

STATE OF MICHIGAN
COURT OF APPEALS

CHARLENE LONDON, as Next Friend of DEON
LONDON,

UNPUBLISHED
October 16, 2012

Plaintiff-Appellant,

v

No. 305614
Wayne Circuit Court
LC No. 08-108778-NI

ALLSTATE INSURANCE COMPANY,

Defendant-Appellee.

Before: MURRAY, P.J., and CAVANAGH and STEPHENS, JJ.

PER CURIAM.

In 2006, plaintiff, Charlene London, as next friend of her son, Deon London, filed suit in district court against defendant, Allstate Insurance Company, seeking first-party no fault insurance benefits. In 2008, the case was removed to circuit court. While the defendant's motion for summary disposition was under advisement, the circuit court dismissed the case for lack of progress. Plaintiff subsequently moved for reinstatement of the case, a motion which the court denied. Plaintiff appeals as of right the denial of her motion to reinstate. We reverse and remand for further proceedings.

MCR 2.502(A)(1) provides that:

On motion of a party or on its own initiative, the court may order that an action in which no steps or proceedings appear to have been taken within 91 days be dismissed for lack of progress *unless the parties* show that progress is being made or *that the lack of progress is not attributable to the party seeking affirmative relief*. [Emphasis added.]

Cases with an unexpired scheduling order, and those set for conference, alternative dispute resolution, hearing or a trial may not be dismissed for lack of progress. MCR 2.502(A)(2). The trial court is required to give 28 days notice in the manner proscribed in MCR 2.501(C).¹ MCR 2.502(A)(3). If, after the court provides notice of no progress, a party fails to

¹ On appeal, plaintiff asserts for the first time that her attorney never received notice of no progress. However, the docket sheet reflects that notice was sent to her attorney in keeping with

make the required showing that progress is being made or lack of progress is not attributable to the party seeking relief, the trial court may dismiss the case without prejudice for lack of progress. MCR 2.502(B)(1). A trial court's decision to dismiss a case for lack of progress is reviewed for an abuse of discretion. *Eliason Corp, Inc v Dep't of Labor*, 133 Mich App 200, 203-204; 348 NW2d 315 (1984).

The trial court's authority to dismiss a case for lack of progress is not unlimited. Given that MCR 2.501 requires a trial court to enter whatever order is necessary to advance the litigation (unless a scheduling order has been entered under MCR 2.401(B)), it follows that the trial court has obligations to advance the litigation. In light of the trial court's obligations under MCR 2.501, a court may not dismiss a case for want of progress when the trial court itself failed to set a date for trial as required by MCR 2.501. *Maxwell v Univ of Mich*, 159 Mich App 417, 422; 407 NW2d 16 (1987); see also 3 Longhofer, Michigan Court Rules Practice, pp 13-15. It follows from this that there are only two categories of actions subject to dismissal for no progress. *Bell v Fuksa*, 159 Mich App 649, 661; 406 NW2d 900 (1987).

The first category is those actions in which a complaint has been served on the defendant, but no answer is filed or other action taken thereafter to secure final judgment. The second category of cases is those in which a final disposition of the action has been made, through trial, mediation award, or otherwise, yet the prevailing party has not taken steps to secure the entry of a final judgment. As the reader may note, both categories of cases involve actions in which one of the parties is free to secure a final disposition, but for some reason has neglected the steps necessary to do so. [*Id.*]

Although MCR 2.502 has been amended since *Bell* and *Maxwell* were decided, the changes are unrelated to whether a trial court can properly dismiss a case under MCR 2.502 when it has failed to advance the case as required under MCR 2.501.

Based upon the reasoning of *Bell* and *Maxwell*, we conclude that the trial court abused its discretion when it dismissed this case for lack of progress before ruling on defendant's outstanding motion for summary disposition. MCR 2.116(I)(1) provides that if a party can establish an entitlement to summary disposition, the court "shall" render judgment without delay. If a motion is denied, the action "must" proceed to final judgment. MCR 2.116(J)(1). These provisions impose upon the trial court a duty to rule on motions for summary disposition, and the courts are required to render the "prompt dispatch of judicial duties." *In re Halloran*, 486 Mich 1054; 783 NW2d 709 (2010) (citation omitted); see also MCR 9.205(B)(1)(a). It follows that a trial court may not impede the progress of the case by failing to rule on a motion for summary disposition or failing to set a trial date, and then find the parties failed to make progress. See *Bell*, 159 Mich App at 661; *Maxwell*, 159 Mich App at 422; see generally *Laidler v Nat'l Bank of Detroit*, 133 Mich App 85, 93; 348 NW2d 42 (1984) ("[B]efore the court is allowed to impose the harsh remedy of dismissal, we believe it should have its own house in order.").

MCR 2.501(C). Moreover, because plaintiff failed to raise this argument in the trial court it is unpreserved and manifest injustice will not result if we decline to consider her unsupported argument. *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 95-96; 693 NW2d 170 (2005).

