Catholic University Law Review

Volume 36
Issue 3 *Spring 1987*

Article 11

1987

Hinkle v. Sam Blanken & Co.: Dismissals for Discovery Abuse – Toward a New Standard in the District of Columbia

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HINKLE v. SAM BLANKEN & CO.: DISMISSALS FOR DISCOVERY ABUSE—TOWARD A NEW STANDARD IN THE DISTRICT OF COLUMBIA

The District of Columbia Superior Court, the court of general jurisdiction in the District of Columbia,[1] hears civil actions in the Civil Division.[2] The court conducts these actions according to the Civil Division Rules.[3] The District of Columbia Superior Court adopted these rules, which are based on the Federal Rules of Civil Procedure,[4] on February 1, 1971.[5] Rules 26 to 37 govern the discovery phase of suits in the Civil Division.[6] Discovery prepares the case for trial by enabling each side to obtain factual information from his opponents.[7] Discovery also enables a party to become familiar with

1. "Except [when exclusive jurisdiction is vested in a federal court], the Superior Court has jurisdiction of any civil action or other matter (at law or equity) brought in the District of Columbia." D.C. CODE ANN. § 11-921(a) (1981). "Therefore, . . . the Superior Court is no longer a court of *limited* jurisdiction, but a court of general jurisdiction with the power to adjudicate any civil action at law or in equity involving local law." Andrade v. Jackson, 401 A.2d 990, 992 (D.C. 1979) (emphasis in original) (The opinion explains the history of District of Columbia Court Reform and Criminal Procedure Act.).

2. "The Superior Court shall consist of the following divisions: Civil Division, Criminal Division, Family Division, Probate Division, and Tax Division." D.C. CODE ANN. § 11-902 (1981).

3. "These rules govern the procedure in all suits of a civil nature in the Civil Division of the Superior Court of the District of Columbia whether cognizable as cases at law or in equity . . . ." D.C. SUPER. CT. CIV. R. 1.

4. "One of the primary objectives in the drafting and adoption of the following Superior Court Rules of Civil Procedure has been to provide an integral and convenient rules structure modeled closely on that of the Federal Rules of Civil Procedure." The Superior Court of the District of Columbia, District of Columbia Court Rules Annotated 195 (1986 ed.) [hereinafter Ann. Court Rules]; *see* Neuman v. Neuman, 377 A.2d 393, 398 (D.C. 1977) (trial court rules similar to federal rules to be construed as consistent with federal rules).

5. Ann. Court Rules at 187.

6. These rules are entitled "Depositions and Discovery," yet pertain to every type of discovery used. D.C. SUPER. CT. CIV. R. 26-36. The types of discovery allowed are oral depositions (D.C. SUPER. CT. CIV. R. 30), written depositions (D.C. SUPER. CT. CIV. R. 31), interrogatories (D.C. SUPER. CT. CIV. R. 33), requests for production of documents or inspection of places (D.C. SUPER. CT. CIV. R. 34), requests for physical or mental examination of a party (D.C. SUPER. CT. CIV. R. 35), and requests for admissions by a party (D.C. SUPER. CT. CIV. R. 36).

7. "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . ." D.C. SUPER. CT. CIV. R. 26(b)(1). *See* Hickman v. Taylor, 329 U.S. 495, 501 (1947); Note, *Discovery Sanctions Under the Fed-*

the adversary's legal claims or defenses, witnesses, and exhibits.[8] Under the modern theory of discovery, information should be liberally pursued in order to reduce the number of surprises, disputed facts, and litigated issues, and to therefore encourage settlement.[9] Generally, courts will leave the conduct of this phase to the parties' attorneys, and intervene only to settle differences that frustrate the purposes of discovery.[10] Court intervention will result when a party delays or refuses to participate in discovery.[11] The party seeking discovery will submit a motion to compel discovery.[12] The court will issue this order forcing the uncooperative party to participate in discovery.[13]

Superior Court Civil Rule 37(b) provides a number of sanctions for the court to impose on a party who persists in violating discovery rules after the court's order compelling discovery.[14] Most orders result in the production of the withheld information because many of the rule's provisions result in

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eral Rules of Civil Procedure: A Goal-Oriented Mission for Rule 37, 29 CASE W. RES. L. REV. 603, 606-10 (1979) (contrasting modern objectives with common law pleadings).

8. D.C. SUPER. CT. CIV. R. 26(b)(1) (listing matters that are open to discovery).

9. *See Hickman,* 329 U.S. at 506-07; Wender v. United Servs. Auto. Ass'n, 434 A.2d 1372, 1375-76 (D.C. 1981); *see also* R. FORRESTER & J. E. MOYE, CASES AND MATERIALS ON FEDERAL JURISDICTION AND PROCEDURE 506-48 (1977) (contrasting common law discovery and pleadings with modern theory); Note, *supra* note 7, at 605.

