

Negligence Law Section

Negligence Law Section E-Journal

WINTER 2025

Message from the Chair

“Section Update for the Membership”

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Part of my role as Chair of the Section this year is keep our membership apprised of the work being done behind the scenes to advocate when asked on important issues that impact the professional practices of our membership, whether plaintiff or defendant. We have recently weighed in on one such issue, via an amicus brief filed in the Michigan Supreme Court.

Recently, the Michigan Supreme Court invited the Section to file a brief articulating its position in cases involving discretionary discovery sanction rulings that ultimately cause a default or dismissal. Many are aware of the seminal case *Dean v Tucker*, 182 Mich. App. 27 (1990) which articulates that when a discretionary ruling on a discovery sanction has the ultimate effect of defaulting a defendant or dismissing the plaintiff, a series of eight factors should be considered first:

- (1) whether the violation was willful 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 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. at 32-33 (footnotes omitted). *Dean* also states that the list of eight factors “should not be considered exhaustive.” *Id. Duray Development, LLC v. Perrin*, 288 Mich. App. 143, 165-166 (2010) echoes the importance of applying the above eight factors. *Duray* further requires a trial court to issue a ruling that specifically reflects consideration of each of the factors. By clearly articulating the analysis in the record as to each of the eight factors, a superior court is afforded the opportunity to review the ruling.

Dean and *Duray* set forth well-settled, bedrock principles of fairness in the context of discretionary discovery sanction rulings. Both cases are ubiquitously cited throughout Michigan's jurisprudence. In fact, a perusal of the 1,000+ cases that cite *Dean* and *Duray* shows that most trial courts already routinely evaluate these factors when issuing discretionary discovery rulings that could result in a dispositive outcome. The Negligence Section advocated affirming the *Dean/Duray* factors as a requirement when ruling on any discretionary discovery sanction that directly or ultimately will result in dismissal or default. The Section wishes to note and thank Cam Ghetto and Ron Weiner for their work drafting this brief.

Finally, I'd like to close with a shameless plug asking for membership turnout at our Spring Meeting in Scottsdale, AZ, from May 1- May 4 at The Phoenician Resort located at the foot of the Camelback Mountain. I'm sure everyone could use a few days of sunshine and warm temperatures after our recent weather events, and despite our busy schedule of educational events, there will be time for hiking, golf, or simply relaxing by the pool. We have an excellent program prepared, focusing specifically on trial evidentiary issues in both first and third-party auto cases and premises liability, attorney-conducted voir dire, demonstrative evidence, using internal policies and learned treatises, and top tips for a successful facilitation. In addition, we will have our annual legislative update, and panel discussions on the key 2025 appellate decisions and forecasting for 2026, the ABOTA/Negligence Section Civility Matters collaboration, and attorney wellness. We are anticipating our typical strong showing of support from a number of state and federal judges, highlighted by Chief Justice Megan Cavanagh. If you are considering going, please book your rooms soon, as space is limited, and we are already filling up our room allotment. I look forward to seeing old acquaintances and meeting new friends, as these events are always a lot of fun in addition to being educational. Hope to see you there!!

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