

STATE OF MICHIGAN
COURT OF APPEALS

NURAH PETROSS,

Plaintiff-Appellant,

v

CHRISTI MARIE SOBEK and KEVIN EUGENE
CHANDLER,

Defendants-Appellees.

UNPUBLISHED

April 17, 2014

No. 312968

Wayne Circuit Court

LC No. 11-004235-NI

Before: HOEKSTRA, P.J., and SAWYER and GLEICHER, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order dismissing her automobile negligence case with prejudice. Because the trial court abused its discretion by failing to consider on the record whether other sanctions would be just and proper, we reverse the trial court's order dismissing plaintiff's case and vacate its award of attorney fees.

Plaintiff's case was scheduled for trial at 8:30 a.m. on September 27, 2012. However, plaintiff did not arrive in the courtroom on time, and at 10:10 a.m. the trial court dismissed the case with prejudice because plaintiff was not present and plaintiff's counsel could not provide an explanation for plaintiff's absence. The trial court stated:

The matter was set for jury at nine o'clock, it's 10:10 [a.m.]. We've been waiting for your client for an hour and 10 minutes and, in fact, we were going to discuss possibly settling it. We can't discuss settlement on the day of a jury trial if the plaintiff fails to appear for her own jury trial, so therefore, the case is being dismissed.

Defense counsel inquired whether the dismissal was with prejudice, and the trial court clarified that the case was dismissed with prejudice. Minutes after the case was dismissed, plaintiff walked into the courtroom.

Following the trial court's dismissal of her case, plaintiff executed an affidavit wherein she explained that she was dealing with significant medical issues on the morning of the trial, including "extreme back pain," swelling in her knee, symptoms of numbness and tingling, muscle spasms, and a migraine. Plaintiff took medication to alleviate her symptoms; however, that medication took time to begin working. She explained that she arrived at the courthouse at

9:20 a.m., had difficulty finding a parking spot, did not bring her cellular telephone because she believed it was not allowed, and initially was misdirected to an incorrect courtroom. Plaintiff further stated that once she found the correct courtroom, she stood outside the courtroom door and waited until the proceedings she was listening to ended before opening the door. Plaintiff filed her affidavit along with a motion for relief from the order of dismissal later on the day the trial court dismissed her case.

On September 28, 2012, a motion hearing was held, and plaintiff was on time and present at the hearing. The trial court denied the motion, stating that it

waited until ten after 10:00 [a.m.], called a whole bunch of other matters. The fact that she walked in at ten after 10:00 [a.m.] is nice, but she wasn't here to even consult with for purposes of settlement, the last minute settlement discussions and nor—she wasn't here at 8:30, she wasn't here at 9:00, she wasn't here when you went to look for her. She wasn't here when I sent staff to look for you who was looking for her.

Thus, the trial court concluded that “the case will remain dismissed.”

On October 10, 2012, plaintiff moved for reconsideration, and on October 17, 2012, and on October 25, 2012, the trial court denied plaintiff's motion without oral argument. Thereafter, defendants moved for entry of judgment and for attorney fees pursuant to MCR 2.403(O), and plaintiff moved for a stay of proceedings pending appeal. The trial court held a hearing on the motions on October 26, 2012. At the day of the hearing, the trial court further stated that it wanted to clarify “the reason for the denial of the motion for reconsideration.” The trial court then explained that plaintiff was an hour and a half late, plaintiff's counsel had no explanation for her absence, the parties were supposed to engage in settlement negotiations, and it had to discharge the jury. The trial court then heard arguments regarding the stay of proceedings and attorney fees. The trial court denied plaintiff's request for a stay and awarded defendants \$4,323.91 in attorney fees and costs pursuant to MCR 2.403(O). Plaintiff now appeals.

We review a trial court's decision to dismiss an action for an abuse of discretion. *Vicencio v Ramirez*, 211 Mich App 501, 506; 536 NW2d 280 (1995). A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *Corporan v Henton*, 282 Mich App 599, 605-606; 766 NW2d 903 (2009).

While a court may exercise its discretion to dismiss a case when a party or counsel fails to appear at a scheduled trial, MCR 2.504(B)(1), dismissal “is a drastic step that should be taken cautiously,” *Vicencio*, 211 Mich App at 506. Moreover, “[o]ur legal system favors disposition of litigation on the merits.” *Id.* at 507. Before imposing the sanction of dismissal, “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.” *Id.* at 506. In *Vicencio*, this Court concluded that the trial court abused its discretion by dismissing the case because it failed to evaluate other available sanctions on the record. *Id.* at 506-507. This Court set forth a nonexhaustive list of factors to be considered before imposing the sanction of dismissal:

(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.* at 507, citing *Dean v Tucker*, 182 Mich App 27, 32-33; 451 NW2d 571 (1990).]

See also *Woods v SLB Prop Mgt, LLC*, 277 Mich App 622, 631; 750 NW2d 228 (2008) (stating "dismissal is a drastic sanction that requires consideration of several factors," and citing the seven factors set forth by *Vicencio*, 211 Mich App at 507).

In this case, the trial court did not consider the seven factors set forth in *Vicencio*, nor did it evaluate other available sanctions on the record. The trial court also made no findings in regard to whether the sanction of dismissal was just and proper. Accordingly, dismissal of plaintiff's case was an abuse of discretion. *Vicencio*, 211 Mich App at 506-507.

Here, the record indicates that plaintiff's failure to arrive on time was due to medical issues outside of her control, that she was not habitually late, and that she generally complied with the trial court's orders. Further, there is no evidence of prejudice to defendant as a result of plaintiff's tardiness, and plaintiff did arrive at the courthouse on the day of the scheduled trial, albeit about an hour and a half late. Under the circumstances of this case, we conclude that the harsh penalty of dismissal was unwarranted, and thus, an abuse of discretion. On remand, the trial court may consider whether a lesser sanction is appropriate.

In light of our conclusion that the trial court abused its discretion by dismissing plaintiff's case, we need not address the additional issues raised by plaintiff. However, we note that the trial court erred by awarding case evaluation sanctions because in *Oram v Oram*, 480 Mich 1163; 746 NW2d 865 (2008), the Court clearly stated that case evaluation sanctions are not proper upon dismissal of a case because an order dismissing a case does not constitute "a verdict" as defined by MCR 2.403(O). Accordingly, the trial court's award of attorney fees is vacated. The trial court may reassess whether attorney fees are warranted under MCR 2.403(O)(1) once a verdict is rendered in this case.

Reversed in part, vacated in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. Plaintiff, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Joel P. Hoekstra
/s/ David H. Sawyer
/s/ Elizabeth L. Gleicher