10. *Cf.* D.C. SUPER. CT. CIV. R. 26(g). When making a motion for a discovery conference, the moving party must have made a reasonable effort to reach agreement on differences with the opposing party. *Id.* Parties have "a duty to participate in good faith in the framing of a discovery plan . . . ." *Id.*

11. *See* D.C. SUPER. CT. CIV. R. 37(a)(2). A party may move to compel discovery if his adversary fails to answer a deposition question, an interrogatory, or fails to permit an inspection of property. D.C. SUPER. CT. CIV. R. 37(a)(3). Also, a party may move to compel discovery if the responses are "evasive or incomplete." *Id.*

12. D.C. SUPER. CT. CIV. R. 37(a)(2). This motion must be accompanied by a certification that the movant has made a good faith effort to obtain the material. *Id.* 37(a).

13. The successful moving party may also recover the fees and expenses of the motion from the dilatory party or the party's attorney. D.C. SUPER. CT. CIV. R. 37(a)(4).

14. D.C. SUPER. CT. CIV. R. 37(b).

> Failure to Comply with Order.
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> . . . .
>
> (2) Sanctions by this Court. If a party . . . fails to obey an order to provide or permit discovery, . . . the Court may make such orders in regard to the failure as are just, and among others the following:
>
> (A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established . . . ;
>
> (B) An order refusing to allow the disobedient party to support or oppose designated claims or offenses, or prohibiting him from introducing designated matters in evidence;
>
> (C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;
>
> (D) In lieu of any of the foregoing orders or in addition thereto, an order treating

tactical disadvantages for the sanctioned party.[15] The most severe sanction is the dismissal of a case or claim, or a default judgment.[16] The superior court judges have used this severe sanction infrequently, yet the District of Columbia Court of Appeals has often reversed dismissals imposed after discovery rule violations.[17] These reversals have been based on the appeals court's perception that the District of Columbia Superior Court judge abused his or her discretion in ordering the dismissal.[18] This abuse has been relatively easy to find given the District of Columbia Court of Appeals' interpretation of when dismissal is warranted under the rule.

This Note will examine the traditional test used by the District of Columbia Court of Appeals to determine when dismissal is appropriate. Then it will outline reasons why other jurisdictions have adopted the view that dismissals should be more liberally allowed in order to deter discovery delays. Recent cases in the District of Columbia Court of Appeals will be examined for indications that the court is moving toward this view. This Note will conclude that the District of Columbia Court of Appeals should adopt this modified test as a better means of preventing discovery abuse.

I. THE "SEVERE CIRCUMSTANCES" TEST

The District of Columbia Court of Appeals requires that dismissal be granted only in "severe circumstances."[19] The court will look for two factors when deciding whether the case presents severe circumstances: (1) whether the discovery violation was "willful," and (2) whether the violation "prejudiced" the party seeking discovery.[20] Additionally, the appeals court

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as a Contempt of Court the failure to obey any orders except an order to submit to a physical or mental examination;

. . . .

15. *See* D.C. SUPER. CT. CIV. R. 37(b)(2)(A), (B), (C).

16. D.C. SUPER. CT. CIV. R. 37(b)(2)(C).

17. *See, e.g.*, Hackney v. Sheeskin, 503 A.2d 1249 (D.C. 1986); Vernell v. Gould, 495 A.2d 306 (D.C. 1985); Durham v. District of Columbia, 494 A.2d 1346 (D.C. 1985); Braxton v. Howard Univ., 472 A.2d 1363 (D.C. 1984); Ungar Motors v. Abdemoulaie, 463 A.2d 686 (D.C. 1983); *see also* Haynes v. District of Columbia, 503 A.2d 1219 (D.C. 1986); Gardiner v. District of Columbia, 499 A.2d 455 (D.C. 1985) (reversing default judgments).

18. "The trial court has discretion to dismiss a cause of action and to impose other sanctions for failure to comply with a discovery request under D.C. Super. Ct. Civ. R. 37(b). On appeal this court will reverse only where the trial court has abused its discretion." *Hackney*, 503 A.2d at 1251 (citing National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639 (1976); Johnson v. United States, 398 A.2d 354 (D.C. 1979)).

19. "The remedy of dismissal for failure . . . to serve answers to interrogatories, while available, should be granted only upon a showing of severe circumstances." Koppal v. Travelers Idem. Co., 297 A.2d 337, 339 (D.C. 1972) (followed in *Ungar Motors*, 463 A.2d at 688 and *Braxton*, 472 A.2d at 1365).

