

STATE OF MICHIGAN
COURT OF APPEALS

ADVANCE SURGERY CENTER LLC,

Plaintiff-Appellant,

v

ALLSTATE PROPERTY & CASUALTY
INSURANCE COMPANY,

Defendant-Appellee.

UNPUBLISHED

January 11, 2024

No. 364613

Oakland Circuit Court

LC No. 21-188435-NF

Before: GLEICHER, P.J., and BORRELLO and SHAPIRO, JJ.

PER CURIAM.

In this action for unpaid no-fault benefits and declaratory relief, plaintiff appeals as of right the trial court’s order precluding plaintiff from calling any witnesses at trial as well as its grant of summary disposition under MCR 2.116(C)(10) (no genuine issue of material fact) to defendant on the basis of plaintiff’s resulting inability to call any witnesses. We reverse, vacate, and remand for further proceedings consistent with this opinion.

I. FACTUAL AND PROCEDURAL BACKGROUND

This case involves a motor vehicle accident in which the claimant, Kimani Braswell, suffered injuries. Braswell sought medical treatment from plaintiff, and plaintiff brought the instant case against defendant for unreasonable delay or unreasonable denial of no-fault benefits and declaratory relief. In its scheduling order, the trial court ordered that each party submit its witness list by November 30, 2021, but plaintiff did not meet this deadline. On June 1, 2022, defendant filed a motion in limine requesting the trial court preclude plaintiff from calling any opinion, fact, or expert witnesses at trial, arguing such witnesses would result in a trial by surprise and unfair prejudice to defendant because plaintiff failed to timely file its witness list. Plaintiff filed its witness list on June 17, 2022.

At the hearing on defendant’s motion in limine, plaintiff argued there would be no surprise because defendant had notice of plaintiff’s witnesses. Specifically, plaintiff argued that defendant could not credibly argue it was surprised by the fact that plaintiff intended to call the claimant, her surgeon (who had been deposed), defendant’s claims adjustor, and defendant’s biller (who had

been deposited). The trial court did not specifically address whether these facts mitigated any potential prejudice to defendant, and instead concluded that because plaintiff's witness list was filed "well after the witness list cutoff[,]" it would necessarily be a trial by surprise. The trial court also noted plaintiff failed to seek leave to file its witness list. As a result, the trial court struck plaintiff's untimely witness list and granted defendant's motion in limine. Defendant later moved for summary disposition under MCR 2.116(C)(10), which the trial court granted, solely on the basis of plaintiff's inability to present witnesses, finding that even the claimant's medical records could not be admitted because its order barred plaintiff from calling any authenticating witnesses. Plaintiff now appeals.

II. ANALYSIS

Plaintiff argues the trial court erred by precluding it from offering any witnesses, and, by extension, granting summary disposition to defendant on the basis of plaintiff's inability to produce witnesses. We agree.¹

MCR 2.401(I)(1) states: "No later than the time directed by the court . . . the parties shall file and serve witness lists." The trial court "may order that any witness not listed in accordance with this rule will be prohibited from testifying at trial except upon good cause shown." MCR 2.401(I)(2). "Once a party has failed to file a witness list in accordance with the scheduling order, it is within the trial court's discretion to impose sanctions against that party." *Duray Dev, LLC v Perrin*, 288 Mich App 143, 164; 792 NW2d 749 (2010). "These sanctions may preclude the party from calling witnesses." *Id.* "Disallowing a party to call witnesses can be a severe punishment, equivalent to a dismissal." *Id.* However, "the mere fact that a witness list was not timely filed does not, in and of itself, justify the imposition of such a sanction." *Dean v Tucker*, 182 Mich App 27, 32; 451 NW2d 571 (1990).

"Severe sanctions are generally appropriate only when a party flagrantly and wantonly refuses to facilitate discovery, not when failure to comply with a discovery request is accidental or involuntary." *Kalamazoo Oil Co v Boerman*, 242 Mich App 75, 86; 618 NW2d 66 (2000) (citation omitted). "Because the decision [to disallow a party from presenting witnesses] is within the trial court's discretion, caselaw mandates that the trial court consider the circumstances of each case to determine if such a drastic sanction is appropriate." *Duray Dev, LLC*, 288 Mich App at 164-165 (quotation marks and citation omitted). "[T]he record should reflect that the trial court gave careful

¹ We review "for an abuse of discretion a trial court's decision to bar witness testimony after a party has failed to timely submit a witness list." *Duray Dev, LLC v Perrin*, 288 Mich App 143, 162; 792 NW2d 749 (2010). "An abuse of discretion exists when the trial court's decision falls outside the range of principled outcomes." *Id.* Motions for summary disposition under MCR 2.116(C)(10) are reviewed de novo. *Johnson v Recca*, 492 Mich 169, 173; 821 NW2d 520 (2012). "A motion for summary disposition brought pursuant to MCR 2.116(C)(10) tests the factual support for a claim." *Innovative Adult Foster Care, Inc v Ragin*, 285 Mich App 466, 474-475; 776 NW2d 398 (2009). "A motion under MCR 2.116(C)(10) may only be granted when there is no genuine issue of material fact. A genuine issue of material fact exists when the record leaves open an issue upon which reasonable minds might differ." *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 160; 934 NW2d 665 (2019).

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.” *Duray Dev, LLC*, 288 Mich App at 165 (alteration in original). *Duray Dev, LLC* provides a nonexhaustive list of factors to consider, including:

(1) whether the violation was wilful 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. . . . [*Id.*, quoting *Dean*, 182 Mich App at 32-33 (alteration in original).]

“The trial court should also determine whether the party can prove the elements of his position based solely on the parties’ testimony and any other documentary evidence.” *Duray Dev, LLC*, 288 Mich App at 165 (quotation marks and citations omitted).

The trial court’s order precluding plaintiff from calling any witnesses was a sanction equivalent to dismissal, which is apparent given the trial court’s ultimate grant of summary disposition to defendant on that basis. Accordingly, the trial court was obligated to carefully consider the *Duray Dev, LLC* factors in ruling on defendant’s motion in limine. *Duray Dev, LLC*, 288 Mich App at 164-165. The trial court failed to do this.

The record shows the trial court never considered the majority of the *Duray Dev, LLC* factors. In granting the motion, the trial court only briefly touched upon the third (prejudice), fourth (actual notice), and seventh (timely notice) factors. We conclude that the failure to consider the other *Duray Dev, LLC* factors was reversible error. Moreover, the trial court did not consider lesser sanctions before imposing a sanction that was a de facto dismissal.

We reverse and remand for the trial court to reassess defendant’s motion in limine, taking all the *Duray Dev, LLC* factors into consideration, “and explaining its determination on the record.” *Duray Dev, LLC*, 288 Mich App at 165-166. Because the grant of summary disposition rested solely on plaintiff’s failure to timely file its witness list, we vacate the trial court’s order granting summary disposition to defendant and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher

/s/ Stephen L. Borrello

/s/ Douglas B. Shapiro