

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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DEBRA STOUGH, Individually and as Next Friend of  
ERIC LEE STOUGH, a Minor

UNPUBLISHED  
December 9, 1997

Plaintiff-Appellant,

v

No. 197777  
Tuscola Circuit Court  
LC No. 95-014451-NO

MAYVILLE COMMUNITY SCHOOLS,  
CHRISTINE SUTTON, also known as ROBIN  
SUTTON, also known as ROBIN METZ, and  
LAWRENCE J. GEIGER,

Defendant-Appellee.

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Before: Hood, P.J., and McDonald and White, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order dismissing her case with prejudice. The order was entered as a discovery sanction for plaintiff's failure to respond to defendants' interrogatories. We reverse and remand.

On November 29, 1995, plaintiff filed her complaint against defendants in circuit court, alleging intentional infliction of emotional distress, negligent hiring/firing, and conspiracy to deprive plaintiff of civil rights on the basis of race. The claims had previously been severed and dismissed without prejudice from plaintiff's federal court case regarding the same subject matter. On January 3, 1996, defendants served plaintiff with requests to admit, which were timely answered by plaintiff. Plaintiff never, however, answered interrogatories and requests to produce that were also dated January 3, 1996. Plaintiff's counsel became seriously ill sometime after answering the requests to admit and, on March 6, 1996, current counsel for plaintiff filed an appearance in the case. On March 14, 1996, defense counsel sent a letter to plaintiff's new counsel requesting that the outstanding discovery be completed. No response was given. A scheduling order was thereafter entered by the trial court on March 19, 1996. It provided that discovery must be completed on December 18, 1996. On March 25, 1996, plaintiff and her minor son appeared for their depositions. Plaintiff also executed releases to allow defendants access to information they requested. On April 22, 1996 the parties entered a protective order with

regard to discovery information that was being gathered by defendants pursuant to releases from plaintiff. On May 7, 1996 defendants filed a motion to compel with regard to the outstanding interrogatories and requests to produce. The trial court granted the motion on May 17, 1996 and ordered that the discovery requests be answered within twenty-one days of the May 17 order. On June 4, 1996 plaintiffs appeared for independent medical examinations at the request of defendants. On June 18, defendants moved to dismiss because plaintiff failed to respond to the outstanding discovery requests pursuant to the May 17 order. Plaintiff did not respond to the motion. On June 28, 1996, the trial court granted the motion and entered an order dismissing plaintiff's case with prejudice.

Plaintiff subsequently moved for reconsideration, arguing that the failure to answer the discovery requests was not wilful and thus, the sanction of dismissal was not warranted. The trial court denied the motion for reconsideration and awarded sanctions to defendants after finding that the motion for reconsideration was frivolous.

Dismissing a party's case for failure to comply with discovery is the most extreme sanction a court can impose. *Thorne v Bell*, 206 Mich App 625, 631; 522 NW2d 711 (1994). It is a "drastic measure and should be used with caution." *Adams v Perry Furniture (On Remand)*, 198 Mich App 1, 15; 497 NW2d 419 (1993), citing *Frankenmuth Mutual Ins Co v ACO, Inc*, 193 Mich App 389, 396-397; 484 NW2d 718 (1992). Prior to imposing such a sanction, the trial court should consider:

whether the failure to respond to discovery requests extends over a substantial period of time, whether an existing discovery order was violated, the amount of time that has elapsed between the violation and the motion for a default judgment, the prejudice to defendant, and whether wilfulness has been shown. [*Thorne, supra* at 633.]

The court should also evaluate other options before concluding that dismissal is warranted and should only impose the sanction "when there has been a flagrant and wanton refusal to facilitate discovery." *Id.*

This Court reviews a trial court's decision imposing discovery sanctions for an abuse of discretion. *Adams, supra* at 15-16. Because we review for abuse of discretion, it is imperative that the trial court indicate for the record "how and why the discretionary decision was made." *Id.* at 16. In this case, the trial court failed to evaluate all available options *on the record*, as was its duty, before concluding that a dismissal was just and proper. See *Adams, supra*. In *Adams*, this Court reversed and remanded the decision of the trial court, dismissing the plaintiff's case.