20. *Braxton*, 472 A.2d at 1365 ("[W]illfulness alone is not usually enough to warrant

will determine whether the dismissal was "too strict or unnecessary under the circumstances."[21] The court will examine the record of all pretrial proceedings, and the sanctioning judge must ensure that the record indicates less severe sanctions were considered and rejected before the dismissal.[22]

The discovering parties have had the most difficulty satisfying the second requirement of the severe circumstances test—that the violation prejudiced them.[23] The District of Columbia Court of Appeals has long held that the delay resulting from the violation of discovery rules does not establish prejudice, even when the violation is also willful.[24] The court of appeals has not considered postponement of the trial or a delay in a verdict as sufficiently prejudicial to the discovering party to support dismissal.[25]

The District of Columbia Court of Appeals gave a succinct expression of its review of dismissals for discovery violations in *Braxton v. Howard University.*[26] In *Braxton,* the court reviewed dismissals of students' complaints against the university alleging assault and false arrest by campus security police.[27] The dismissals were based on the students' failures to comply with orders compelling answers to the university's interrogatories.[28] In overturning the dismissals,[29] the District of Columbia Court of Appeals articulated the two requirements for dismissals to withstand review. First, the record must demonstrate that there was no abuse of discretion,[30] and second, that lesser sanctions were considered before the dismissal,[31] so that the sanction

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dismissal. . . . The moving party must also demonstrate that the failure to answer resulted in . . . prejudice before the court may . . . dismiss the complaint."). See *infra* notes 33-44 and accompanying text for a discussion of the test used by the court of appeals to determine when dismissal will be upheld on appeal.

21. *Vernell,* 495 A.2d at 311 (citing Himmelfarb v. Greenspoon, 411 A.2d 979, 982 (D.C. 1980)). Generally, the courts of appeals' view has been that a sanction is too strict if any lesser sanction could result in compliance with the rules, despite past conduct in violation of them. *See, e.g., Braxton,* 472 A.2d at 1366.

22. *E.g., Braxton,* 472 A.2d at 1366.

23. *Cf.* Firestone v. Harris, 414 A.2d 526, 527 (D.C. 1980) (establishing the willfulness factor). "There is no requirement that this failure be willful or malicious; a conscious failure to comply [with order to answer interrogatories] is sufficient [for entry of default judgment]."

24. *Braxton,* 472 A.2d at 1365-66 (delay not ordinarily prejudicial per se).

25. *E.g.,* Pollock v. Brown, 395 A.2d 50, 52 (D.C. 1978); *see infra* note 45 (delay alone not prejudicial).

26. 472 A.2d 1363 (D.C. 1984).

27. *Id.* at 1364.

28. *Id.*

29. *Id.* at 1366. The court reversed the dismissals and remanded for two reasons. The first was that the court did not count the delay encountered by the university as prejudice. *Id.* Secondly, the court states that the superior court judge failed to state whether he had considered lesser sanctions. *Id.*

30. *Id.* at 1365. "Only if the court abuses its discretion . . . will we overturn its decision."

31. *Id.* at 1366.

is no more severe than necessary.[32]

The dismissal will be overturned only where the court of appeals finds an abuse of discretion.[33] A trial judge's dismissal of a case in which there has been no "showing of severe circumstances" constitutes an abuse of discretion.[34] The severe circumstances test is a longstanding one in the District.[35] But in *Braxton,* the District of Columbia Court of Appeals first specified the two factors which it considers when trying to determine if the dismissal satisfied the severe circumstances test: (1) the willfulness of the sanctioned conduct, and (2) whether the conduct resulted in prejudice to the other party.[36] Neither of the factors alone establishes the severe circumstances.[37]

The willfulness prong is easily satisfied by any knowing failure to comply with a discovery order.[38] As for the prejudice factor, the court of appeals required the party trying to uphold the dismissal to show additional, demonstrable harm to the case besides delay, such as the inability to proceed with the action,[39] the loss of a witness,[40] or a complete frustration of the discov-

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32. *Id.* The requirement that the sanction be no more severe than necessary is really another expression of the abuse of discretion test. *See infra* note 47 (sanction should be appropriate to the offense).

33. "As the language of the rule makes clear, the decision to impose such sanctions is left to the discretion of the trial court." *Braxton,* 472 A.2d at 1365.

34. *Id.* "This court has held that a trial court abuses its discretion if it fails to consider lesser sanctions before dismissing an action under Rule 37, or if there is no 'showing of severe circumstances' which would justify dismissal." *Id.* (quoting Ungar Motors v. Abdemoulaie, 463 A.2d 686, 688-89 (D.C. 1983)).

35. *See* Dodson v. Evans, 204 A.2d 338, 341 (D.C. 1964) ("An appellate court should be reluctant to disturb an exercise of discretion by a trial judge unless it is convinced that he exceeded a proper discretion in imposing a penalty too strict or unnecessary under the circumstances."); *see also* U.S. Merchandise Mart, Inc. v. D & H Distrib. Co., 279 A.2d 511, 513 (D.C. 1971) ("In order to determine whether the trial court's action constituted abuse of discretion [we must] examine the entire proceeding[ ] . . . ."). *Id. quoted in Ungar Motors,* 463 A.2d at 687-88; Koppal v. Travelers Indem. Co., 297 A.2d 337, 339 (D.C. 1972) ("The remedy of dismissal for failure . . . to serve answers to interrogatories . . . should be granted only upon a showing of severe circumstances.").

