STATE OF MICHIGAN

COURT OF APPEALS

YVONNE ADAMS, Personal Representative of the ESTATE OF SHAMEEKAH ADAMS, the ESTATE OF YOLANDA ADAMS, the ESTATE OF LACHELLE ADAMS, and the ESTATE OF CLARENCE WILLIAMS, JR.,

Plaintiff-Appellant,

v

PERRY FURNITURE COMPANY,

Defendant-Appellee.

UNPUBLISHED
January 21, 1997

No. 176990
Oakland Circuit Court
LC No. 86-320049-NP

Before: Jansen, P. J., and Reilly and E. Sosnick,* JJ

PER CURIAM.

This matter returns to this Court from the trial court's post-remand order dismissing plaintiff's case for failure to produce one of three expert witnesses for a discovery-only deposition in accordance with a February 27, 1989, discovery order. The trial court originally dismissed this case on December 26, 1989, without explanation. This Court reversed the dismissal order and remanded "for a rehearing for the imposition of appropriate sanctions for failure to comply with the discovery order." *Adams v Perry Furniture (On Remand)*, 198 Mich App 1, 18; 497 NW2d 514 (1993). Following remand, the trial court again dismissed the action. Plaintiff appeals as of right. We reverse and remand for further proceedings.

This Court's previous opinion summarized the facts preceding the remand to the trial court as follows:

> [T]he circuit court in this case entered an order on February 27, 1989, compelling discovery-only depositions of the plaintiff's three expert witnesses with no time limit for the taking of the depositions. The depositions of two of those witnesses were

* Circuit judge, sitting on the Court of Appeals by assignment.

> completed within two months of that order. . . . Perry's counsel sent several letters to the plaintiff's counsel in an attempt to schedule the third witness' deposition. The parties finally scheduled the deposition of the plaintiff's third expert witness for November 14, 1989. Plaintiff's counsel canceled the deposition on its scheduled day.
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> Perry filed its motion for default judgment on December 6, 1989. Plaintiff's counsel failed to appear for the hearing on the motion on December 13, 1989.
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> * * *
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> The court entered its order of default judgment on December 26, 1989. After each party presented arguments at the hearing on the motion for reconsideration, the court again simply denied the plaintiff's motion without discussing the other available sanctions.

This Court in *Adams*, *supra* determined that it could not review the trial court's decision for an abuse of discretion because the court failed to indicate how and why the discretionary decision was made. *Id*. at 16. "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 plaintiff's failure to comply with the discovery order was wilful. Accordingly, we reverse and remand for a rehearing for the imposition of appropriate sanctions, including the possibility of dismissal." *Id.* at 18.

Following remand, counsel presented their arguments at a hearing on June 9, 1993. The circuit court issued an order on June 15, 1994, which stated in pertinent part as follows:

> The Court of Appeals remanded the case for the Court to make a finding on the issue of willfulness and to examine all of the possible sanctions on the record.
>
> The Court is aware that it could have entered an order striking the pleadings or parts of pleadings staying further proceedings until the order is obeyed. It is also aware that it could have entered an Order for Contempt of Court for failure to obey an order.
>
> Based upon the history of the case, however, the Court finds that Plaintiff was aware of the order and knowingly failed to comply with said order. This constitutes willful disobedience of the Courts [sic] order.
>
> This Court feels that dismissal is the proper sanction to be imposed in this case.

We agree with plaintiff that, considering the circumstances of the case, the court's dismissal of plaintiff's complaint as a penalty for failure to produce an expert witness within a reasonable time was an abuse of discretion.

Before imposing the drastic sanction of dismissal of a claim for failure to obey a discovery order, the court should consider "whether the failure to respond to discovery requests extends over a

substantial period of time, whether there was a court order directing discovery that has not been complied with, the amount of time that has elapsed between the violation and the motion for default judgment, and whether wilfulness has been shown." *Adams, supra* at 15, quoting *Frankenmuth Mutual Ins Co v ACO, Inc,* 193 Mich App 389, 396-397; 484 NW2d 718 (1992). In *Dean v Tucker,* 182 Mich App 27, 32; 451 NW2d 571 (1990), this Court set forth the following nonexhaustive list of factors to be considered in determining an appropriate sanction:

> (1) whether the violation was wilful or accidental; (2) the party's history of refusing to comply with discovery requests (or refusal to disclose witnesses); (3) the prejudice to the defendant; (4) actual notice to the defendant of the witness and the length of time prior to trial that the defendant received such actual notice; (5) whether there exists a history of plaintiff engaging in deliberate delay; (6) the degree of compliance by the plaintiff with other provisions of the court's order; (7) an attempt by the plaintiff to timely cure the defect; and (8) whether a lesser sanction would better serve the interests of justice.

