

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

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KENNETH ALLEN,

Plaintiff-Appellant,

v

DETROIT NEWS, INC.,

Defendant-Appellee.

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UNPUBLISHED  
December 2, 2003

No. 241526  
Wayne Circuit Court  
LC No. 01-118183-NO

Before: Murray, P.J., and Gage and Kelly, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's orders dismissing the case and denying his motion for reconsideration. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

On May 31, 2001 plaintiff filed suit alleging that defendant,<sup>1</sup> his former employer, violated the Worker's Disability Compensation Act, MCL 418.101 *et seq.*, by terminating his employment in retaliation for his having filed a claim for worker's compensation benefits. Plaintiff also asserted a claim for loss of consortium. On July 17, 2001 defendant filed an answer and served its first set of interrogatories and requests for production of documents. Plaintiff failed to respond to the discovery requests in a timely fashion. Defendant filed a motion to compel answers to discovery. The trial court entered a stipulated order providing that plaintiff would furnish "complete and accurate" responses to defendant's first set of interrogatories and requests for production of documents by October 5, 2001. Plaintiff produced unsigned answers on October 9, 2001. In response to various questions, including some seeking documents such as income tax returns, pay records, and medical records, plaintiff stated either that he was not in possession of the information or that the information would be produced at a later time. Plaintiff attached several pages of medical records to the responses.

On October 19, 2001 defendant served a notice of taking of deposition duces tecum, and requested that plaintiff bring to the deposition the same documents he failed to produce in his responses to the interrogatories and requests for documents. Plaintiff appeared for the

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<sup>1</sup> Defendant indicates that its correct corporate name is the Detroit Newspaper Agency.

deposition, but failed to produce any documents. Plaintiff's counsel ordered plaintiff not to answer a number of questions relating to the bases for his claims. The instructions not to answer were not based on privilege. Plaintiff's deposition was not completed because during the deposition his counsel refused to continue the proceedings past 3:00 p.m. Plaintiff's counsel agreed to produce plaintiff to continue the deposition on another date, but subsequently refused to do so.

On January 14, 2002 defendant moved to dismiss the case due to plaintiff's abuse of the discovery process. The trial court granted the motion, finding that plaintiff engaged in a pattern of discovery abuses, including submitting incomplete answers to interrogatories, refusing to produce requested documents, and refusing to answer proper questions posed at his deposition. The trial court dismissed the case with prejudice.

Plaintiff moved for reconsideration. The trial court denied the motion, finding that plaintiff had engaged in a pattern of discovery abuses, and that it considered the appropriate factors prior to imposing the sanction of dismissal. The trial court awarded defendant \$3,412.50 in costs.<sup>2</sup>

MCR 2.313(B)(2)(c) authorizes a trial court to enter an order dismissing a proceeding against a party who fails to provide discovery. Dismissal is a drastic sanction, and should be imposed only when a party flagrantly and wantonly refuses to facilitate discovery. The sanction of dismissal should not be imposed if the failure to comply with a discovery request is accidental or involuntary. The record should reflect that the trial court gave careful consideration to the factors involved and considered all options in determining the appropriate sanction. The factors that should be considered include: (1) whether the violation was willful or accidental; (2) the party's history of noncompliance with discovery; (3) the prejudice to the other party; (4) the degree of compliance by the party with other court orders; and (5) whether a lesser sanction would better serve the interests of justice. The trial court's decision to impose a discovery sanction is reviewed for an abuse of discretion. *Bass v Combs*, 238 Mich App 16, 26-27; 604 NW2d 727 (1999).

We review a trial court's decision to grant or deny a motion for reconsideration for an abuse of discretion. *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000).

Plaintiff argues that the trial court abused its discretion by dismissing the case. He emphasizes that the case was only seven months old, and contends that the trial court failed to consider whether a lesser sanction would be appropriate under the circumstances. We disagree and affirm the trial court's orders.

Plaintiff engaged in a pattern of discovery abuses. He failed to respond to defendant's interrogatories and requests for production of documents in a timely fashion. He disobeyed a stipulated order to provide "complete and accurate" responses by a certain date, and subsequently furnished late, incomplete, and unsigned responses. Plaintiff ignored defendant's

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<sup>2</sup> Plaintiff does not specifically challenge the award of costs on appeal.

request that he sign the answers. He ignored defendant's request that he produce certain documents at his deposition. Plaintiff's counsel refused to allow plaintiff to answer several questions relating to the bases for his claims against defendant, and refused to allow the deposition to be completed on the scheduled day. Plaintiff's counsel refused to produce plaintiff to allow the deposition to be completed, notwithstanding his agreement that he would do so. Plaintiff violated both a stipulated order allowing him to file an amended complaint to correct defendant's corporate name and the trial court's scheduling order requiring him to file his witness list by a certain date.

The trial court did not abuse its discretion when it found that plaintiff's discovery abuses were willful, had continued throughout the entire case, and could not be considered accidental. *Bass, supra* at 34 n 7. Additionally, the trial court also did not abuse its discretion by concluding that defendant was prejudiced by plaintiff's discovery abuses because the abuses prevented defendant from gathering the material necessary to adequately prepare its defense. Plaintiff's assertion that dismissal was unduly harsh because counsel had assured the trial court that he would comply with any discovery order the trial court issued is without merit in light of the evidence that plaintiff had already failed to comply with several court orders regarding discovery. The record discloses a history of recalcitrance or deliberate noncompliance with discovery orders and procedures. The circumstances supported imposition of the harsh sanction of dismissal. *Thorne v Bell*, 206 Mich App 625, 633-634; 522 NW2d 711 (1994). No abuse of discretion occurred. *Bass, supra* at 26; *Churchman, supra*.

Affirmed.

/s/ Christopher M. Murray  
/s/ Hilda R. Gage  
/s/ Kirsten Frank Kelly