STATE OF MICHIGAN

COURT OF APPEALS

NICALAS MORRIS and BRIAN LA CROIX,

Plaintiffs-Appellants/Cross-Appellees,

V

CLEMCO INDUSTRIES CORPORATION,

Defendant-Appellant/Cross-Appellee,

and

W.H. DUFFILL INC.,

Defendant.

UNPUBLISHED
December 27, 2002

No. 235456
Wayne Circuit Court
LC No. 99-906115-NP

Before: Hood, P.J. and Smolenski and Kelly, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's order dismissing their case for lack of an expert witness, the trial court having stricken plaintiffs' expert. Defendant Clemco Industries Corporation (Clemco) cross-appeals arguing that even if the trial court erred in striking plaintiffs' expert for discovery violations, that the expert's opinions were inadmissible. Defendant Clemco also cross-appeals the trial court's order striking its expert witness. We reverse in part, affirm in part and remand for further proceedings.

I. Basic Facts and Procedural History

During the course of plaintiffs' employment at Western Waterproofing Company (Western), plaintiffs were injured while moving allegedly defective sand pots. The sand pots were designed and manufactured by defendant Clemco and sold to Western by defendant W. H. Duffill, Inc. (Duffill).

On May 1, 1999, plaintiffs filed their multi-count products liability claim, essentially alleging that the sand pots were defectively designed. After answering the complaint, both defendants Clemco and Duffill served interrogatories on plaintiffs, requesting, in part, information pertaining to the identity and opinions of plaintiffs' potential experts. Plaintiffs

answered the expert questions stating, "My attorney advises a decision on an expert witness has not yet been made."

On July 13, 1999, the trial court entered a scheduling order requiring witness lists to be exchanged by February 7, 2000. Plaintiffs filed their witness list on February 10, 2000, three days late. Plaintiffs listed Howard Sarrett as their expert. Defendant Clemco's timely filed witness list, instead of naming an expert, merely stated, "Expert witness on design and use of sand pot to be determined once all the facts have been evaluated."[1] Defendant Duffill's expert was similarly identified. On February 17, 2000, defendant Clemco served another set of interrogatories on plaintiffs, exclusively addressing expert opinions. Defendant Duffill did not submit separate interrogatories, but requested supplementation of plaintiffs' original interrogatory answers. Plaintiffs answered defendant Clemco's expert witness interrogatories and supplemented its answers to defendant Duffill's original expert interrogatories. Neither defendant moved to compel supplemental answers on the ground that plaintiffs' answers were evasive, incomplete or inadequate. Defendants sought production of all documents exchanged between plaintiffs' counsel and Sarrett. In response, plaintiffs stated, "No. This information is privileged." Defendants did not seek to compel the production of these documents.

Plaintiffs likewise served interrogatories on defendants. Relevant here are two sets of interrogatories to defendant Clemco. In regard to the first set, plaintiffs received answers only after the trial court ordered defendant Clemco to answer. In regard to the second set, dealing with expert witnesses, defendant Clemco never answered.

In the meantime, the trial court granted summary disposition to defendant Duffill. Defendant Clemco removed the case to Federal Court. By the time the case was again pending in the trial court, plaintiffs offered Sarrett for a discovery only deposition; however, it was never taken for reasons that are unclear from the record.

On May 29, 2001, Sarrett's de bene esse deposition took place with trial scheduled for June 4, 2001. At the time of Sarrett's deposition, plaintiffs produced Sarrett's report for inspection only, but did not provide defendant Clemco with a copy until several days before trial.

On the day of trial, the trial court heard several motions. Plaintiffs moved to strike defendant Clemco's expert, Kevin Smith, because he had not been named as a potential expert until defendant Clemco submitted its trial brief, shortly before trial. Defendant Clemco argued that it was unable to determine if a rebuttal expert was needed until Sarrett's de bene esse deposition, asserting that plaintiffs' answers to interrogatories were evasive and incomplete. The trial court found disclosure was not timely made and granted plaintiffs' motion.