36. *Braxton,* 472 A.2d at 1365. "While we have never explicitly stated what we regard as 'severe circumstances,' we have often looked to two factors in deciding cases such as this: whether the opposing party suffered any prejudice as a result of the failure to provide discovery, and whether that failure was willful."

37. *See supra* note 20; *see also Braxton,* 472 A.2d at 1366. "[W]hile appellant's delay . . . was flagrant . . . appellee's counsel was unable to articulate any genuine prejudice which his client had suffered as a result . . . ."

38. See *supra* note 23 for the manner in which the willfulness test is met.

39. *See* Pollock v. Brown, 395 A.2d 50, 52 (D.C. 1978). "Although the [defendant] Pollocks may have been hindered in their ability to prosecute their counterclaim because of the Browns' discovery delays, *there is no indication that they were in any way prejudiced in their defense of the Browns' claim* . . . ." *Id.* (emphasis added); *see also Braxton,* 472 A.2d at 1366; *but see* Massengale v. 3M Business Prods. Sales, Inc., 504 A.2d 574, 579 (D.C. 1985) (finding delay was prejudice because of party's right to be free from harassment and because of expen-

ery process.[41] Mere delay, even where it creates additional attorney's fees or aggravation for the hindered party,[42] did not suffice to establish the prejudice prong.[43] Instead, the District of Columbia Court of Appeals required an articulation of the specific resulting prejudice other than delay.[44]

The strictness of the prejudice requirement led to instances where parties could delay or avoid discovery without accounting for long periods of time.[45] In many cases, these parties were, in fact, in violation of court orders to proceed with discovery.[46] Yet, the violations of the rules or orders alone were usually not enough to support the superior court's dismissal of the case under Civil Rule 37(b). The District of Columbia Court of Appeals required that the sanction imposed fit the abuse committed,[47] and did not favor dismissal of cases for violations during the discovery phase.[48] This attitude reflected the conviction that a case should be tried on its merits, and that

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diture of needless time and effort); Henderson v. District of Columbia, 493 A.2d 982, 990-91, 993 (D.C. 1985).

40. *See Braxton,* 472 A.2d at 1366 (colloquy between superior court judge and moving counsel); *see also Massengale,* 504 A.2d at 579 n.13.

41. Coleman v. Lee Washington Hauling Co., 392 A.2d 1067, 1069-71 (D.C. 1978) (discussion of the application of sanctions after a continued failure to comply with court order); *Massengale,* 504 A.2d at 578 (repeated failure to comply constitutes "flagrant bad faith and callous disregard of legal duty").

42. The court of appeals pointed out that additional attorney's fees incurred by a party are recoverable under rule 37. *Braxton,* 472 A.2d at 1366. D.C. SUPER. CT. CIV. R. 30(g), 37(a)(4) also provides for expenses from a dilatory party to one whose motions to compel discovery are granted.

43. *Braxton,* 472 A.2d at 1366 n.4.

44. In *Braxton,* the District of Columbia Court of Appeals reversed a dismissal because the appellee was unable to articulate this harm. *Id.* at 1366. *See supra* note 37; Vernell v. Gould, 495 A.2d 306, 312-13 (D.C. 1985) (trial court did not demonstrate that party's delay "completely frustrated the orderly process of the court").

45. *See Braxton,* 472 A.2d at 1366 (dismissal reversed because no showing of prejudice after delay of "nearly a year"); Hackney v. Sheeskin, 503 A.2d 1249, 1252 (D.C. 1986) (dismissal reversed because no prejudice from "repeatedly fail[ing] to meet deadlines in responding to discovery"); Haynes v. District of Columbia, 503 A.2d 1219, 1224 (D.C. 1986) (default judgment reversed absent showing of prejudice after period of approximately 26 months).

46. The sanctioned party was in violation of an order compelling discovery in *Braxton,* 472 A.2d at 1364; *Hackney,* 503 A.2d at 1250-51; *Haynes,* 503 A.2d at 1221.

47. "Therefore, for there to have been a meaningful exercise of discretion . . . it was necessary to consider whether less severe and *more appropriate* sanctions than dismissal were justified." Koppal v. Travelers Indem. Co., 297 A.2d 337, 339 (D.C. 1972) (emphasis added). *See* Ungar Motors v. Abdemoulaie, 463 A.2d 686, 688-89 (D.C. 1983); Pollock v. Brown, 395 A.2d 50, 52 (D.C. 1978) (citing Oaks v. Rojcewicz, 409 P.2d 839, 844 (Alaska 1966)); C. WRIGHT & A. MILLER, FED. PRACTICE & PROCEDURE § 2284 (1973)) ("[t]he sanction should, where possible, fit the offense").

