STATE OF MICHIGAN

COURT OF APPEALS

KELLY SCHLEGAL, Next Friend of JOSHUA SCHLEGAL, Plaintiff-Appellant, v EDWARD CHOJNACKI, Defendant-Appellee.	UNPUBLISHED October 25, 2007 No. 274285 Alpena Circuit Court LC No. 05-000643-NI

Before: Owens, P.J., and Bandstra and Davis, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order of dismissal with prejudice entered after plaintiff's next friend failed to timely comply with an order to pay $350 in attorney fees incurred by defendant when plaintiff and the next friend failed to appear for her deposition. We reverse and remand for reconsideration. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Plaintiff first argues that his objection to the proposed order of dismissal, which was submitted under the seven-day rule, MCR 2.602(B), was timely filed and should have been considered before entry of the order. We disagree.

MCR 2.602(B) provides that a proposed order under the seven-day rule will be submitted to the court for signing if no objections to that order are *filed with the court clerk* within *7 days after service.* Plaintiff argues that the rule governing service, MCR 2.107(C), should also govern filing. MCR 2.107(C) provides for service by mailing. Thus, plaintiff argues, the objections mailed on September 28, 2006, the seventh day after service of the proposed order on plaintiff, were timely served and filed, despite the fact that the court clerk did not enter the objections until October 2, 2006. However, whereas MCR 2.107(C) speaks to service and allows for service by mailing, MCR 2.107(G) speaks to filing with the court. It states that a document must be filed with the clerk of the court, although the judge may accept the papers and note the date of filing before forwarding on to the clerk. Since the court rule makes a distinction between service and filing, and speaks to mailing only as it relates to service, filing is deemed to occur only when a document reaches the judge or court clerk. Therefore, plaintiff's objections to the proposed order were not timely filed.

Plaintiff next argues that the imposition of the sanction of dismissal, as well as dismissal with prejudice, was not based on an analysis of the factors outlined in *Bass v Combs*, 238 Mich App 16; 604 NW2d 727 (1999), and therefore was error. We agree.

In *Bass*, the Court stated:

> The Michigan Court Rules at MCR 2.313(B)(2)(c) explicitly authorize a trial court to enter an order dismissing a proceeding or rendering a judgment by default against a party who fails to obey an order to provide discovery. The trial court should carefully consider the circumstances of the case to determine whether a drastic sanction such as dismissing a claim is appropriate. 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. 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. The factors that should be considered in determining the appropriate sanction include the following:
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> (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 [other party]; (4) actual notice to the [other party] of the witness 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's] 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.* at 26-27; citations omitted].

Here, the provision in the order for dismissal in the event of a failure to pay the fee was not addressed at the hearing at which the court ordered that plaintiff pay defendant's attorney fees related to the failure to appear for a deposition. This provision was simply included in the order for costs without analysis. While a timely objection to the order for costs may have been the appropriate time to object to the sanction of dismissal for failure to pay, as the trial court opined in denying reconsideration, it is reasonable to conclude that neither plaintiff nor plaintiff's counsel anticipated the need to object at that time where the intent was to pay the sanction and furnish a supplemental answer to an interrogatory, thus correcting all discovery deficiencies. Notably, the interrogatory issue was not addressed at the hearing or in the order for costs. And, although defendant had filed a motion to compel, there is no record indicating it was ever addressed by the court. There was also never an order compelling discovery. Moreover, the reasons for failing to appear at the deposition are unknown based on this record. There is no evidence that the failure to comply with discovery was willful, let alone "flagrant and wanton." There is also no evidence of prejudice to defendant and no documented history of "deliberate" delay. There was evidence of an attempt to advise that compliance with the order for costs would be forthcoming but delayed, and evidence that no accommodation was made by defense counsel even though only a twelve-day delay was requested and there had been no prior requests. Finally, there was evidence in the motion for reconsideration that plaintiff paid the sanction by the date promised, having provided the money on October 2, 2006 at a point where plaintiff's

counsel, albeit mistakenly, thought that the objections to the order of dismissal were being considered.

Under these circumstances, we conclude that the trial court erred in failing to grant the motion for reconsideration of the order of dismissal. While questioning whether any sanction should be imposed based on these facts, we remand to give the court an opportunity to consider whether a lesser sanction is warranted.

We reverse and remand for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ Richard A. Bandstra
/s/ Alton T. Davis