Defendant Clemco moved to exclude plaintiffs' expert from testifying at trial. Defendant Clemco contended that Sarrett was unqualified and his opinions did not meet the minimum requirements, pursuant to MRE 702 and MCL 600.2955. The trial court dismissed the motion as untimely, but ruled that defendant Clemco could renew the motion after cross-examination. Defendant Clemco further sought to exclude Sarrett's testimony contending that plaintiffs'

[1] Defendant Clemco supplemented its witness list on May 31, 2000, but used the same language in identifying its potential expert.

answers to interrogatories were evasive and incomplete. Defendant Clemco pointed out that although plaintiffs had answered the expert witness interrogatories, albeit incompletely and evasively, plaintiffs had never supplemented the original set of interrogatories.

The trial court, clearly frustrated that plaintiffs' witness list was three days late, stated:

> All right. Again, not to be redundant, one of the most disturbing aspects of being up here is the lack of adherence to court orders, from big law firms, to small to one man firms to prominent international law firms to local law firms. The decision, gentlemen, does not just -- in fact, this case -- this case does not stand on its own.
>
> Whatever decision I make I'm of the firm opinion that that's something that the lawyers can use as a guide in terms of the policies and procedures that I utilize here. It's always been my position that lawyers cannot amend court orders. You can't do it. And yet every time you turn around in general you have lawyers that agree to stipulate away discovery cut-off deadlines and continue discovery and I've indicated to counsels before that any discovery done in violation of a court order would not be admissible during trial.

The trial court granted defendant Clemco's motion to exclude Sarrett, finding that plaintiffs' witness list was late and the original interrogatories were not supplemented. The trial court "recognized the harshness" of striking Sarrett's testimony but added:

> Every Friday I have lawyers before me that, for whatever reasons, believe that they could have taken -- do as they wish irrespective of court rules, do as they wish irrespective of the court orders and that simply cannot be tolerated by the Court, or quite frankly, I would think by any other Judge on the bench.

Thereafter, the trial court granted defendant Clemco's motion to dismiss plaintiffs' case because it lacked supporting expert testimony.

II. Standard of Review

We review a motion for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).[2] We review a trial court's decision to grant or deny discovery sanctions, including dismissal, for an abuse of discretion. *Vicencio v Ramirez*, 211 Mich App 501, 507; 536 NW2d 280 (1995); *Richardson v Ryder Truck Rental, Inc*, 213 Mich App 447, 450; 540 NW2d 696 (1995).

III. Plaintiffs' Expert Witness

Plaintiffs argue the trial court abused its discretion by striking their expert witness. We agree.

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[2] Although the trial court's order was entitled "Order of Final Dismissal," we note that the order was, in essence, an order granting summary disposition pursuant to MCR 2.116(C)(10).

Parties are subject to sanctions for failure to comply with a discovery order. MCR 2.313(B). The imposition of sanctions may include taking facts as established, barring claims or defenses, striking pleadings, staying proceedings, default or dismissal, citation for contempt of court and imposition of costs. *Id*. However, the trial court should act cautiously before imposing the sanctions of dismissal, default or the barring of an expert witness that will result in dismissal. *Hanks v SLB Management, Inc*, 188 Mich App 656, 658; 471 NW2d 621 (1991); *Dean v Tucker*, 182 Mich App 27, 32; 451 NW2d 571 (1990); *Equico Lessors, Inc v Original Buscemi's, Inc*, 140 Mich App 532, 534-535; 364 NW2d 373 (1985). The court must carefully evaluate all available options on the record before concluding that such a drastic sanction is just and proper. *Kalamazoo Oil Co v Boerman*, 242 Mich App 75, 86; 618 NW2d 66 (2000), quoting *Richardson, supra*; *Hanks, supra*.

To determine whether to strike an expert witness when it will result in the dismissal of the case, the circumstances of the case must be considered, including (1) whether the violation was willful or accidental, (2) the party's history of refusing to comply with discovery, (3) the prejudice to the opponent, (4) actual notice to the opponent of the information sought, (5) the party's history in causing deliberate delay, (6) the degree of compliance with other orders, (7) any attempt to timely cure the defect, (8) the efficacy of any lesser sanction and (9) the existence of a discovery order. *Dean, supra* at 32-33; *Equico, supra* at 534-535.