48. "SCR Civil Rule 37(d) refers to the relief available . . . and dismissal appears to be the least preferred . . . ." *Koppal,* 297 A.2d at 339; *Ungar Motors,* 463 A.2d at 689 (dismissal described as "draconian"); Gardiner v. District of Columbia, 499 A.2d 455, 457 (D.C. 1985) ("dismissal . . . is a most severe sanction").

dismissal should only be granted when a party's dilatory conduct clearly harmed his opponent's case.[49]

The reluctance of courts to impose the ultimate sanction had, in the past, encouraged parties in litigation to delay discovery.[50] Across the nation, litigants viewed the court's hesitancy to dismiss as leniency in enforcing the rules.[51] Widespread delay resulted, and led to revisions of the federal discovery rules.[52] The rule revisions, however, did not entirely resolve the avoidance and delay problem as federal courts remained reluctant to deter these violations through dismissal.[53]

In 1976, however, the United States Supreme Court embraced dismissal as a method of deterrence, pursuant to Federal Rule of Civil Procedure 37(b)(2).[54] The United States District Court for the Eastern District of Pennsylvania had dismissed the plaintiffs' case in *National Hockey League v. Metropolitan Hockey Club* because of their repeated, flagrant failures to answer interrogatories.[55] After many time extensions,[56] plaintiffs were expressly warned that their delay could result in dismissal.[57] The Court of Appeals for the Third Circuit reversed the dismissal, following the traditional lenient policy.[58] On appeal, the Supreme Court reversed.[59] The

49. "[S]uch a dismissal runs counter to valid societal preference for a decision on the merits . . . ." Shimer v. Edwards, 482 A.2d 399, 401 (D.C. 1984). *See* Note, *supra* note 7, at 622 (discussing historic reluctance of federal courts to dismiss cases for discovery violations rather than on the merits); *see also* Note, *Rule 37 Sanctions: Deterrents to Discovery Abuses,* 46 MONT. L. REV. 95, 97 (1985) (same situation in state court).

50. Note, *The Emerging Deterrence Orientation in the Imposition of Discovery Sanctions,* 91 HARV. L. REV. 1033, 1033-35 (1978); Rosenberg, *Sanctions to Effectuate Pretrial Discovery,* 58 COLUM. L. REV. 480, 481-83 (1958).

51. Brady v. Fireman's Fund Ins. Cos., 484 A.2d 566, 569-70 (D.C. 1984) (court discussion of a party's possible use of obstruction as a "litigation tactic"); Note, *Rule 37 Sanctions, supra* note 49, at 95. "Faced with no real threat of punishment, parties across the nation abused the rules of discovery, rendering the discovery processes virtually useless." *Id.* at 97 (footnote omitted).

52. Note, *supra* note 7, at 603-04.

53. The first applicable revisions were in 1948. The rules were again revised in 1970. *Id.* at 610-15. Federal judges' attitudes toward dismissal, however, remained the same. *Id.*

54. National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639 (1976) (per curiam).

55. *Id.* at 640.

56. *Id.* at 640-41. For the convoluted history of this case, see *In re* Professional Hockey Antitrust Litigations, 63 F.R.D. 641 (E.D. Pa. 1974).

57. "Moreover, this action was taken in the face of warnings that their failure . . . could result in the imposition of sanctions under Fed. R. Civ. P. 37. If the sanction of dismissal is not warranted by the circumstances of this case, then the Court can envisage no set of facts whereby that sanction should ever be applied." *National Hockey League,* 427 U.S. at 641 (quoting district court opinion, 63 F.R.D. 641, 656 (1974)).

58. *Id.* The court of appeals concluded there had been extenuating circumstances present, that the plaintiffs had expended great effort, and gave weight to the lead counsel's statement

Court stated that rule 37 dismissals must be available to penalize parties using delaying tactics and to deter those parties who might imitate this misconduct during discovery.[60] The Court further stated that leniency could rightly enter into the choice of sanctions,[61] but that it could not "wholly supplant other and equally necessary considerations."[62] The Supreme Court specified punishment and deterrence as equally valid considerations in this decision.[63]

II. TOWARD DELAY AS PREJUDICIAL

The District of Columbia Court of Appeals has cited *National Hockey League* in its opinions.[64] To date, the court of appeals has not explicitly followed the penalizing and deterrence reasoning of *National Hockey League,*[65] but only agreed that abuse of discretion is the applicable standard of review.[66] Yet, three recently decided cases signal a departure from the

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that he would not knowingly miss a deadline. The court of appeals' opinion is set forth in *In re* Professional Hockey Antitrust Litigation, 531 F.2d 1188 (3d Cir. 1976).

