

STATE OF MICHIGAN
COURT OF APPEALS

DOROTHY BECK, CURTIS MARK FRALICK,
VIRGINIA HUNSBERGER, LOIS JACOBSON,
JOHN KOZLOWSKI, STEVEN A. NORTHRUP,
JUDY SMALLWOOD, EUGENE W. SMITH,
KAROL VANORMAN,

UNPUBLISHED
September 27, 2012

Plaintiffs-Appellants,

v

CASS COUNTY ROAD COMMISSION,

No. 305246
Cass Circuit Court
LC No. 10-000911-CL

Defendant-Appellee.

Before: KELLY, P.J., and HOEKSTRA and STEPHENS, JJ.

PER CURIAM.

Plaintiffs, nine former employees of defendant Cass County Road Commission, appeal as of right the trial court's order granting defendant's motion to dismiss under MCR 2.313(B)(2)(c). We affirm.

Plaintiffs first argue that the trial court erred by dismissing plaintiffs' case as a sanction for the willful failure to comply with an order to compel discovery. We disagree. We review a trial court's imposition of discovery sanctions for an abuse of discretion. *Traxler v Ford Motor Co*, 227 Mich App 276, 286; 576 NW2d 398 (1998).

In this case, after plaintiffs failed to respond to defendant's request for documents and failed to answer defendant's interrogatories, defendant properly moved the trial court for an order to compel discovery under MCR 2.313(A), which the trial court granted after plaintiffs' counsel failed to appear at the hearing on the motion. Plaintiffs subsequently failed to comply with the order to compel discovery. Thereafter, defendant moved to dismiss the case pursuant to MCR 2.313(B)(2)(c). The trial court held a hearing on the motion, and plaintiffs' counsel once again failed to appear. Plaintiffs' counsel did send substitute counsel in his place, though that attorney was unprepared to argue the motion. At the close of the hearing, the trial court granted the motion and dismissed plaintiffs' case with prejudice.

Before dismissing a case, "the trial court should carefully consider the circumstances of the case to determine whether a drastic sanction, such as dismissing a claim, is appropriate." *Richardson v Ryder Truck Rental, Inc*, 213 Mich App 447, 451; 540 NW2d 696 (1995). In *Dean*

v Tucker, 182 Mich App 27, 32-33; 451 NW2d 571 (1990), this Court provided a nonexhaustive list of factors a trial court should consider when evaluating the appropriateness of a discovery sanction:

- (1) whether the violation was wil[l]ful 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.

Here, the trial court found that plaintiffs willfully violated its order to compel discovery, and that they had a history of refusing to comply with discovery requests and engaging in deliberate delay. The court based its findings on the fact that plaintiffs violated a stipulation before the trial court that it would provide defendant with discovery by January 14, 2011, that plaintiffs failed to comply with its order to compel discovery, that plaintiffs' one attempt to provide defendant with discovery was "clearly insufficient," and that plaintiffs failed to pay sanctions to defendant as required by its order to compel discovery. The court also found that there was no attempt by plaintiffs to timely cure the defect or comply with other provisions of its order. And, while the trial court did not explicitly mention whether other sanctions could serve the interests of justice, the trial court implicitly rejected the efficacy of those sanctions noting the degree of prejudice to defendant and plaintiffs' past failure to comply with the court's orders and sanctions. The trial court's explanation of why it was dismissing plaintiffs' case addressed the *Dean* factors. Thus, on this record, we cannot conclude that the trial court's decision to dismiss plaintiffs' case was an abuse of discretion. *Traxler*, 227 Mich App at 286.

Plaintiffs also argue that the trial court erred in denying their motion for relief from judgment pursuant to MCR 2.612(C)(1)(c) and MCR 2.612(C)(1)(f). We review a trial court's denial of a motion for relief from judgment for an abuse of discretion. *Redding v Redding*, 214 Mich App 639, 643; 543 NW2d 75 (1995). MCR 2.612(C)(1)(c) provides that a trial court may relieve a party from a final order where there was "[f]raud (intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party." However, MCR 2.612(C)(1)(c) does not provide plaintiffs relief because the alleged misconduct was committed by their own attorney. See *Coates v Drake*, 131 Mich App 687, 691; 346 NW2d 858 (1984).

MCR 2.612(C)(1)(f) provides that a trial court may relieve a party from a final order for "[a]ny other reason justifying relief from the operation of the judgment." There are three requirements that must be fulfilled to grant relief under MCR 2.612(C)(1)(f):

- (1) the reason for setting aside the judgment must not fall under subsections a through e,
- (2) the substantial rights of the opposing party must not be detrimentally affected if the judgment is set aside, and
- (3) extraordinary circumstances must exist that mandate setting aside the judgment in order to achieve justice. [*Heugel v Heugel*, 237 Mich App 471, 478-479; 603 NW2d 121 (1999).]

Assuming without deciding that the first two requirements are fulfilled,¹ we find that the trial court did not abuse its discretion in denying the motion to grant relief under MCR 2.612(C)(1)(f). Plaintiffs claim their ignorance of their trial counsel’s discovery violations was an extraordinary circumstance; but “a lawyer’s negligence is attributable to the client and does not normally constitute grounds for setting aside a default judgment.” *Pascoe v Sova*, 209 Mich App 297, 299; 530 NW2d 781 (1995), citing *White v Sadler*, 350 Mich 511, 525; 87 NW2d 192 (1957). Plaintiffs also claim that their original trial counsel abandoned their case and that abandonment constitutes an extraordinary circumstance. An attorney’s abandonment of, or withdrawal from, a client’s case is an extraordinary circumstance under MCR 2.612(C)(1)(f). *Pascoe*, 209 Mich App at 300. However, unlike *Pascoe*, where the party’s counsel withdrew from representation without notice at trial, *id.*, plaintiffs’ trial counsel did not withdraw from the case until after the trial court granted defendant’s motion to dismiss. Plaintiffs further suggest that their counsel’s failings during discovery constituted “effective abandonment,” but fail to provide any authority for that proposition. “It is not sufficient for a party ‘simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position.’” *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998), quoting *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). “An appellant’s failure to properly address the merits of his assertion of error constitutes abandonment of the issue.” *Thompson v Thompson*, 261 Mich App 353, 356; 683 NW2d 250 (2004). Plaintiffs have not established that an extraordinary circumstance existed under MCR 2.612(C)(1)(f).

The record in this case demonstrates that plaintiffs’ original counsel was neither vigorous in his prosecution of this case nor compliant with the orders of the trial court. However, plaintiffs have not provided us with sufficient case law upon which to differentiate between their “effective abandonment” theory, which would call for reconsideration of dismissal, and ordinary professional negligence, which would not. While it may have potentially been within the trial court’s discretion to grant the motion for relief from judgment, we are unable to say that the trial court acted outside its discretion when it denied that motion.

Affirmed.

/s/ Michael J. Kelly
/s/ Joel P. Hoekstra
/s/ Cynthia Diane Stephens

¹ Neither plaintiffs nor defendant address those requirements in their briefs on appeal.