

STATE OF MICHIGAN
COURT OF APPEALS

DAVID L. HUNTER,

Plaintiff-Appellee,

v

MICHAEL P. WATCHOWSKI, RICK P.
CORNELL, THOMAS P. PRESSLEY,
LIEUTENANT ATKINSON and CITY OF
ANN ARBOR,

Defendants-Appellants.

UNPUBLISHED

October 3, 1997

No. 190760

Washtenaw Circuit

LC No. 95-004274-CZ

Before: Saad, P.J., and Neff and Reilly, JJ.

PER CURIAM.

Plaintiff, proceeding in pro per, appeals as of right the trial court's order granting defendants' motion to dismiss. We reverse and remand.

Plaintiff, proceeding in pro per, filed the instant action against defendants alleging false arrest and conspiracy to violate his civil rights. During discovery, plaintiff improperly terminated his deposition in violation of MCR 2.306(D). Defendants filed a motion to compel discovery, pursuant to MCR 2.313, based on plaintiff's termination of the deposition. The trial court issued an order compelling plaintiff to make himself available for the continuation of his deposition and ordering him to pay defendants \$5,000 for misrepresentations that he made to the court regarding what occurred at the deposition. Plaintiff subsequently failed to appear at a court-ordered scheduling conference. Defendants filed a motion to dismiss, pursuant to MCR 2.504(B)(1), based on plaintiff's failure to appear at the scheduling conference and his failure to pay the court-imposed sanctions. The trial court granted defendants' motion.

Plaintiff first argues that the trial court abused its discretion by granting defendants' motion to compel discovery and for sanctioning plaintiff \$5,000. This Court reviews a trial court's decision to grant or deny a discovery motion for an abuse of discretion. *Linebaugh v Sheraton Michigan Corp*, 198 Mich App 335, 343; 497 NW2d 585 (1993). Additionally, this Court reviews for an abuse of

discretion a trial court's imposition of sanctions. *Michigan Millers Mutual Ins Co v Bronson Plating Co*, 197 Mich App 482, 494; 496 NW2d 373 (1992), aff'd 445 Mich 558 (1994). Plaintiff improperly terminated his deposition; therefore, the trial court did not abuse its discretion by granting defendants' motion to compel discovery. However, we agree with plaintiff that the trial court abused its discretion by sanctioning plaintiff \$5,000.

At the hearing on the motion to compel, defense counsel informed the court that, at the deposition, plaintiff gave her a document after she asked to see it but that he objected to her marking the document as an exhibit. Defense counsel noted that she then indicated to plaintiff that she would make a copy of the document, and that when she left the room to make the copy, plaintiff followed her and in a loud, menacing tone stated that she could not copy the document. Defense counsel stated to the court that they went back to the deposition room, and that plaintiff terminated the deposition. Plaintiff then informed the court that he had the document in his hand so that defense counsel could view it and she grabbed it out of his hands, and that he requested that she return the document to him. Plaintiff further argued that defense counsel terminated the deposition by leaving the room to copy the document.

The trial court requested that the transcript from the deposition be submitted in order to determine which party terminated the deposition, and stated that one of the parties was lying to the court and would be sanctioned \$5,000. Upon review of the transcript, the court noted that, at the deposition, defense counsel asked plaintiff whether she could view the document, and that plaintiff did, in fact, terminate the deposition. The court then ordered that plaintiff pay defendants \$5,000.

Upon review of the transcripts, we find that the trial court abused its discretion in sanctioning plaintiff \$5,000. At the hearing on the motion, plaintiff did not deny that defense counsel asked to see the document. Rather, plaintiff stated that defense counsel grabbed the document from his hand while she was viewing it and attempted to have it marked as an exhibit. This assertion cannot be proved or disproved from the record because it is not clear from the deposition transcript if plaintiff actually gave the document to defense counsel or if she took it.

In addition, although the record clearly reveals that plaintiff did, in fact, improperly terminate the deposition, such a revelation does not warrant imposition of \$5,000 in sanctions against plaintiff. At the hearing, plaintiff did not deny that he left the deposition because defense counsel attempted to copy the document over his objection. Instead, he argued to the court that "[b]y leaving the room I say that [defense counsel] terminated [the deposition]." Although this argument is incorrect, it does not constitute a lie to the court, and therefore, the trial court abused its discretion by ordering that plaintiff pay defendants \$5,000. Consequently, the trial court also abused its discretion by granting defendants' motion to dismiss based on plaintiff's failure to pay the \$5,000 in court-imposed sanctions.

However, defendants are entitled to reasonable expenses, including attorney fees, incurred in connection with their motion for order compelling discovery, under MCR 2.313(A)(5)(a). If plaintiff fails to comply with the trial court's order compelling discovery, the court may order such sanctions as are just. MCR 2.313(B)(2). The court may not, however, award sanctions in the form of punitive

damages to the opposing party as punishment for plaintiff's misconduct. See *Hicks v Ottewell*, 174 Mich App 750, 756; 436 NW2d 453 (1989). Upon remand, the trial court must determine the amount of expenses, including attorney fees, to which defendants are entitled.

Plaintiff also argues that the trial court abused its discretion by granting defendants' motion to dismiss based on plaintiff's failure to attend the scheduling conference. We agree. This Court reviews a trial court's order of dismissal for abuse of discretion. *Thorne v Carter*, 149 Mich App 90, 93; 385 NW2d 738 (1986). MCR 2.401(B)(1) provides that the trial court may direct that a scheduling conference be held. Additionally, MCR 2.401(G)(1) states "[f]ailure of a party or the party's attorney to attend a scheduled conference, as directed by the court, constitutes . . . grounds for dismissal under MCR 2.504(B)." The trial court must excuse the failure to attend a conference if dismissal would cause manifest justice or the failure to attend was not a result of the culpable negligence of the party. MCR 2.401(G)(2).

In this case, even though the scheduling order was signed by the trial judge's administrative assistant, rather than the judge, in violation of MCR 2.602(A), plaintiff failed to attend the scheduling conference, which constitutes grounds for dismissal under MCR 2.401(G). However, there is no indication on the record that plaintiff's failure to attend the conference delayed the action or prejudiced defendants. Moreover, the conference was still conducted, and despite plaintiff's absence, the dates of future actions were determined. Based on the foregoing, we find that dismissal was too harsh, and therefore, the trial court abused its discretion by granting defendants' motion to dismiss based on this ground.

Reversed and remanded. We do not retain jurisdiction.

/s/ Janet T. Neff

/s/ Maureen Pulte Reilly