59. *National Hockey League,* 427 U.S. at 643.

60. *Id.*

61. *Id.* at 642.

62. *Id.*

63. *Id.* at 642-43.

> There is a natural tendency on the part of reviewing courts, properly employing the benefit of hindsight, to be heavily influenced by the severity of outright dismissal as a sanction for failure to comply with a discovery order. It is quite reasonable to conclude that a party who has been subjected to such an order will feel duly chastened, so that even though he succeeds in having the order reversed on appeal he will nonetheless comply promptly with future discovery orders of the district court.
>
> But here, as in other areas of the law, the most severe in the spectrum of sanctions provided . . . must be available to the district court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct . . . .

Id.

64. Hackney v. Sheeskin, 503 A.2d 1249, 1251 (D.C. 1986); Massengale v. 3M Business Prods. Sales, Inc., 504 A.2d 574, 577-78 (D.C. 1985); Vernell v. Gould, 495 A.2d 306, 311 (D.C. 1985); Braxton v. Howard Univ., 472 A.2d 1363, 1365 (D.C. 1984); Ungar Motors v. Abdemoulaie, 463 A.2d 686, 687 (D.C. 1983); Firestone v. Harris, 414 A.2d 526, 527 (D.C. 1980); Himmelfarb v. Greenspoon, 411 A.2d 979, 982 (D. C. 1980); Coleman v. Lee Washington Hauling Co., 392 A.2d 1067, 1069 (D.C. 1978).

65. Other jurisdictions have done so, however. Dakota Bank & Trust Co. v. Brakke, 377 N.W.2d 553, 556 (N.D. 1985); Downer v. Aquamarine Operators, Inc., 701 S.W.2d 238, 242 (Tex. 1985) (reh'g denied); Owen v. F.A. Buttrey Co., 627 P.2d 1233 (Mont. 1981); Zaccardi v. Becker, 162 N.J. Super. 329, 392 A.2d 1220 (1978).

66. *Hackney,* 503 A.2d at 1251 (reverse only on abuse of discretion); *Massengale,* 504 A.2d at 577 (abuse of discretion standard); *Vernell,* 495 A.2d at 311 (same); *Braxton,* 472 A.2d at 1365 (same); *Ungar Motors,* 463 A.2d at 687 (trial court has broad discretion in sanctioning); *Firestone,* 414 A.2d at 527 (abuse of discretion standard); *Coleman,* 392 A.2d at 1069 (same).

position that mere delay never causes the prejudice necessary to dismiss a case.[67] In *Braxton,* the court acknowledged, in dicta, that extreme delay without additional harm could satisfy the prejudice prong of the severe circumstances test.[68] The next year, in *Henderson v. District of Columbia,*[69] the court found that prejudice could result from a party's disregard of discovery rules and orders which result in delay.[70] In *Henderson,* the District of Columbia Superior Court sanctioned the District government under rule 37(b)(2)(A) for failing to comply with a discovery order.[71] Rule 37(b)(2)(A) permitted admission of certain facts against the District government;[72] it was not a dismissal or default sanction pursuant to rule 37(b)(2)(C).[73] Nevertheless, the court of appeals found the delay prejudicial because it resulted in postponement of the trial date,[74] and flagrantly frustrated the discovery process.[75] The sanctioned party in *Henderson* repeatedly failed to respond

67. Recently, the District of Columbia Court of Appeals has indicated that it may be moving away from its strict view of the prejudice requirement of the severe circumstances test toward one which would deter discovery violations by making dismissals easier to obtain. *See infra* notes 108-24 and accompanying text. The court has departed from its previous insistence that the discovery violation must harm the opponent's ability to present the case. *See infra* notes 85-88 and accompanying text. The court of appeals has implied that delay to the proceedings resulting from dilatory conduct alone will warrant dismissal. *Id.* This view is similar to the United States Supreme Court decision in *National Hockey League,* which allows dismissal to deter and punish abuses. *See supra* note 54-63 and accompanying text.

68. *Braxton,* 472 A.2d at 1366 n.4.

> We are not saying, of course, that an extraordinarily long delay in complying with a discovery request . . . may never be *so inherently prejudicial as to warrant dismissal under Rule 37.* Although the general rule is that delay alone will not ordinarily generate the requisite degree of prejudice, . . . an exceptionally long delay may, in an appropriate case, permit a very narrow exception to the rule.

Id. (emphasis added).

69. 493 A.2d 982 (D.C. 1985).

70. *Id.* at 993. "[T]he record clearly demonstrates that prejudice resulted."

71. *Id.* at 990.

72. *Id.*

73. The court of appeals rejected the District's contention that these admissions amounted to a default. *Id.* at 992-93.

74.