A review of the record indicates that the basis for striking plaintiffs' witness was plaintiffs' three-day delay in filing the witness list and failure to supplement the original interrogatories. Neither warrants the sanction imposed by the trial court. The mere fact that a witness list is not timely filed does not, in and of itself, justify striking the entire list or a specific witness. *Dean, supra* at 32-34. There is no indication that plaintiffs' three-day delay in filing the witness list was anything other than accidental. There was no prejudice to defendant Clemco, particularly in light of the fact that defendant Clemco was aware of plaintiffs' expert witness and his proposed testimony. Additionally, the record does not demonstrate a history of plaintiffs engaging in deliberate delay, but rather, establishes a record of compliance with the trial court's orders.

Furthermore, failure to supplement the original interrogatories does not justify striking plaintiffs' expert. A party who has responded to a discovery request with a response that was complete when made has a duty to seasonably supplement the response when the subject matter of the request is expert testimony. MCR 2.302E(1)(a)(ii). If the party fails to seasonably supplement the response, the trial court may enter an order that is just, including sanctions. MCR 3.302E(2); MCR 2.313(B)(2)(b). However, because sanctions are discretionary, the trial court must carefully consider the circumstances of the case before it. Here, there is no indication that plaintiffs willfully failed to provide information regarding their expert witness. Indeed, plaintiffs offered their expert to defendant Clemco for deposition and answered defendant Clemco's expert witness interrogatories. The expert's anticipated testimony was detailed in plaintiffs' trial brief and mediation summary. Although plaintiffs failed to supplement the original set of interrogatories to defendant Clemco, the identical interrogatories were supplemented to defendant Duffill and a copy was provided to defendant Clemco. Because these circumstances simply do not warrant the striking of plaintiffs' expert, the trial court abused its discretion by imposing this sanction.

Finally, defendant Clemco argues that plaintiffs' answers to interrogatories were incomplete and evasive. After review of the record, we are unable to determine the manner in which the answers are inadequate. We note that if defendant Clemco, during the course of discovery, believed the answers were insufficient, it could have moved the trial court to compel plaintiffs to provide more complete answers. At that time, defendant Clemco could have explained how the answers were incomplete or evasive and what specific information it was seeking.

IV. Defendant's Cross-Appeal

Next, defendant Clemco argues the trial court erred in denying its motion to strike plaintiffs' expert testimony based on MRE 702 and MCL 600.2955. However, this issue is not preserved for appellate review because the trial court did not address the substance of the motion. This Court does not review issues not addressed by the trial court. *Garavaglia v Centra, Inc,* 211 Mich App 625, 628; 536 NW2d 805 (1995). Further, no manifest injustice will result from this Court's failure to review the issue. *Kratze v Independent Order of Oddfellows, Garden City Lodge No. 11;* 442 NW2d 136, 141, n 5; 500 NW2d 115 (1993). The trial court dismissed the motion as untimely, but ruled that defendant Clemco could renew the motion after cross-examination.

Defendant Clemco also argues that the trial court abused its discretion in striking its expert witness. We disagree. Unlike plaintiffs, defendant Clemco did not timely disclose the identity of its expert. Defendant Clemco's expert witness was not named in either its original witness list or its amended witness list. Additionally, defendant Clemco never responded to plaintiffs' expert witness interrogatories that were outstanding for over one year.[3] There was no effort made to timely cure the failure to provide the identity of the witness or the substance of his proposed testimony. Plaintiffs' first notice of the identity and anticipated testimony of defendant Clemco's proposed expert was in defendant Clemco's trial brief submitted shortly before trial. Based on this untimely notice, plaintiffs would be prejudiced if the expert was permitted to testify. On this record, we cannot say that the trial court abused its discretion by striking defendant Clemco's expert witness.

Reversed in part, affirmed in part, and remanded for further proceedings. We do not retain jurisdiction.

/s/ Harold Hood
/s/ Michael R. Smolenski
/s/ Kirsten Frank Kelly

[3] The record shows that even as of the day of trial, plaintiffs' expert interrogatories to defendant Clemco remained unanswered.