STATE OF MICHIGAN

COURT OF APPEALS

JASON BLACKBURN,

Plaintiff-Appellant,

v

ALAIN Y. FABI, M.D., BRONSON METHODIST HOSPITAL, DAVID E. REMMLER, M.D., W.A. FOOTE MEMORIAL HOSPITAL, ALLEGIANCE HEALTH SERVICES, AND INDEPENDENT EMERGENCY PHYSICIANS, P.C.,

Defendants-Appellees.

UNPUBLISHED
May 24, 2016

No. 327595
Kalamazoo Circuit Court
LC No. 13-000423-NH

Before: O'BRIEN, P.J., and K. F. KELLY and FORT HOOD, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's May 8, 2015 order granting summary disposition to defendants. On appeal, he challenges the trial court's January 14, 2015 order striking three of his expert witnesses as a discovery sanction. We reverse and remand for further proceedings.

In this medical malpractice lawsuit, plaintiff alleges that defendants failed to timely detect and treat cauda equina syndrome. From the beginning of this case, the parties have failed to successfully facilitate discovery. The parties have filed multiple motions to compel or adjourn, all of which cited the opposition's tactics as reasoning for the delay. In March 2014, for example, defendants David E. Remmler, M.D., W.A. Foote Memorial Hospital, Allegiance Health Services, and Independent Emergency Services (the Remmler defendants) and defendants Alain Y. Fabi, M.D. and Bronson Methodist Hospital (the Fabi defendants) each filed a motion to compel, seeking plaintiff's responses to five-month-old interrogatories and production requests. One month later, it was plaintiff who filed a motion to compel, citing "[d]efendants[']" failure "to cooperate in discovery" "for many months." In May 2014, defendants filed a joint motion to adjourn based on plaintiff's failure to respond to two discovery requests, and plaintiff objected based on defendants' "unwillingness to cooperate in basic discovery." Then, one month after that, plaintiff filed another motion to compel, asserting that "[d]efendants refused to provide deposition dates for their own witnesses and refused to schedule the deposition of Plaintiff," that defendants failed to provide requested documentation, and that "defense counsel objected

literally hundreds of times" during the only depositions that had taken place at that time. Defendants denied those allegations and responded that plaintiff's counsel was "verbally abusing and intimidating" witnesses during depositions. In September and November 2014, the parties stipulated to adjourn this matter. Under the November 2014 stipulated adjournment, plaintiff was required to "provide dates for Plaintiff's experts on or before 12/12/2014." Later in November, the Fabi defendants filed another motion to compel, seeking responses to two-month-old interrogatories and production requests.

On December 22, 2014, the Fabi defendants moved to strike plaintiff's expert witnesses as a sanction for plaintiff's failure to meet the December 12 deadline. Relying on the factors set forth in *Dean v Tucker*, 182 Mich App 27, 32; 451 NW2d 571 (1990), the Fabi defendants argued that striking plaintiff's expert witnesses was appropriate because plaintiff's failure to comply with discovery was willful, because plaintiff's failure severely prejudiced defendants, and because no other sanction was appropriate. The Remmler defendants concurred with the motion. Plaintiff responded that the motion was "completely" and "totally groundless" as well as filed his own motion seeking to limit defendants' experts, to substitute experts, and to compel the testimony of a fact witness. At oral argument on the Fabi defendants' motion, defendants relied primarily on plaintiff's failure to provide deposition dates for his expert witnesses on or before December 12 to support their position. The trial court agreed and struck three of plaintiff's expert witnesses. It stated, in entirety, as follows:

> In this case, when the Court weighs the various factors, I find that the majority weigh in the Defendant's favor. I will exercise my discretion. I do understand that it is a harsh sanction but considering the course of trajectory of this particular litigation, I think it is appropriate. Accordingly, Dr. Weinberger, Dr. Ancell, and Dr. Paranjpe are stricken.

After issuing its ruling, plaintiff's counsel pleaded with the trial court to change its mind, explaining that the decision "ha[d] the effect of dismissing [his] case." The trial court did not change its decision or provide further explanation other than stating that it was appropriate "considering everything that's occurred in this case." The trial court entered a written order submitted by defendants pursuant to MCR 2.602(B)(3)(a) reflecting its decision on January 14, 2015.

Plaintiff subsequently moved for rehearing and reconsideration, arguing that he did, in fact, provide deposition dates before December 12, that any delay in doing so was accidental and inadvertent, that defendants suffered no prejudice, and that defendants were primarily responsible for the delays in this case. The trial court denied plaintiff's motion and entered a written order submitted by defendants pursuant to MCR 2.602(B)(3)(a) reflecting that decision. That order highlighted the parties' unsuccessful back-and-forth communication throughout the case as well as pointed to several instances where plaintiff's counsel was slow or failed to respond to defendants' counsels' emails or provided and retracted deposition dates for his experts. After plaintiff's motion was denied, defendants moved for, and the trial court granted, summary disposition pursuant to MCR 2.116(C)(10) in light of the fact that all but one of plaintiff's experts had now been stricken. This appeal followed.

On appeal, defendant challenges the trial court's January 14, 2015 order striking his expert witnesses. He claims that the trial court's analysis of the *Dean* factors and other possible sanctions was inadequate. We agree.

A trial court's imposition of discovery sanctions is reviewed for an abuse of discretion. *Hardrick v Auto Club Ins Ass'n*, 294 Mich App 651, 659; 819 NW2d 28 (2011). A trial court abuses its discretion when its decision falls beyond the range of principled outcomes. *Id*. at 659-660. Any factual findings underlying a trial court's decision are reviewed for clear error. *Johnson Family Ltd P'ship v White Pines Wireless, LLC*, 281 Mich App 364, 387; 761 NW2d 353 (2008). "A finding is clearly erroneous when this Court is left with a definite and firm conviction that a mistake has been made." *Id*.