> [T]he record clearly demonstrates that prejudice resulted. [The party seeking discovery] was suspended without pay [from the District of Columbia police force]. A trial date had been set for September 8, 1981. As a result of the discovery problems, that trial date had to be reset by Judge Bacon to March 22, 1982. Indeed discovery orders by Judge Bacon and Judge Pratt . . . graphically show the difficulty the trial court had in obtaining compliance with discovery rules by the District of Columbia, et al.

Id. at 993.

The court also found that the discovering party suffered harm when he was suspended without pay from the police force pending trial. *Id.* at 989-93. The relevance of the suspension was left unexplained by the court. In the past, only harm relating to the litigation was recognized as prejudicial.

75. *Id.* at 993.

to discovery requests,[76] missed court ordered deadlines,[77] and did not oppose or obey a motion to compel discovery.[78]

The District of Columbia Court of Appeals again held mere delay to be prejudicial in *Massengale v. 3M Business Products Sales, Inc.*,[79] and upheld the superior court's dismissal. The appeals court stated that the discovering party had a right "to be free from vexatious and harassing litigation."[80] In *Massengale,* the court of appeals specifically adopted the dicta from *Braxton,* and found that the delay was so egregious as to be inherently prejudicial.[81] The sanctioned party in *Massengale* had delayed proceedings for sixteen months, disregarded four court orders,[82] pleas from the opposing counsel,[83] and admonitions from the bench.[84]

In April 1986, the District of Columbia Court of Appeals decided *Hinkle v. Sam Blanken & Co.*[85] This case represents the most dramatic departure from earlier decisions reviewing superior court dismissals.[86] *Hinkle* departs from earlier cases by the manner in which the prejudice requirement of the severe circumstances test is met. Specifically, the court of appeals considered delay as prejudicial to the discovering party.[87] The court stated that prejudice resulted from the frustration of waiting for answers to discovery

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76. "The difficulties [defendants caused during discovery] included deposition sites, dates, nonappearance of party deponents; failure to answer interrogatories; and failure to produce documents and things." *Id.* at 991.

77. Defendants missed the first of the court-ordered discovery deadlines to answer interrogatories on April 24, 1981. *Id.* at 990.

78. The court sanctioned the defendant by an order dated May 22, 1981. *Id.* The defendants withheld their answers for an additional two months. *Id.*

79. 504 A.2d 574, 579 (D.C. 1985).

80. *Id.*

81. *Id.* "In *Braxton* we did 'not attempt to identify . . . the kinds of extreme circumstances which would justify such an exception,' . . . but we are persuaded that such circumstances exist in this case." (citation omitted).

82. *Id.* at 578.

> The first set of interrogatories and the request for production of documents were served . . . on April 25, 1980. . . . [M]ore than sixteen months later, despite at least three informal requests, four motions to compel . . . , and four court orders, [plaintiffs] had not even attempted to comply with their discovery obligations . . . . Judge Murphy was completely justified in dismissing the case because of [plaintiffs'] failure to pay the monetary sanctions that had been outstanding for over three years . . . .

Id.

83. *Id.* at 575-77.

84. *Id.* at 576-78.

85. 507 A.2d 1046 (D.C. 1986).

86. In reverse chronological order, the cases reflecting this departure are Hinkle v. Sam Blanken & Co., 507 A.2d 1046 (D.C. 1986); Massengale v. 3M Business Prods. Sales, Inc., 504 A.2d 574 (D.C. 1985); Henderson v. District of Columbia, 493 A.2d 982 (D.C. 1985); Braxton v. Howard Univ., 472 A.2d 1363 (D.C. 1984).

87. *Hinkle,* 507 A.2d at 1050.

attempts and from the missed opportunity for a judgment resulting from the postponement of the trial.[88] Under *Hinkle,* the party seeking dismissal thus has a greater likelihood of establishing prejudice from the other party's delay. While the earlier rule is not explicitly overruled, the clear trend is away from the old rule.

The action commenced in June 1983, when the plaintiff filed an action to recover for a breach of contract by defendants Hinkle and Johnson.[89] The defendants' counsel filed a timely answer and counterclaims.[90] On July 5, 1983, the plaintiff began discovery by serving the defendants with interrogatories and notices of deposition.[91] When the defendants ignored these requests, the plaintiff repeated them in October 1983.[92] Still, the defendants completely failed to answer or object to[93] the interrogatories, and failed to appear for their depositions.[94] In November 1983, five months after commencing the action, and four months after initiating discovery, the plaintiff filed a motion to compel discovery by the defendants.[95] The defendants were served with copies of this motion and were given notice of the hearing.[96] Both Hinkle and Johnson continued to completely ignore the case and neither of them replied to the motion, attended or sent representation to the hearing.[97] Judge Henry Greene granted the motion to compel discovery on January 11, 1984.[98] The order compelling discovery set deadlines for Hinkle and Johnson to answer the interrogatories and to submit to depositions.[99] He also entered a default judgment against them contingent upon their further unexcused refusal to comply with discovery rules.[100] Because the trial date was only two weeks away, the judge granted the plaintiff's request to postpone trial.[101] Both deadlines passed without the defendants

88. *Id.*

89. *Id.* at 1047.

