# STATE OF MICHIGAN

# COURT OF APPEALS

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| MARVIN BROWN,<br><br>Plaintiff-Appellant,<br><br>and<br><br>MICHIGAN INSTITUTE OF PAIN AND HEADACHE, PC, doing business as METRO PAIN CLINIC, and HENRY FORD HEALTH SYSTEM,<br><br>Intervening Plaintiffs,<br><br>v<br><br>MICHIGAN ASSIGNED CLAIMS PLAN,<br><br>Defendant-Appellee. | UNPUBLISHED<br>June 19, 2018<br><br>No. 338375<br>Wayne Circuit Court<br>LC No. 15-016338-NF |

Before: SWARTZLE, P.J., and SHAPIRO and BOONSTRA, JJ.

PER CURIAM.

Plaintiff Marvin Brown appeals as of right from the trial court's April 24, 2017, final order of dismissal. Plaintiff challenges the trial court's earlier order dismissing his claim for no-fault insurance benefits against defendant Michigan Assigned Claims Plan as a sanction for plaintiff's failure to comply with discovery. We affirm.

## I. BACKGROUND

On December 15, 2015, plaintiff filed a complaint against defendant alleging entitlement to no-fault insurance benefits following an automobile accident in January 2015. Shortly thereafter, the Michigan Institute of Pain and Headache, PC, and Henry Ford Health System (the intervening plaintiffs) intervened as plaintiffs seeking reimbursement for medical expenses that plaintiff incurred through their care. Defendant answered the complaints and denied plaintiff's allegations.

On April 4, 2016, the trial court entered a scheduling order setting a discovery-cutoff date of July 26, 2016, and setting case evaluation for September 2016. The order explicitly stated that

"failure to comply strictly" with all the terms of the order "may result in sanctions." On June 17, 2016, defendant filed a motion to compel discovery, noting that, on March 7, 2016, it served interrogatories and requests to produce on plaintiff, but plaintiff failed to respond. Defendant also noted that plaintiff's counsel was uncooperative in scheduling plaintiff's deposition. The record showed that defendant's counsel emailed the parties, beginning on June 7, 2016, to schedule plaintiff's deposition. Plaintiff's counsel's office responded that the deposition could be held at its office and indicated the general hours during which depositions were scheduled, but did not provide any available dates. Defendant and the intervening plaintiffs agreed to schedule plaintiff's deposition for July 12, 2016, but plaintiff's counsel's office responded that the date would not work. Defendant's counsel asked for additional dates before the July 26, 2016, discovery deadline but there was no response from plaintiff's counsel's office. Plaintiff's counsel subsequently agreed to hold the deposition on July 12, 2016, but cancelled the day before the deposition.

A hearing on the motion to compel was scheduled for July 29, 2016. Two days before the hearing, plaintiff responded to the motion and argued that the motion was irrelevant as he "will have answered all discovery prior to hearing of this motion." Plaintiff also stated that he was "ready, willing and able to appear for his next scheduled deposition." Because plaintiff did not timely file his response to defendant's motion, the motion was granted without a hearing. More than a month later, on August 31, 2016, the trial court entered an order stating:

> IT IS HEREBY ORDERED that Plaintiff, Marvin Brown, shall submit signed answers to Interrogatories and provide fully-signed and notarized authorizations, respond to responses to Defendant's Requests for Production within fourteen (14) days from the entry of this Order.
>
> IT IS HEREBY FURTHER ORDERED that Plaintiff shall appear for a deposition within thirty (30) days from the entry of this Order with failure to do so resulting in dismissal of this action with prejudice.

After entry of the order, defendant's counsel emailed plaintiff's counsel on two separate occasions requesting a date for plaintiff's deposition. Plaintiff's counsel never responded to the emails and a date was never scheduled. Moreover, plaintiff did not provide the aforementioned discovery authorizations. Plaintiff did submit answers to the interrogatories but failed to sign them as required by the trial court's order. On October 6, 2016, the trial court entered the following order of dismissal:

> Defendant, Michigan Assigned Claims Plan, having moved to compel Plaintiff's answers to discovery and to compel deposition, oral arguments having been heard, and an Order having been entered;
>
> Plaintiff failing to comply with this Court's Order of August 31, 2016 by not providing fully executed and notarized authorizations within 14 days of this Court's Order and failing to appear for deposition on or before September 30, 2016;

> IT IS NOW HEREBY ORDERED AND ADJUDGED that [plaintiff's] cause of action be dismissed with prejudice and without costs as to any party.

The trial court subsequently dismissed the intervening plaintiff's claims and, on April 24, 2017, entered a final order closing the case.

This appeal followed.

## II. ANALYSIS

This Court reviews for an abuse of discretion a trial court's decision whether to dismiss a case as a sanction for discovery abuses. *Kalamazoo Oil Co v Boerman*, 242 Mich App 75, 89; 618 NW2d 66 (2000). A trial court abuses its discretion when it chooses an outcome outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

Dismissal of a plaintiff's claim is a drastic sanction, and a trial court should evaluate whether the sanction is appropriate under the circumstances. *Duray Dev, LLC v Perrin*, 288 Mich App 143, 164-165; 792 NW2d 749 (2010). "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." *Id*. at 165 (internal citation and quotation marks omitted). Among the list of nonexhaustive factors a trial court may consider when determining an appropriate sanction are:

> (1) whether the violation was willful 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. [*Dean v Tucker*, 182 Mich App 27, 32-33; 451 NW2d 571 (1990).]