"Our legal system favors disposition of litigation on the merits." *Vicencio v Jamie Ramirez, MD, PC*, 211 Mich App 501, 507; 536 NW2d 280 (1995). Pursuant to MCR 2.313(B)(2)(c), however, a trial court may enter an order sanctioning, and even dismissing a proceeding or rendering a default judgment against, a party who fails to obey a discovery order. *Thorne v Bell*, 206 Mich App 625, 632; 522 NW2d 711 (1994). Before dismissing a case as a discovery sanction, "the record should reflect that the trial court gave careful consideration to the factors involved and considered all of its options in determining what sanction was just and proper in the context of the case before it." *Dean*, 182 Mich App at 32. This Court has previously explained that trial courts should consider the following non-exhaustive list of factors: (1) whether the party's violation was willful, (2) whether the party has a history of refusing to comply with discovery, (3) whether the other party or parties suffered prejudice, (4) whether the other party or parties had actual notice of the witnesses and the length of time prior to trial that such notice was received, (5) whether there is a history of deliberate delay, (6) whether the party has complied with other provisions of the trial court's order, (7) whether the party made an attempt to timely cure the defect, and (8) whether a lesser sanction would better serve the interests of justice. *Id*. at 32-33. A trial court's failure to evaluate other sanctions on the record constitutes an abuse of discretion. *Vicencio*, 211 Mich App at 506-507. Although the trial court did not dismiss plaintiff's complaint in this case under MCR 2.313(B)(2)(c), "the result of the order barring plaintiff[']s] expert witness testimony is analogous" and led to dismissal. *Middleton v Margulis*, 162 Mich App 218, 223; 412 NW2d 268 (1987). "In such a situation, where barring plaintiff[']s] expert witness testimony in effect results in barring plaintiff[] from supporting [his] claim and dismissal of [his] action necessarily results, the discovery sanction should be exercised cautiously." *Id*.

In this case, we conclude that the record simply does not reflect the "careful consideration" that is required. While it is apparent that the trial court was aware of the *Dean* factors, its oral decision was brief, did not specifically address any of the *Dean* factors, and did not reflect consideration of any other available sanction. It merely stated that it "weigh[ed] the various factors" and "f[ou]nd that the majority weigh in the Defendant's favor." Therefore, it concluded, striking plaintiff's witnesses was an appropriate sanction "considering the course and trajectory of this particular litigation." At a minimum, there is nothing in the record that suggests that the trial court considered, much less carefully considered, "all of its options in determining what sanction was just and proper." Instead, without mentioning any other sanctions, it struck plaintiff's experts, which had the effect of dismissing plaintiff's case. In situations such as this, where the record reflects that the trial court did not adequately consider the *Dean* factors or other

available options, a remand is necessary. See *Duray Dev, LLC v Perrin*, 288 Mich App 143, 165-166; 792 NW2d 749 (2010).

On appeal, the Remmler defendants contend that the record "reveals a careful and thorough consideration by the Trial Court of the *Dean* factors." This claim is not supported by the record. While they point to the brief factual history set forth in the order denying reconsideration that was entered pursuant to MCR 2.313(B)(2)(c), even that order does not analyze the *Dean* factors. It merely summarizes the back-and-forth nature of the discovery between the parties in this matter. Similarly, they argue that "it is obvious that the Trial Court considered [amongst other things] that lesser sanctions and/or warnings would be of no avail." Again, this is simply untrue. Even in the orders drafted by defendants and entered pursuant to MCR 2.313(B)(2)(c), the trial court never mentioned the consideration of any other sanctions. The Fabi defendants contend on appeal that this case is analogous to *Rhoades v Trinity Health-Mich*, unpublished opinion per curiam of the Court of Appeals, issued November 10, 2011 (Docket No. 295082), pp 2-3, but, in that case, the trial court addressed multiple motions to compel, motions to strike witnesses, and motions to dismiss as well as "warned" plaintiffs two months before doing so "that the trial court was ready to dismiss." Those facts are not present in this case. Indeed, the trial court did not mention, much less impose, any lesser sanctions prior to dismissing this case. Thus, the Fabi defendants' reliance on *Rhoades* is misplaced.

Instead, this case is factually similar to *Brennan v MidMichigan Med Center-Gratiot*, unpublished opinion per curiam of the Court of Appeals, issued December 15, 2015 (Docket No. 323121), pp 1-2, a case in which this Court reversed a trial court's dismissal of a case based on the plaintiff's failure to comply with a discovery order after being fined on a previous occasion. Despite that previous sanction, this Court explained that the trial court's brief explanation, which did not reflect careful consideration of the *Dean* factors or other available sanctions, was simply insufficient. *Id*. at 3. Thus, it stated, where the record does not "demonstrate that the 'trial court gave careful consideration to the factors involved and considered all of its options,' " a remand is required. *Id*., quoting *Dean*, 182 Mich App at 32. The same is true here.

Accordingly, we conclude that the trial court abused its discretion by failing to carefully consider the *Dean* factors and any other available sanctions before striking plaintiff's expert witnesses. We therefore reverse its May 8, 2015 order granting summary disposition and its January 14, 2015 order striking plaintiff's expert witnesses and remand for further proceedings for the reasons set forth above.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. Plaintiff, as the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Colleen A. O'Brien
/s/ Kirsten Frank Kelly
/s/ Karen M. Fort Hood