In this case, a hearing on defendant's summary disposition motion was held in November 2009. At that point in time, the parties had already completed case evaluation, exchanged witness lists, and completed discovery. At the motion hearing plaintiff's counsel asked the trial court for a trial date. Instead, the court indicated it would take the summary disposition motion under advisement. Certainly, either party's counsel could thereafter have taken steps to inquire into the status of the defendant's motion. See *Wickings v Arctic Enterprises, Inc*, 244 Mich App 125, 145; 624 NW2d 197 (2000) (noting the importance of communication with the court). However, the fact remains that the trial court bore the obligation of ruling on the motion and, assuming all or part of the motion was denied, setting a trial date. MCR 2.116; MCR 2.501. As a result of the status of the proceedings, plaintiff was not in a position to seek final judgment or entry of a judgment. See *Bell*, 159 Mich App at 661; Longhofer, pp 13-15. Because the trial court was remiss in its obligations to rule on the motion for summary disposition and set a trial date, dismissal for lack of progress was an abuse of discretion. See *Maxwell*, 159 Mich App at 422; Longhofer, pp 13-15. Lack of progress was "not attributable to" plaintiff. MCR 2.502(A)(1).²

Having decided the trial court abused its discretion in dismissing the case for lack of progress, we also find the trial court abused its discretion in denying plaintiff's motion to reinstate. Under MCR 2.502(C), "[o]n motion for good cause, the court may reinstate an action dismissed for lack of progress on terms the court deems just. On reinstating an action, the court shall enter orders to facilitate the prompt and just disposition of the action." Notably, MCR 2.502 does not place any time limit on a party's ability to move for the reinstatement of an action. *Wickings*, 244 Mich App at 139. The only requirement under MCR 2.502(C) is that the moving party must show "good cause." *Id.* A trial court's decision relating to a motion to reinstate an action is reviewed for an abuse of discretion. *Id.* at 138.

In *Wickings*, this Court identified several factors that may be relevant to determining whether "good cause" exists.³ 244 Mich App at 142. These factors include errors in dismissing

² In arguing that the trial court did not abuse its discretion, defendant asserts that plaintiff's case was not, in fact, ready for trial. Defendant notes that the trial court expressed some misgivings about plaintiff's case and indicated it was leaning toward granting defendant's motion for summary disposition. From this, defendant argues plaintiff should have been doing something to improve the merits of her case. However, a dismissal order under MCR 2.502 is an administrative decision to dismiss that does not involve an adjudication on the merits. *North v Dep't of Mental Health*, 427 Mich 659, 661; 397 NW2d 793 (1986). If the trial court concluded that defendant's motion for summary disposition should be granted, it had the obligation to do so. MCR 2.116(I). Instead, the trial court abused its discretion by dismissing the case for lack of progress without deciding the motion for summary disposition or setting a trial date as required by MCR 2.116 and MCR 2.501.

³ Because the list of factors is neither exhaustive nor applicable to every case, we reject plaintiff's contention that the trial court was required to consider each factor before denying her motion to reinstate. *Wickings*, 244 Mich App at 142 n 28. We also reject plaintiff's argument that her case should be reinstated because to deny her motion would bar much of her recovery

the case and the moving party's justification in failing to make progress before dismissal. *Id.* Based on these factors, we conclude plaintiff established good cause for the reinstatement of her case. As discussed, it was error for the trial court to dismiss the case when the trial court was in fact remiss in its own obligations to rule on the motion for summary disposition and set a trial date. *Bell*, 159 Mich App at 661; *Maxwell*, 159 Mich App at 422. The trial court's delays in fulfilling its judicial obligations related to the case also provided some justification for plaintiff's inability to make further progress in the case. *Wickings*, 244 Mich App at 141-142. "If the trial court erroneously believes that the parties failed to make progress when, in fact, the court itself failed to prescribe the progress it desired to see, then the parties have good cause to reinstate the action." *Id.* In sum, we conclude that there was good cause for reinstatement and the trial court abused its discretion by denying plaintiff's motion. See *id.* at 139-142; *Bell*, 159 Mich App at 661; *Maxwell*, 159 Mich App at 422.

In reaching this conclusion, we reject defendant's claim that it will suffer prejudice by reinstatement. To establish prejudice the nonmoving party "must show actual prejudice which can be charged to the [moving party's] delay[.]" *Heaney v Verson Allsteel Press Co, Inc*, 64 Mich App 597, 600-601; 236 NW2d 155 (1975). Defendant has not shown how the mere passage of time caused "actual prejudice." Moreover, where the nonmoving party shares equally in the lack of progress, this can be a factor which weighs heavily in favor of reinstatement. *Id.* at 599. If plaintiff showed a lack of diligence, it was in failing to remind the court to rule on defendant's motion for summary disposition. Defendant was equally capable of reminding the court to rule on its own motion. Because defendant acquiesced in the delay and could have prevented any prejudice by asking the court to rule on its summary disposition motion, it is disingenuous to now assert that plaintiff is solely responsible for the lack of progress and any consequential prejudice. See *id.*

In reaching the contrary conclusion, the trial court found reinstatement was inappropriate because of (1) the age of the case and (2) plaintiff's failure to remind the trial court to rule on the motion for summary disposition. However, the purpose of a dismissal for lack of progress is not necessarily to dismiss old cases, but to dismiss cases that are not being pursued. See *Heaney*, 64 Mich App at 600. Moreover, because the trial court had an obligation under MCR 2.116 and MCR 2.501 to rule on the motion for summary disposition and set a trial date, the lack of progress cannot be attributed to plaintiff. The trial court's reasons for denying the motion are unavailing in light of the erroneous dismissal of the case. Accordingly, we find the trial court abused its discretion in denying plaintiff's motion to dismiss.

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

/s/ Christopher M. Murray
/s/ Mark J. Cavanagh
/s/ Cynthia Diane Stephens

under the one year back rule. MCL 500.3145(1). Contrary to plaintiff's argument, the fact that plaintiff will be harmed by refusal to reinstate a case is not usually grounds for reinstating the case. See, e.g., *Hoad v Macomb Circuit Judge*, 298 Mich 462, 466; 299 NW 146 (1941).