Dismissal of the complaint should be employed as a sanction for discovery abuse only when there has been "a flagrant and wanton refusal to facilitate discovery, that is, the failure must be conscious or intentional, not accidental or involuntary." *Adams, supra* at 15-16, quoting *Frankenmuth, supra.*

In this case, plaintiff's counsel's failure to cooperate with defense counsel's efforts to arrange the deposition of one of their three expert witnesses over a ten-month period suggests a deplorable level of discourtesy toward opposing counsel. Within three months of the trial court's order allowing defendant to take discovery-only depositions of plaintiff's three identified expert witnesses, counsel were able to arrange and accomplish the depositions of two of them, both of whom resided outside of Michigan. Counsel were also able to arrange and accomplish the depositions of four other witnesses during the period from March through September, 1989. Beginning no later than April 17, 1989, defense counsel repeatedly requested plaintiff's counsel to provide dates for the deposition of the third expert witness, Eugene Klingler. No explanation has been suggested for why plaintiff's counsel cooperated in the scheduling of other witnesses' depositions, but did not offer dates for Klingler until October 10, 1989. After the scheduled deposition was canceled by plaintiff's counsel on November 14, 1989, plaintiff's counsel again failed to suggest dates for rescheduling the deposition and did not respond to defense counsel's request to do so. Even though the court's order allowing discovery only depositions did not set a time limit and there was no discovery deadline or trial date set, plaintiff's counsel's failure to make "reasonably diligent efforts to comply with a legally proper discovery request by an opposing party" was discourteous and contrary to MRPC 3.4(d).

Although we do not condone plaintiff's counsel's behavior, we conclude that the sanction of dismissal of the complaint was too severe a penalty and an abuse of discretion. Unlike several other cases we have examined on this issue, the discovery order in this case did not set a deadline for compliance. This was not an instance in which plaintiff's counsel disregarded a court-imposed deadline. Compare, *Houston v Southwest Detroit Hosp,* 166 Mich App 623; 420 NW2d 835 (1987); *Hanks v SLB Management, Inc,* 188 Mich App 656; 471 NW2d 621 (1991); *Dean, supra; Barlow v John Crane-Houdaille, Inc,* 191 Mich App 244; 477 NW2d 133 (1991); *Thorne v Bell,* 206 Mich App

625; 522 NW2d 711 (1994); *Mink v Masters*, 204 Mich App 242; 514 NW2d 235 (1994); *Welch v J Walter Thompson USA, Inc*, 187 Mich App 49; 466 NW2d 319 (1991). The record indicates that, with the exception of arranging the deposition of Klingler, plaintiff cooperated in discovery, even during the period in which defense counsel was unsuccessfully trying to arrange Klingler's deposition. In addition to cooperating in scheduling depositions of four other witnesses, plaintiff responded to Perry' interrogatories and notified counsel that certain physical evidence and photographs were available for inspection at plaintiff's counsel's office. In addition, defendant had notice of the name of the witness, a description of his proposed testimony and a copy of the witness' curriculum vitae since that information was supplied by plaintiff in March, 1988. Although plaintiff's counsel's actions were undoubtedly frustrating to defense counsel, any prejudice suffered by the defense could be cured by requiring plaintiff to pay "reasonable expenses, including attorney fees, caused by the failure . . . ." MCR 2.313(B)(2). Inasmuch as there was no history of discovery abuse, any prejudice could be cured and there is no suggestion that plaintiff herself was in any way at fault for her attorney's failure to arrange Klingler's deposition, a lesser sanction would better serve the interests of justice. *Dean, supra*. The trial court's decision to dismiss the complaint was an abuse of discretion.

The court's order dismissing the complaint is reversed and the case is remanded for further proceedings. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Maureen Pulte Reilly
/s/ Edward Sosnick