

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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JEFFREY BREWER,

Plaintiff-Appellee,

v

MONROE DODGE-CHRYSLER, INC.,

Defendant-Appellant.

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UNPUBLISHED

August 3, 2006

No. 259892

Oakland Circuit Court

LC No. 03-048127-CP

Before: Fitzgerald, P.J., and Saad and Cooper, JJ.

PER CURIAM.

Defendant, Monroe Dodge-Chrysler, appeals an order of judgment in the amount of \$28,217 in favor of plaintiff, Jeffrey Brewer. Specifically, Monroe Dodge-Chrysler challenges a trial court order that prevented it from presenting witnesses or exhibits at trial on the grounds that Monroe Dodge-Chrysler failed to file a witness or exhibit list in the case. We affirm.

I. Facts and Procedural History

On May 2, 2002, Brewer bought a used PT Cruiser from Monroe Dodge-Chrysler and, thereafter, he experienced numerous steering problems. According to Brewer, despite the fact that Monroe Dodge-Chrysler attempted to repair the car before he bought it, the dealership failed to disclose that the car was in a prior accident and failed to adequately repair the vehicle.

Brewer filed his complaint against Monroe Dodge-Chrysler and DaimlerChrysler on March 10, 2003. Specifically, Brewer alleged that Monroe Dodge-Chrysler should be held liable for breach of contract, misrepresentation, breach of warranty, violation of various Michigan statutes, and breach of covenant of good faith and fair dealing. The trial court issued a scheduling order on May 24, 2003. DaimlerChrysler answered the complaint in April 2003, but Monroe Dodge-Chrysler did not answer the complaint until June 16, 2003. The scheduling order stated that each party must submit its witness and exhibit lists by August 29, 2003. Brewer and DaimlerChrysler timely filed their witness and exhibit lists with the court, but Monroe Dodge-Chrysler failed to do so. Thereafter, on December 9, 2003, DaimlerChrysler filed a cross-claim against Monroe Dodge-Chrysler.

On March 9, 2004, plaintiff filed a motion to prevent Monroe Dodge-Chrysler from introducing witnesses and documents at trial. Brewer argued that Monroe Dodge-Chrysler's failure to file and serve its witness and exhibit lists, and its failure to respond to Brewer's

discovery requests, violated the court's scheduling order and that it should be sanctioned for failure to engage in good faith discovery. Monroe Dodge-Chrysler admitted that it failed to file a witness or exhibit list, but argued that it was never served with a scheduling order for the case. Alternatively, Monroe Dodge-Chrysler argued that it relied on DaimlerChrysler's witness and exhibit lists, which DaimlerChrysler timely filed in August 2003. The attorney for Monroe Dodge-Chrysler explained that, because DaimlerChrysler's lists referred to "defendants' witness list" and "defendants' exhibit list," he thought DaimlerChrysler was submitting those documents on behalf of Monroe Dodge-Chrysler as well. DaimlerChrysler's attorney denied that it was his intent to file the lists for both defendants.

The trial court ruled that Monroe Dodge-Chrysler may not call any witnesses and may not introduce any documents at trial, but that it may rely on any witnesses or documents called or introduced by Brewer or DaimlerChrysler. The trial court also permitted Monroe Dodge-Chrysler to utilize any exhibits introduced during the deposition testimony of its service manager, Glenda Hood.

Brewer settled with DaimlerChrysler a few days before trial in October 2004. A different judge presided over the trial and the attorney for Monroe Dodge-Chrysler asked him for permission to call Glenda Hood as a witness. Judge Simon denied Monroe Dodge-Chrysler's request on the basis of the first judge's order. The jury found Monroe Dodge-Chrysler liable on only one of Brewer's claims and returned a verdict in favor of Brewer for Monroe Dodge-Chrysler's violation of the Michigan Consumer Protection Act.

## II. Analysis

Monroe Dodge-Chrysler complains that the trial court abused its discretion when it prohibited it from calling any witnesses at trial.

If a party violates the discovery rules, a court may "order such sanctions as are just." MCR 2.313(B)(2). Further, pursuant to MCR 2.313(B)(2)(b), sanctions may include "prohibiting the party from introducing designated matters into evidence." We review a trial court's imposition of discovery sanctions for an abuse of discretion. *Dean v Tucker*, 182 Mich App 27, 32; 451 NW2d 571 (1990). If the court excludes evidence because of a discovery violation, "[t]he 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).

Courts should consider the following factors when considering a sanction for violation of the discovery rules:

- (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 [plaintiff],
- (4) actual notice to the [plaintiff] of the witness and the length of time prior to trial that the [plaintiff] received such actual notice,
- (5) whether there exists a history of [defendant] engaging in deliberate delay,
- (6) the degree of compliance by the [defendant] with other provisions of the court's order,
- (7) an attempt by the [defendant] to timely cure the defect, and
- (8) whether

a lesser sanction would better serve the interests of justice. This list should not be considered exhaustive. [*Dean, supra* at 32-33.]

We hold that the trial court failed to specifically consider the *Dean* factors when it ruled that Monroe Dodge-Chrysler could not present witnesses at trial. However, we nonetheless affirm the trial court's order because the record clearly reflects that, had the trial court considered the factors, the outcome would have been the same.

While Monroe Dodge-Chrysler's counsel argued that he thought he could rely on DaimlerChrysler's witness and exhibit lists, DaimlerChrysler made it clear from the outset that its position would be adverse to Monroe Dodge-Chrysler's when it stated as a defense that "[p]laintiff's claims and/or injuries were caused by the wrongful conduct, illegal acts, intentional acts, misfeasance, malfeasance, and/or negligence of Monroe Dodge-Chrysler." Further, Monroe Dodge-Chrysler failed to file its own witness list even after DaimlerChrysler filed a cross-claim against it. Moreover, defendants had separate counsel, they filed separate answers and defenses and there is no indication that there was joint representation of the defendants or collaboration by the defense attorneys. Accordingly, we find that Monroe Dodge-Chrysler's failure to file a witness or exhibit list was not the result of mere inadvertence, but was either intentional or, at least, not prudent.

We also find Monroe Dodge-Chrysler's position disingenuous in light of its other discovery abuses. Specifically, Monroe Dodge-Chrysler failed to answer plaintiff's interrogatories or produce documents on request and it did not timely cure its failure to file the witness and exhibit lists. Accordingly, Monroe Dodge-Chrysler repeatedly violated the trial court's scheduling order and Brewer's duly filed requests for discovery.

Monroe Dodge-Chrysler notes that Brewer had the opportunity to depose one of its witnesses, Glenda Hood, prior to trial and that Monroe Dodge-Chrysler produced documents at her deposition. The record also reflects that Brewer had notice prior to trial that Brewer intended to call Hood and J.P. Mahalak, the general manager of Monroe Dodge-Chrysler. However, in light of Monroe Dodge-Chrysler's repeated failure to comply with the terms of the court's scheduling order and the discovery rules, we nonetheless hold that the trial court did not abuse its discretion when it imposed the sanction. "An abuse of discretion occurs when an unprejudiced person considering the facts upon which the decision was made would say that there was no justification or excuse for the decision." *City of Novi v Robert Adell Children's Funded Trust*, 473 Mich 242, 254; 701 NW2d 144 (2005). In light of the factors set forth in *Dean, supra*, the trial court's decision was clearly justified.

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ Henry William Saad

/s/ Jessica R. Cooper