The circuit court failed to carefully evaluate all available options on the record before concluding that the drastic sanction of dismissal was just and proper. The court also failed to find on the record that the plaintiff's failure to comply with the discovery order was wilful.[*Id.* at 17-18.]

Here, we reach the same result and reverse and remand because the trial court failed to make the required record. We cannot determine if there was an abuse of discretion because of the lack of a record.

We note, however, that the facts in the record demonstrate that plaintiff did not fail to facilitate discovery. She participated in depositions, and it appears that all of the information requested in the interrogatories was obtained with the exception of information regarding expert witnesses. Plaintiff also executed releases for information, and both she and her son participated in the independent medical examinations. Although several months intervened between when plaintiff was first served with the interrogatories and when the dismissal was entered, time is not the only factor to be considered. Discovery had not ended at the time the dismissal was entered; defendants had obtained most of the information they were seeking via the interrogatories and requests to produce; there was no prejudice; and the time that elapsed between the violation of the discovery order and the motion for default was only approximately ten days. In addition, there was no showing that the violation was wilful, especially where plaintiff had fully participated in all of the other requested discovery. In her motion for reconsideration, her counsel set forth the circumstances under which the violation occurred, including allegations that the associate responsible for the case had left the firm and failed to inform her colleagues of the order compelling discovery or the motion for dismissal. Although counsel's conduct is inexcusable, even under the circumstances described in plaintiff's motion for reconsideration, there was no showing that the May 17 order was consciously or intentionally violated. Moreover, counsel immediately responded to the interrogatories, paid the discovery sanctions, and then filed its motion for reconsideration. They did not continue to disobey the order while seeking relief.

This case is unlike the cases to which defendants cite. In *Welch v J Walter Thompson*, 187 Mich App 49; 466 NW2d 319 (1991), the plaintiff refused the discovery request several months after being served with it. He also declined an offer of a protective order over the requested discovery. An order compelling discovery was entered, which the plaintiff ignored. The court then ordered the plaintiff to pay costs. It gave him seven days to comply with the previous order and warned that failure to comply within seven days would result in a dismissal. Here plaintiff never refused the request, was not given additional time to comply when the first deadline passed and was not warned prior to the dismissal. In *Mink v Masters*, 204 Mich App 242; 514 NW2d 235 (1994), a scenario similar to that in *Welch* took place. The order of dismissal was not entered until the defendant failed to comply with both of the court's orders. The first compelled the discovery; the second gave additional time to conform to the first order. In addition, unlike the case at hand, the defendant in *Mink* failed to provide the discovery while it was seeking relief from the order of dismissal. This case is also unlike *Barlow v Crane-Houdaille, Inc.*, 191 Mich App 244; 477 NW2d 133 (1991) where the discovery violation prejudiced the defendant. Here there was no showing of prejudice. On remand, the trial court should determine an appropriate sanction based on the facts of the case, keeping in mind that the extreme sanction of dismissal with prejudice is reserved for the most egregious cases.

Plaintiff also argues that the trial court erred by awarding defendants sanctions on her motion for reconsideration, finding that the motion was "so totally without merit as to justify additional sanctions against Plaintiffs and their counsel." We agree. Under the circumstances, it was error for the trial court to award sanctions to defendants on the motion for reconsideration. The motion was not devoid of merit where it set forth facts about which the court was previously unaware and which arguably demonstrated a palpable error with regard to the wilful nature of violating the discovery order.

Finally, we deny defendants' request for sanctions pursuant to MCR 7.216(C) as this appeal is certainly not vexatious.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Harold Hood

/s/ Gary R. McDonald

/s/ Helene N. White