

STATE OF MICHIGAN
COURT OF APPEALS

KELLY A. RUFF, JEFFREY L. RUFF and JACK
RODGERS, as Next Friend of JEREMIAH RUFF and
JOSHUA RUFF,

UNPUBLISHED
March 27, 1998

Plaintiffs-Appellees

v

DONUT SYSTEMS, INC.,

No. 194597
Genesee Circuit Court
LC No. 94-031402-NO

Defendant-Appellant

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

PER CURIAM.

Defendant appeals as of right from the judgment entered on the jury's verdict in favor of plaintiffs in this personal injury action arising from Kelly Ruff's (plaintiff) slip and fall in a Dunkin' Donuts store. We reverse, finding meritorious defendant's challenge to the trial court's rulings excluding defendant's witnesses and exhibits for failure to comply with the court's filing deadlines.

Plaintiffs filed a complaint against defendant alleging premises liability and loss of consortium. Pursuant to MCR 2.401, a pre-trial scheduling conference was held on December 13, 1994. The court ordered that lay witness lists were to be submitted no later than January 13, 1995; defendant's expert witness list was to be submitted no later than February 13, 1995,¹ discovery was to terminate on April 1, 1995; and all exhibits were to be marked and exchanged at least 60 days prior to trial, to be evidenced by the filing of a proof of service. Trial was initially scheduled for October 17, 1995, but was adjourned until February 21, 1996.

On January 31, 1995, defendant filed its first witness list containing 42 entries, 19 designated as experts. Soon after, defendant filed an amended witness list that included two medical doctors as experts. The amended witness list was dated February 9, 1995 and was time stamped February 15, 1995, two days after the February 13 deadline. On August 25, 1995, defendant filed an exhibit list. On September 5, 1995, defendant again submitted an amended witness list, listing an employee of defendant as well as employees of the ambulance service that transported plaintiff.² Plaintiffs then filed

three motions seeking to exclude defendant's lay and expert witnesses and trial exhibits for failure to file the lists in accordance with the deadlines set by the trial court in the pre-trial scheduling order. The trial court granted plaintiffs' motions and entered an order precluding the testimony of any lay witnesses listed after July 13 and the admission of defendant's proposed exhibits. Later, another order was entered excluding defendant's experts Drs. Jacob Zvirbulis and Hugh Sulfridge, and quashing their de bene esse depositions, because their names first were listed on defendant's amended witness list, which was filed after the February 13, 1995 deadline.

Defendant filed a motion for reconsideration asserting that plaintiff had failed to demonstrate any prejudice, and that it had complied with the scheduling order pertaining to trial exhibits. In a written opinion, the trial court reversed its prior ruling, holding that because the trial date was adjourned, plaintiff had not suffered any prejudice and the evidence demonstrated that defendant complied with the scheduling order requiring the exchange of marked exhibits between the parties.

Defendant then filed another motion, seeking reconsideration of the trial court's order excluding the expert witnesses listed on its first amended witness list and arguing that the trial court should reverse its ruling on the same bases as it granted defendant's prior motion for reconsideration. In a written opinion and order, the trial court denied defendant's motion ruling that it was untimely and failed to demonstrate that the trial court committed palpable error.

Plaintiffs filed a motion for reconsideration of the trial court's order reversing the order precluding witnesses and exhibits, arguing that defendant had demonstrated a consistent disregard of the trial court's filing requirements and that because defendant's witness list was filed after mediation,³ plaintiff suffered prejudice supporting the trial court's initial order. The trial court agreed and, in a written opinion and order, reinstated its original ruling barring defendant from presenting the witnesses and exhibits.

Plaintiff again filed a motion seeking to exclude all defendant's expert witnesses because of the late submission of defendant's expert witness list. The motion was granted and an order was entered barring defendant from presenting its expert witnesses.

The matter then proceeded to trial and the jury found in plaintiff's favor awarding her \$1,650,000. An additional \$400,000 was awarded on the loss of consortium claims. Defendant's post-trial motion for new trial and/or remittitur was denied.

