

STATE OF MICHIGAN
COURT OF APPEALS

EDWARD CARSON, SR. and THERESA
CARSON, d/b/a MIDWEST MEMORIAL
MONUMENT COMPANY,

UNPUBLISHED
November 25, 1997

Plaintiffs-Appellants,

v

No. 191689
Wayne Circuit Court
LC No. 95-509293 NZ

WXYZ TELEVISION, JOSEPH DUCEY, DORIS
BISCOE and JOHN RUCKER,

Defendant-Appellees.

Before: Jansen, P.J., and Fitzgerald and Young, JJ.

MEMORANDUM.

Plaintiffs appeal by right the Wayne Circuit Court's order of dismissal, imposed as a discovery sanction pursuant to MCR 2.313(B)(2). This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Despite receiving gratuitous but well intentioned warnings from defense counsel both before and after the deadline passed, plaintiffs failed to respond to requests to produce documents within the time allowed by MCR 2.310(B)(2). After further efforts at obtaining voluntary compliance with the request were exhausted, defendants filed their motion to compel production, which after rescheduling came on for hearing on November 17, 1995.

At that hearing, plaintiffs' counsel, who had filed no written pleadings in opposition to the motion, failed to appear. MCR 2.119(E)(4)(a). Although counsel telephoned the court claiming a family medical emergency, counsel's own subsequent documents establish that although there may have been family medical business, it was not of an emergency nature. Furthermore, as the trial judge aptly noted at the time, plaintiffs' counsel is not a sole practitioner and another attorney from the firm should have made arrangements to attend the hearing. MCR 2.117(B)(3)(b).

As the motion to compel was then unopposed, the motion was granted in an order signed by the court at the time and filed with the clerk, as authorized by MCR 2.602(B)(1). This order appears in the

lower court file, although it appears to have escaped notice by plaintiffs' counsel. Although there is no indication that the clerk arranged to have a copy of the order served on all attorneys of record, the substance of the order was communicated to plaintiffs' counsel the same day by fax from defense counsel, thereby providing actual notice of both the facts and substance of the court's ruling. See *Jones v Shafer Iron Co*, 96 Mich 98; 55 NW 684 (1893).

The order required plaintiffs to furnish the documents within seven days, or by November 24th, and within the same time frame to pay \$600 in costs assessed pursuant to MCR 2.119(E)(4)(c). Neither the payment nor discovery was effectuated within that time, or, so far as the record establishes, at any later time. At a hearing on December 1, 1995, plaintiffs' counsel did appear, claiming to have filed written pleadings on November 28, 1995.

A copy of such pleadings, bearing a time stamp by the Wayne Circuit Court Clerk of November 28, 1995, at 4:09 p.m., has been attached to plaintiffs' brief on appeal. However, no such document appears in the lower court record, nor does the copy of the document furnished to this Court include a proof of service, showing either that a copy was provided for the trial judge, as required by MCR 2.119(A)(2), or that a copy was served on defense counsel as required by MCR 2.119(C)(1). Furthermore, this document fails to indicate either that the order of November 17 had generated plaintiffs' compliance, or to establish valid grounds for modifying or vacating that order. It should be noted here that the trial judge established on the record that, although plaintiffs' counsel represented that such a document had been filed with the Wayne Circuit Court Clerk on the date and at the time indicated, no proof of that contention was actually made in open court. The lower court record itself contains only a proof of service filed on November 28 at 8:20 a.m. referring to "plaintiffs' answers to first requests for answers to interrogatories," which appears to be another issue entirely.

Finding no compliance with its order of November 17 as of December 1st, even though the deadline for compliance was November 24th, the circuit court dismissed plaintiffs' action. Under all the circumstances, the order of dismissal does not represent an abuse of the trial court's discretion. *Draggoo v Draggoo*, 223 Mich App 415, 423; 566 NW2d 642 (1997).

Affirmed.

/s/ Kathleen Jansen

/s/ E. Thomas Fitzgerald

/s/ Robert P. Young, Jr.