d 373 (1985). The court must carefully evaluate all available options on the record before concluding that such a drastic sanction is just and proper. *Kalamazoo Oil Co v Boerman*, 242 Mich App 75, 86; 618 NW2d 66 (2000).

To determine whether to strike an expert witness when it will result in the dismissal of the case, the circumstances of the case must be considered, including (1) whether the violation was willful or accidental, (2) the party's history of refusing to comply with discovery, (3) the prejudice to the opponent, (4) actual notice to the opponent of the information sought, (5) the party's history in causing deliberate delay, (6) the degree of compliance with other orders, (7) any attempt to timely cure the defect, (8) the efficacy of any lesser sanction and (9) the existence of a discovery order. *Dean, supra* at 32-33.

In the instant case, our review of the record indicates that the trial court abused its discretion when it imposed the extreme sanction of striking plaintiff's listed expert witness and dismissing his case for the failure to show an objective injury. The trial court's basis for striking plaintiff's witness was his two-week delay in filing his first witness list and his late inclusion of Dr. Parker on the August 18th amended witness list. Neither warrants the sanction imposed by the trial court. The mere fact that a witness list is not timely filed does not, in and of itself, justify striking the entire list or a specific witness. *Dean, supra* at 32. The trial court did not review any of the factors listed above. Our review of the factors indicates that such a drastic measure was not appropriate. There is no indication that plaintiff's delay in filing the witness lists was anything other a consequence of his late referral to Dr. Parker. Defendants did not suffer actual prejudice, particularly in light of the fact that they were made aware of plaintiff's expert witness and his proposed testimony. At the time of plaintiff's late disclosure, over a month remained until the submission of the claim to case evaluation on the scheduled date of October 10, 2003. Almost three months remained until the initially scheduled trial date of December 10, 2003. Additionally, the record does not demonstrate a history of plaintiff engaging in deliberate delay. Instead of the imposition of such an extreme sanction, the trial

court could have taxed plaintiff with the costs necessary for defendants to review Dr. Parker's proposed testimony and prepare accordingly.

We sympathize with the trial court's intent to have the parties comply with its discovery schedule. Nonetheless, the striking of plaintiff's expert witness and subsequent grant of summary disposition in favor of defendants is too harsh a sanction under the facts of this case. We express no opinion at this time whether defendants would be entitled to summary disposition on the ground that plaintiff fails to meet the threshold for a serious impairment of body function.

Reversed and remanded for further proceedings on plaintiff's claim. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly
/s/ David H. Sawyer
/s/ Kurtis T. Wilder