

STATE OF MICHIGAN  
COURT OF APPEALS

---

ATTORNEY GENERAL and MICHIGAN  
DEPARTMENT OF ENVIRONMENTAL  
QUALITY,

UNPUBLISHED  
July 7, 1998

Plaintiffs-Appellants,

v

DONALD L. HARKINS,

No. 202323  
Oakland Circuit Court  
LC No. 96-520092 CE

Defendant-Appellee.

---

Before: Griffin, P.J., and Gribbs and Talbot, JJ.

PER CURIAM.

The trial court dismissed plaintiffs' cause of action and awarded defendant \$500 in costs after plaintiffs failed to file a timely response brief to defendant's motion for summary disposition. MCR 2.504(B)(1). We reverse.

Our system of law favors disposition of cases on the merits. Dismissal is a drastic step that should be taken cautiously. *Vincencio v Ramirez*, 211 Mich App 501, 506; NW2d (1995). Before imposing such a sanction, the trial court is required to carefully evaluate all available options on the record and conclude that the sanction of dismissal is just and proper. *Id.* Some of the factors that a court should consider before imposing the sanction of dismissal include: (1) whether the violation was wilful or accidental; (2) the party's history of refusing to comply with previous court orders; (3) the prejudice to the opposing party; (4) whether there was a history of deliberate delay; (5) the degree of compliance with other parts of the court's orders; (6) attempts to cure the defect; and (7) whether a lesser sanction would better serve the interests of justice. *Id.* Where the trial court does not evaluate other available options on the record, dismissal is an abuse of discretion. *Id.*

The trial court's dismissal in this case was too harsh a remedy. Plaintiffs' error was slight, the risk of prejudice to defendant was minimal, and the trial court did not evaluate other available options. Plaintiffs' response brief, although late, was presented two weeks before oral argument was scheduled on defendant's motion for summary disposition. The pre-trial date in this action to require defendant to

restore illegally filled and/or dredged wetlands was still two months away. Further, plaintiffs' counsel experienced unavoidable delays during the preparation of the brief at issue. Counsel received defendant's motion for summary disposition late because of delays in the mail system. After further delay caused by previously scheduled Thanksgiving travel, counsel suffered the total loss of her response brief in a computer malfunction. In the weeks immediately following the briefing deadline, counsel was stricken by severe respiratory flu, and was on previously scheduled holiday leave during Christmas and New Year's. Counsel offered the response brief at the default hearing. Defendant was not prejudiced by the delay and the trial court could have chosen less drastic measures to remedy plaintiffs' counsel's failure to timely file a brief.

Reversed.

/s/ Richard Allen Griffin

/s/ Roman S. Gibbs

/s/ Michael J. Talbot