

STATE OF MICHIGAN
COURT OF APPEALS

JAYLIN SIBA,

Plaintiff-Appellant,

v

FARM BUREAU MUTUAL INSURANCE
COMPANY OF MICHIGAN, FARM BUREAU
GENERAL INSURANCE COMPANY, and
SAFECO INSURANCE COMPANY,

Defendants-Appellees.

UNPUBLISHED
July 24, 2018

No. 339049
Macomb Circuit Court
LC No. 2016-001587-NF

Before: CAMERON, P.J., and JANSEN and O'CONNELL, JJ.

PER CURIAM.

In this first-party no-fault action, plaintiff, Jaylin Siba, appeals as of right the trial court's order dismissing his complaint for no-fault benefits with prejudice. Because the trial court did not adequately articulate its reasons for dismissing the case or demonstrate whether it considered the possibility of a lesser sanction, we reverse.

I. BACKGROUND

Siba was involved in an automobile accident in which he was injured. He alleged that he was entitled to personal protection insurance (PIP) benefits and uninsured motorist vehicle benefits from defendants, Farm Bureau Mutual Insurance Company, Farm Bureau General Insurance Company (collectively, Farm Bureau), and Safeco Insurance Company (Safeco). When defendants failed to provide those benefits, Siba brought this lawsuit. After nearly 10 months of discovery, the trial court dismissed Siba's complaint with prejudice after Siba failed to attend a court-ordered independent medical examination (IME). On appeal, Siba contends that the trial court abused its discretion by dismissing his complaint because the circumstances and the record did not warrant dismissal as a sanction.

II. DISCUSSION

"We review a dismissal of a case for failure to comply with a court order for an abuse of discretion." *Woods v SLB Prop Mgt, LLC*, 277 Mich App 622, 630; 750 NW2d 228 (2008). A trial court abuses its discretion when its "decision is outside the range of principled outcomes." *Hardrick v Auto Club Ins Ass'n*, 294 Mich App 651, 659-660; 819 NW2d 28 (2011). We review

a trial court's interpretation and application of a court rule de novo, *Donkers v Kovach*, 277 Mich App 366, 369; 745 NW2d 154 (2007), and the factual findings underlying the trial court's decision for clear error, *Hardrick*, 294 Mich App at 660. "A finding is clearly erroneous when this Court is left with a definite and firm conviction that a mistake has been made." *Id.* (quotation marks and citation omitted).

"Trial courts possess the inherent authority to sanction litigants and their counsel, including the right to dismiss an action." *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). "MCR 2.313(B)(2)(c) explicitly authorize[s] a trial court to enter an order dismissing a proceeding or rendering a judgment by default against a party who fails to obey an order to provide discovery." *Kalamazoo Oil Co v Boerman*, 242 Mich App 75, 86; 618 NW2d 66 (2000) (quotation marks and citation omitted). Because dismissal is the harshest sanction, a trial court "must follow the procedures set forth in our court rules before ordering an involuntary dismissal." *Donkers*, 277 Mich App at 369. A trial court imposing dismissal as a sanction must "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). A trial court's failure to state its findings or consider lesser sanctions on the record constitutes an abuse of discretion. *Vicencio*, 211 Mich App at 506-507; *Hanks v SLB Mgt, Inc*, 188 Mich App 656, 660; 471 NW2d 621 (1991).

"The record should reflect that the trial court gave careful consideration to the factors involved and considered all its options in determining what sanction was just and proper in the context of the case before it." *Bass v Combs*, 238 Mich App 16, 26; 604 NW2d 727 (1999), overruled on other grounds by *Dimmitt & Owens Fin, Inc v Deloitte Touche (ISC), LLC*, 481 Mich 618; 752 NW2d 37 (2008). Those factors include:

- (1) whether the violation was willful or accidental;
- (2) the party's history of refusing to comply with previous court orders;
- (3) the prejudice to the opposing party;
- (4) whether there exists a history of deliberate delay;
- (5) the degree of compliance with other parts of the court's orders;
- (6) attempts to cure the defect;
- and (7) whether a lesser sanction would better serve the interests of justice. [*Id.*]

This list is not exhaustive. *Vicencio*, 211 Mich App at 507. "Severe sanctions are generally appropriate only when a party flagrantly or wantonly refuses to facilitate discovery, not when the failure to comply with a discovery request is accidental or involuntary." *Kalamazoo Oil Co*, 242 Mich App at 86 (quotation marks and citation omitted).

