

STATE OF MICHIGAN
COURT OF APPEALS

JULIE ANN DICE and FRANK R. DICE,
Individually and as Next Friend of FRANK D.
DICE and STEVEN DICE,

UNPUBLISHED
July 2, 2002

Plaintiffs-Appellants,

v

MARY ANN CHASE,

No. 229643
Saginaw Circuit Court
LC No. 99-030728-NI

Defendant-Appellee.

Before: Fitzgerald, P.J., and Holbrook, Jr., and Doctoroff, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's order dismissing their complaint with prejudice for failure to provide discovery. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiffs filed suit alleging that on November 2, 1996, Julie Ann Dice sustained injuries when the vehicle she was operating collided with the vehicle driven by defendant Mary Ann Chase. Plaintiffs asserted a loss of consortium claim on behalf of Frank R. Dice, Frank D. Dice, and Steven Dice. On two occasions the adult plaintiffs failed to appear for properly noticed depositions. On the first scheduled date plaintiffs appeared at their counsel's office in Flint rather than at the designated site in Saginaw. On the second scheduled date plaintiffs were out of town. On each occasion defendant's counsel was informed that plaintiffs' counsel was in court on an unrelated matter.

Defendant moved to dismiss plaintiffs' complaint pursuant to MCR 2.313(D) on the ground that plaintiffs twice failed to appear for noticed depositions. At a hearing, defendant's counsel stated that he received no advance notice that neither plaintiffs nor their counsel would appear as scheduled. The trial court told plaintiffs' counsel it had contacted the courts in which counsel represented that he appeared on the deposition dates, and the information obtained from the courts was inconsistent with that provided by counsel. Counsel could provide no explanation as to why the depositions were not rescheduled. The trial court found that plaintiffs' failure to attend the depositions was willful, wanton, and flagrant, and dismissed the matter with prejudice.

MCR 2.313(D)(1)(a)¹ states that if a party to an action fails to appear for his deposition, after receiving proper notice, the court in which the action is pending may order sanctions, including those authorized under MCR 2.313(B)(2)(a), (b), and (c). MCR 2.313(B)(2)(c) authorizes the court to dismiss an action if a party fails to provide or permit discovery. Dismissal is a drastic sanction that should be imposed only when a party willfully and flagrantly refuses to facilitate discovery. To be willful, a failure need only be conscious or intentional rather than accidental or involuntary. *Edge v Ramos*, 160 Mich App 231, 234; 407 NW2d 625 (1987). When determining the appropriate sanction the court should consider various factors, including: (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 provisions of the court's orders; and (5) whether a lesser sanction would better serve the interests of justice. The record should reflect that the trial court gave careful consideration to other options before imposing dismissal as a sanction. We review the trial court's imposition of discovery sanctions for an abuse of discretion. *Bass v Combs*, 238 Mich App 16, 26-27; 604 NW2d 727 (1999).

Plaintiffs argue the trial court abused its discretion by dismissing their case. We disagree and affirm. Plaintiffs' counsel attributed plaintiffs' failure to appear on both occasions to his own scheduling conflicts and his required appearances in other courts on those dates. The trial court contacted the other courts and received information that at a minimum cast doubt on counsel's truthfulness regarding his whereabouts on those dates. The evidence supported the trial court's finding that on both occasions plaintiffs willfully failed to appear for properly noticed depositions. *Edge, supra*. Plaintiffs and their counsel made no attempts to accommodate defendant's right to conduct discovery. Defendant was prejudiced in that she was unable to conduct meaningful discovery prior to the close of the discovery period. Plaintiffs correctly point out that the trial court did not evaluate other options on the record before dismissing the case; however, the trial court's emphasis on the discrepancy between the information it received from the other courts and the information provided by plaintiffs' counsel clearly indicated the trial court concluded that dismissing the case was its only viable option. Under all the circumstances, we hold the trial court's dismissal of the case with prejudice did not constitute an abuse of discretion. *Bass, supra*.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Donald E. Holbrook, Jr.
/s/ Martin M. Doctoroff

¹ The trial court's order dismissing the action cites MCR 2.313(D)(1)(b) as the ground on which the dismissal is based. That subrule provides that a party is subject to sanctions if he fails to serve answers or objections to interrogatories. The hearing transcript indicates that the trial court dismissed the case due to plaintiffs' failure to appear for properly noticed depositions. It is logical to assume that the order's reference to MCR 2.313(D)(1)(b) is merely a typographical error.