

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

---

ARLIS MARIE BISHOP, Personal Representative of  
the Estate of CLAUDE WAYNE BISHOP, Deceased,

UNPUBLISHED  
March 3, 1998

Plaintiff-Appellant,

v

No. 204074  
Ingham Circuit Court  
LC No. 93-075763-NH

MICHIGAN AFFILIATED HEALTH CARE  
SYSTEM, INC. d/b/a LANSING GENERAL  
HOSPITAL, LANSING ORTHOPEDIC, P.C., and  
KENTON L. WATERBROOK, D.O.,

Defendants-Appellees.

ON REMAND

---

Before: Jansen, P.J., and Doctoroff and Gage, JJ.

PER CURIAM.

This case is on remand from the Supreme Court for plenary consideration of the issue raised in plaintiff's appeal of right. 454 Mich 910 (1997). In this medical malpractice action, the trial court granted defendants' motions to disqualify plaintiff's expert witness and denied plaintiff's oral motion to amend her witness list to add a new expert witness. The trial court later granted defendants' motions for summary disposition, in part, on the ground that plaintiff could not support her case by expert testimony. Plaintiff appeals as of right from the trial court's denial of her motion to amend her witness list. We reverse and remand.

The decision whether to allow a party to add an expert witness is within the discretion of the trial court. *Tisbury v Armstrong*, 194 Mich App 19, 20; 486 NW2d 51 (1991). However, our legal system favors disposition of litigation on the merits. *Vicencio v Ramirez*, 211 Mich App 501, 507; 536 NW2d 280 (1995). Where the sanction of barring an expert witness results in the dismissal of plaintiff's action, the sanction should be exercised cautiously. *Dean v Tucker*, 182 Mich App 27, 32; 451 NW2d 571 (1990). In *Dean, supra*, pp 32-33, this Court enumerated some of the factors that should be considered in determining the appropriate sanction: (1) whether the violation was willful or accidental; (2) the party's history of refusing to comply with discovery requests or refusal to disclose witnesses; (3) the prejudice to defendants; (4) actual notice to defendants of the witness and the length

of time before trial that the defendants received such actual notice; (5) whether there exists a history of plaintiff's engaging in deliberate delay; (6) the degree of compliance by plaintiff with other provisions of the court's order; (7) an attempt by plaintiff to timely cure the defect; and (8) whether a lesser sanction would better serve the interests of justice.

In applying the factors set forth in *Dean*, we conclude that the trial court abused its discretion in denying plaintiff's motion to amend the witness list to add an expert witness because the resulting sanction of dismissal of the action was too drastic. Plaintiff asked to amend her witness list one week before mediation and six weeks before trial. Plaintiff did fail to cooperate in securing a prompt deposition of her original witness. However, there were no other delays caused by plaintiff and the upcoming trial date was the original trial date. Moreover, there is really no prejudice to defendants, other than the fact of this first adjournment. As a result, because a grant of plaintiff's motion would have resulted in the first adjournment of the trial date and because the denial of the motion denied plaintiff the opportunity to have the merits of her case litigated, the sanction of denial which necessarily resulted in the granting of summary disposition, was too severe. *Tisbury, supra*, p 21. We do note that the trial court may, in its discretion, impose any lesser sanction on remand, such as requiring plaintiff to pay the costs of the deposition, to pay actual costs including attorney fees incurred by the defense as a result of plaintiff's failure to timely name the expert witness, or any other sanction the trial court believes necessary. See MCR 2.313(B)(2).

We therefore reverse the order of summary disposition and remand to allow plaintiff to amend her witness list.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ Kathleen Jansen  
/s/ Martin M. Doctoroff  
/s/ Hilda R. Gage