In this case, the trial court's finding regarding whether Siba's failure to attend the court-ordered IME was willful or accidental was unclear. The trial court did not make a finding either way, first questioning "how willful" Siba's inaction was, then adding that Siba might have been negligent, and concluding that if so, his negligence was "culpable." Such an equivocal statement, however, is inconsistent with a trial court's obligation to decide whether the failure to comply with discovery was willful or accidental.

In addition, the trial court did not consider several other factors. Siba's history of sluggish responses to discovery, his failure to attend two prior scheduled IMEs, and his failure to attend a second IME contrary to the trial court's order may support a finding that the discovery

violation that led to dismissal was not accidental. Siba's history of delays necessitated the filing of no less than five separate motions to compel, three of which were withdrawn and two of which resulted in orders compelling discovery. After the first order, Siba was still late responding to discovery, but he maintained that Farm Bureau agreed to accept his responses later than the date stated in the order. Siba complied with the second order except that he did not attend a second IME. He claimed that he was confused about the scheduling and there was no reason for him to have a second IME when he had already gone to one. Siba's apparent struggle to comply with the discovery process also necessitated two extensions of the discovery cutoff date, and Farm Bureau responded to Siba's initial delay in responding to written discovery with a first motion to dismiss that it later agreed to withdraw, apparently because Siba submitted the requested responses. Nonetheless, by the time Farm Bureau filed its second motion to dismiss at issue in this appeal, Siba had attended one IME and his deposition and had responded to written discovery, and Farm Bureau's only basis for filing the second motion to dismiss was Siba's failure to attend the second scheduled IME. In addition, the record contains no evidence that Siba made any attempt to cure his noncompliance and attend a second IME despite filing a motion for reconsideration of the trial court's dismissal order. This history may support the trial court's decision, but the trial court did not make a record that it was considered.

The trial court further failed to address the prejudice to Farm Bureau. Farm Bureau expended resources scheduling the second IME appointment and organizing transportation for Siba to attend it, and Siba's failure to go to the second IME left Farm Bureau without evidence it might have been able to use to mount its defense. On the other hand, by the time Farm Bureau filed its second motion to dismiss, Siba had already submitted to one IME, had been deposed by Farm Bureau, and had seemingly provided all other requested discovery. At that point, it is doubtful that Farm Bureau's ability to mount a defense was truly prejudiced by Siba's failure to attend the second IME after he had already attended one IME.

Finally, the trial court did not analyze on the record whether dismissal with prejudice was an appropriate sanction compared to lesser possible sanctions. Ordinarily, given the debatable facts in this case, dismissal would fall neatly within the discretion of the trial court as an appropriate sanction. Siba's conduct during discovery, whether Siba's discovery violation was willful, and the extent to which the violation prejudiced Farm Bureau are fact-intensive inquiries. Siba has undoubtedly demonstrated a history of sluggish compliance with discovery that necessitated numerous filings and two extensions, and he has shown little interest in curing the violation that led to dismissal of his complaint. This case ultimately turns on the trial court's failure to make a record of whether lesser sanctions might have better served the interests of justice. Therefore, the trial court abused its discretion because the trial court abrogated its responsibility by failing to consider the possibility that a lesser sanction would have better served the interests of justice.

We reverse and remand for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Thomas C. Cameron

/s/ Kathleen Jansen

/s/ Peter D. O'Connell