The sanction of dismissal is used in circumstances where the party has flagrantly refused to facilitate discovery and is typically accompanied by "a history of recalcitrance or deliberate noncompliance with discovery orders." *Thorne v Bell*, 206 Mich App 635, 633-634; 522 NW2d 711 (1994). Nonetheless, a trial court need not impose a series of lesser sanctions before dismissing an action. *Bass v Combs*, 238 Mich App 16, 35; 604 NW2d 727 (1999), overruled on other grounds by *Dimmit & Owens Fin, Inc v Deloitte Touche (ISC), LLC*, 481 Mich 618; 752 NW2d 37 (2008). Still, before dismissing an action, "the trial court is required to carefully evaluate all available options on the record and conclude that the sanction of dismissal is just and proper." *Vicencio v Ramirez*, 211 Mich App 501, 506; 536 NW2d 280 (1995).

We agree with plaintiff that the trial court in this case erred by failing to explain on the record its decision to dismiss plaintiff's action in light of the other available sanctions. Our conclusion that the trial court erred, however, does not answer the separate inquiry of whether

remand is necessary. Our case law indicates that dismissal may be upheld as a discovery sanction if, apart from the trial court's error in explaining its decision, the record otherwise justifies the sanction. See *Vilencio*, 211 Mich App at 507 (finding that the trial court erred by not evaluating sanction options other than dismissal, but reviewing the record to determine whether dismissal was otherwise appropriate); *Dean*, 182 Mich App at 33-35 (same).

When a sanction short of dismissal "would not better serve the interests of justice," dismissal is proper as a sanction. *North v Dept of Mental Health*, 427 Mich 659, 662; 397 NW2d 793 (1986). This severe sanction is appropriate in the case of willful refusals to facilitate discovery, *Welch v J Walter Thompson, USA, Inc*, 187 Mich App 49, 52; 466 NW2d 319 (1991), "not when the failure to comply with a discovery request is accidental or involuntary," *Kalamazoo Oil Co*, 242 Mich App at 86 (internal citation and notation omitted). "To be willful, the failure need not be accompanied by wrongful intent. It is sufficient if it is conscious or intentional." *Welch*, 187 Mich App at 52.

The record confirms that plaintiff's failure to comply with the trial court's discovery order was willful. The language of the order was clear and direct—plaintiff had to provide certain discovery within 30 days or his action would be dismissed with prejudice. Defendant's counsel reached out on multiple occasions to seek a date for plaintiff's deposition, but the entreaties were met with silence. Plaintiff had been ordered to answer defendant's interrogatories with *signed* answers, but, again, that requirement was met with silence. Even setting aside the matter of the authorizations because there may have been some miscommunication, the record is clear that plaintiff otherwise refused to abide by the trial court's discovery order. And, there is nothing in the record to suggest that there was a good-faith reason for not abiding by the order, such as a serious injury or medical condition that occurred during the 30-day period.

Nor was plaintiff's refusal to cooperate a one-off occurrence. The underlying basis for the trial court's discovery order was, after all, plaintiff's prior refusals to cooperate. Specifically, on March 7, 2016, roughly four-and-a-half months before the original discovery deadline, defendant's counsel contacted plaintiff's counsel requesting dates for plaintiff's deposition. Plaintiff's counsel failed to provide any dates, leaving counsel for defendant and the intervening plaintiffs to set a date of July 12, 2016. Plaintiff's counsel responded that this date would not work and defendant's counsel requested additional dates, to which no response was received. Additionally, as of early June 2016, plaintiff had yet to reply to defendant's interrogatories or provide discovery authorizations. Thus, by the time of defendant's June 7, 2016, motion to compel discovery, plaintiff had failed to facilitate any discovery.

After defendant filed its motion, plaintiff waited more than a month to file an untimely response. Plaintiff did not provide any of the requested discovery during that time, but, in the response brief, plaintiff promised that discovery responses would be provided within two days. Unfortunately, plaintiff did not provide responses within the promised two days, nor even within the following month while the trial court considered the proposed order.

In total, more than six months passed between defendant's first attempts to facilitate discovery and the trial court's order dismissing plaintiff's claims. It is worth noting that, in this time, both the original discovery deadline and scheduled case evaluation passed. Crucially,

plaintiff did not just miss a scheduling-order deadline; rather, he missed a specific deadline ordered by the trial court as a discovery sanction, and he was expressly warned that failure to abide by the order would result in dismissal with prejudice. Thus, the record confirms that plaintiff's silence was not the result of good-faith efforts or unavoidable conditions, but rather was the product of willful inaction in response to defendant's numerous attempts to complete discovery. It is clear to this Court that a lesser sanction would not have facilitated discovery and that dismissal of plaintiff's claims best served the interests of justice. *Bass*, 238 Mich App at 35; *Dean*, 182 Mich App at 32-33.

Accordingly, although the trial court erred by not considering other sanctions on the record, remand is not required because dismissal was the appropriate sanction.

Affirmed.

/s/ Brock A. Swartzle
/s/ Mark T. Boonstra

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PER CURIAM.

I concur in the result only.

/s/ Douglas B. Shapiro