

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

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LINDA BRENNAN,

Plaintiff-Appellant,

v

MIDMICHIGAN MEDICAL CENTER-  
GRATIOT, MIDMICHIGAN MEDICAL  
CENTER-MIDLAND, MICHIGAN SPINE AND  
BRAIN INSTITUTE, P.C., and DR. MARK  
ADAMS,

Defendants-Appellees,

and

MID-MICHIGAN RADIOLOGY ASSOCIATES,  
P.C., DR. MOHAMMAD NAVEED, and DR.  
DAVID PETRELLA,

Defendants.

UNPUBLISHED  
December 15, 2015

No. 323121  
Gratiot Circuit Court  
LC No. 13-011838-NH

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Before: GADOLA, P.J., and K. F. KELLY and FORT HOOD, JJ.

PER CURIAM.

Plaintiff appeals by leave granted the trial court's order dismissing her claims against certain defendants as a discovery sanction in this medical malpractice action. We reverse and remand for further proceedings consistent with this opinion.

Plaintiff alleges that she is the victim of medical malpractice arising from the failure to timely detect and treat a compression fracture of a thoracic disc. The parties experienced several difficulties during the course of discovery. Defendants MidMichigan Medical Center-Gratiot and MidMichigan Medical Center-Midland (collectively "MidMichigan Medical Centers") filed a motion to compel, alleging that plaintiff did not timely respond to interrogatories and requests for production of documents that were made on November 26, 2013. After a hearing, the trial court entered an order granting MidMichigan Medical Centers' motion to compel and ordering plaintiff to pay a \$350 sanction and to provide the requested discovery within 14 days. Defendants Mark Adams, M.D., and the Michigan Spine and Brain Institute, P.C., also filed a motion to compel, alleging that plaintiff failed to respond to interrogatories and requests for

production of documents served on December 23, 2013, and January 17, 2014. The parties stipulated to an order requiring plaintiff to provide the requested discovery by April 7, 2014.

On May 2, 2014, defendants Adams and the Michigan Spine and Brain Institute, P.C., filed a motion to dismiss because plaintiff failed to provide discovery as required by the stipulated order. They alleged that plaintiff answered their first set of interrogatories by submitting answers to interrogatories from other codefendants, and plaintiff did not provide signed and responsive answers to their second set of interrogatories. MidMichigan Medical Centers joined in this motion to dismiss, arguing that plaintiff failed to timely comply with the court order and supplied answers to interrogatories that referenced attachments that plaintiff did not send. MidMichigan Medical Centers also asserted that plaintiff did not answer their second set of interrogatories and failed to pay the \$350 sanction. Following a hearing, the trial court granted the motion and dismissed plaintiff's claims against MidMichigan Medical Centers, Adams, and the Michigan Spine and Brain Institute, P.C. with prejudice.

“We review a trial court’s imposition of discovery sanctions for an abuse of discretion.” *Hardrick v Auto Club Ins Ass’n*, 294 Mich App 651, 659; 819 NW2d 28 (2011). An abuse of discretion occurs when the trial court’s decision falls outside the range of principled outcomes. *Id.* at 659-660. We review any factual findings underlying a trial court’s decision for clear error. *Johnson Family Ltd Partnership v White Pines Wireless, LLC*, 281 Mich App 364, 387; 761 NW2d 353 (2008). “A finding is clearly erroneous when this Court is left with a definite and firm conviction that a mistake has been made.” *Id.*

“MCR 2.313(B)(2)(c) authorizes a trial court to enter an order dismissing a proceeding or rendering a judgment by default against a party who fails to obey an order to provide discovery.” *Thorne v Bell*, 206 Mich App 625, 632; 522 NW2d 711 (1994). The harsh sanction of dismissal is only appropriate if a party flagrantly and wantonly refuses to facilitate discovery. *Traxler v Ford Motor Co*, 227 Mich App 276, 286; 576 NW2d 398 (1998). Before imposing such a sanction, “the record should reflect that the trial court gave careful consideration to the factors involved and considered all of its options in determining what sanction was just and proper in the context of the case before it.” *Dean v Tucker*, 182 Mich App 27, 32; 451 NW2d 571 (1990). A trial court should consider the following factors before imposing the sanction of dismissal:

- (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’s 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. This list should not be considered exhaustive. [*Id.* at 32-33 (footnotes omitted).]

Failure to evaluate other available sanctions on the record constitutes an abuse of discretion. *Vicencio v Ramirez*, 211 Mich App 501, 506-507; 536 NW2d 280 (1995).

The central issue in this case is whether the trial court abused its discretion by failing to examine the *Dean* factors and the possibility of lesser sanctions. The trial court's explanation for its decision was brief, and it gave only one justification for dismissal:

I agree and recognize case law tells us all that dismissing the claim with prejudice is a profound remedy to be avoided where it's not essential. The Court, of course, also recognizes that medical malpractice litigation is fraught with discovery issues, problems, some of those simply because of the complexity of the underlying alleged tortious conduct, sometimes because of the necessary, or otherwise, complexity of the law of medical malpractice as it relates to procedural matters.

But here, when we joined this party in December and we don't know who standard of care is for plaintiff as against Dr. Adams, I think the remedies requested are appropriate. I'll grant the motion, sign a corresponding order dismissing with prejudice as to Dr. Adams and Midland's health center. Thank you all very much for your time today.

The trial court's written order did not elaborate further on the reasons dismissal was appropriate; instead, it said that the listed defendants were dismissed for the reasons stated on the record. Where the record reflects that the trial court did not consider the *Dean* factors or consider other available options, remand is an appropriate remedy. See *Duray Dev, LLC v Perrin*, 288 Mich App 143, 165-166; 792 NW2d 749 (2010).

Defendants argue that the record reflects that the trial court was aware of the *Dean* factors when it rendered its decision because counsel referenced the factors in one of the motion briefs. Even if counsel's mention of the *Dean* factors suggests that the trial court was aware of the factors, it does not demonstrate that the "trial court gave careful consideration to the factors involved and considered all of its options." *Dean*, 182 Mich App at 32. Defendants also argue that no rule precluded the trial court from adopting the position of the prevailing party as set forth at oral argument or in the briefs. The trial court is undoubtedly free to adopt the position of one of the parties; however, the trial court's short oral ruling in this case did not indicate that it adopted all of defendants' positions. Rather, the court merely indicated that the "the remedies requested are appropriate" and explained that plaintiff had not specified what expert would testify against defendant Adams.

Lastly, plaintiff's argument that the trial court would have abused its discretion even if it considered the *Dean* factors and lesser sanctions is not persuasive given the procedural history of this case. Considering that plaintiff had a history of failing to fully comply with discovery requests and court orders, the trial court could reasonably conclude after analysis of the *Dean* factors that dismissal is appropriate.

In sum, the trial court abused its discretion by failing to explicitly consider the *Dean* factors or the possibility of lesser sanctions. Accordingly, a remand is appropriate. On remand, the trial court should reassess its decision regarding dismissal considering the above-mentioned factors and explain its determination on the record.

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

/s/ Michael F. Gadola  
/s/ Kirsten Frank Kelly  
/s/ Karen M. Fort Hood