Defendant first contends that the trial court erred in precluding its presentation of lay and expert witnesses and exhibits. We agree.

This Court reviews a trial court's imposition of discovery sanctions for an abuse of discretion. *Beach v State Farm Mut Auto Ins Co*, 216 Mich App 612, 618; 550 NW2d 580 (1996); *Merit Mfg & Die, Inc v ITT Higbie Mfg Co*, 204 Mich App 16, 21; 514 NW2d 192 (1994). While it is within the trial court's authority to bar an expert witness or dismiss an action as a sanction for the failure to timely file a witness list, the fact that such action is discretionary, rather than mandatory, necessitates a

consideration of the circumstances of each case to determine if such a drastic sanction is appropriate. The mere fact that a witness list was not timely filed does not, in itself, justify the imposition of such a sanction. *Dean v Tucker*, 182 Mich App 27, 32; 451 NW2d 571 (1990). This Court has identified eight factors which should be considered when imposing sanctions for failing to file a timely witness list:

(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 opposing party, (4) actual notice to the opposing party of the witness and the length of time prior to trial that such actual notice was received, (5) whether there exists a history of engaging in deliberate delay, (6) the degree of compliance with other provisions of the court's order, (7) an attempt to timely cure the defect, and (8) whether a lesser sanction would better serve the interests of justice. [*Dean, supra* at 32-33.]

We conclude that application of these factors necessitates reversal and a new trial in which defendant's witnesses are allowed to testify. Neither party disputes that the late filings were accidental. In fact, defendant's expert witness list was purportedly mailed on February 10, 1995, before the deadline, and was filed just two days late. There is no evidence that defendant's actions evidenced a refusal to disclose witnesses or comply with discovery requests. Further, plaintiffs had ample actual notice of the witnesses listed in the January and February witness lists, which were filed well before the original trial date of October 1995.

There is inadequate support for the trial court's finding that plaintiffs suffered prejudice arising out of defendant's tardy filing. One list was due January 13, but filed January 31. A second was due February 13, but filed February 15. Discovery continued through May, and mediation was not held until August. There is no satisfactory explanation for plaintiffs waiting until the eve of trial, well after the close of discovery and mediation, to seek to exclude the witnesses. Had plaintiffs acted in a timely manner, there would have been more than sufficient time to depose the witnesses at issue before mediation and trial. Because any prejudice complained of by plaintiffs was largely of their own making,⁴ we hold that the trial court's finding of prejudice was clearly erroneous.

Further, had plaintiffs acted in a timely manner, the trial court could have crafted a sanction more in line with the magnitude of the violation, such as imposing costs. Instead, by precluding defendant from presenting its lay and expert witnesses, the trial court imposed the most severe sanction possible and extensively hampered defendant's ability to present a defense.⁵ Because application of the eight factors in *Dean* do not support the trial court's imposition of the harsh sanction of excluding all witnesses and exhibits, we conclude that the trial court abused its discretion and remand for a new trial.

Our reversal makes it unnecessary to address defendant's remaining arguments on appeal, except to caution that any finding of witness unavailability on retrial should be carefully supported on the record, and to note that defendant's mitigation defense is a viable defense in theory, but must be supported by adequate testimony pertaining to plaintiff's conduct in order to justify a jury instruction.

Reversed and remanded. We do not retain jurisdiction.

/s/ Harold Hood

/s/ Gary R. McDonald

/s/ Helene N. White

¹ Plaintiff's list was due a month earlier.

² Defendant does not challenge the trial court's exclusion of these witnesses.

³ In reality, only the last witness list was filed after mediation.

⁴ We do not mean to suggest that it is proper for a party filing a late witness list to simply file the list and wait for a response in the form of a motion to strike. Defendants here should have filed a motion to allow the late filing. Nevertheless, a party aggrieved by a late filing should not simply assume that the witnesses will be disallowed by the court, and refrain on that basis from conducting discovery, especially where the departure from the filing deadline is de minimis, as here.

⁵ We reject plaintiff's argument that notwithstanding the court's rulings, defendant had a fair opportunity to present its case.