90. *Id.*

91. *Id.*

92. *Id.* The defendants' original counsel meanwhile had withdrawn from the case.

93. D.C. SUPER. CT. CIV. R. 33(a) allows objections to interrogatories in lieu of answers. D.C. SUPER. CT. CIV. R. 26(c) allows a court to issue protective orders on the motion of a party subjected to annoying, oppressive, or burdensome discovery. The order may direct the conduct of discovery, or order that it not proceed.

94. *Hinkle,* 507 A.2d at 1047.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. The deadlines were January 26th for the answers to interrogatories and January 27th for the depositions. *Id.*

100. *Id.*

101. *Id.* at 1047-48.

either answering the interrogatories or giving depositions.[102] The plaintiff moved for a default judgment under the terms of the order.[103] Superior Court Judge Murphy granted the motion after an adversary hearing,[104] and the defendants appealed.

In *Hinkle,* the District of Columbia Court of Appeals confronted a flagrant abuse of discovery.[105] There had been a complete frustration of the discovery process by parties who flagrantly ignored the court's orders.[106] The court found that severe circumstances existed,[107] and that the defendants' knowing failure to comply with the orders satisfied the willfulness factor.[108] The opinion concluded that prejudice to the party seeking discovery existed due to the plaintiff's lost opportunity for a judgment and the frustration of waiting for answers from the defendants.[109] The court of appeals affirmed the dismissal, finding no abuse of discretion.[110] The *Hinkle* court thus signaled that delay as prejudice can be established when the delay results from disregard of discovery norms.

III. THE *HINKLE* TEST

In *Hinkle,* the District of Columbia Court of Appeals came close to adopting the penalizing theory of *National Hockey League.* The court announced that abuse of discretion is still the standard of review,[111] and that the severe circumstances test must be met.[112] Yet, when examining this case, the court determined that there was no abuse of discretion, and that under the circumstances Judge Murphy correctly applied the harsh sanction of dismissal.[113] The defendants' misconduct had been severe and inexcusable, and they had

102. *Id.* at 1048. Defendants acknowledged receiving the order. *Id.* Apparently they had not hired a replacement counsel until after the hearing on the motion to compel and the threat of dismissal. *Id.* at 1048 n.1.

103. *Id.* at 1048.

104. Defendants' new counsel argued against imposing a default judgment on the grounds that the discovery order was invalid. *Id.* at 1049. Judge Murphy, noting that defendants had not sought to overturn this order, found no justification for the complete failure to comply with it. *Id.*

105. *See supra* notes 91-102 and accompanying text.

106. *Hinkle,* 507 A.2d at 1047-48.

107. *Id.* at 1049-50.

108. *Id.*

109. "Not only did [plaintiff] endure over 8 months of frustration waiting in vain for responses . . . , he also lost an opportunity to obtain a money judgment . . . , because [defendants'] delay caused postponement of the original trial date." *Id.* at 1050.

110. "Our review of the record, which bristles with instances of appellants' disregard of the rules and orders of the court, persuades us that no abuse of discretion occurred." *Id.* at 1048.

111. *Id.* at 1048.

112. *Id.* at 1049.

113. *Id.*

offered no justification for their failure to obey the court's orders.[114] The District of Columbia Court of Appeals ratified both Judge Greene's contingent imposition of default judgment[115] and Judge Murphy's order entering the default judgment.[116] In doing so, the court did not specifically refer to a penalizing purpose, but implied acceptance of the *National Hockey League* rationale. The court found no abuse of discretion by either judge—Judge Greene when he selected the most severe sanction or Judge Murphy when he found it necessary to impose that sanction. The actions of the lower court judges clearly served as penalties in the case.[117]

The District of Columbia Court of Appeals ruled without reservation that the defendants' misconduct prejudiced the plaintiff.[118] The court of appeals required no showing of articulated, separate harm other than delay.[119] The court affirmed the default judgment based on the prejudice resulting from the months of delay the plaintiff endured waiting for answers, and from the postponement of the trial date.[120] Neither delay nor trial postponement had been enough to establish prejudice in the past.[121] But the court of appeals modified its position to recognize that extreme discovery delay is prejudicial,[122] and that delay alone can be prejudicial.[123] Yet, the court made no attempt either to modify its previous strict application of the prejudice requirement or adopt a *National Hockey League* approach.[124] As a result, the decisions announcing this new position must be examined to determine whether they are in fact merely applications of the old standard or *Braxton* exceptions.

Massengale, the first case recognized as a *Braxton* exception, moved to-

114. *Id.* Defendants failed to answer the first set of interrogatories. *Id.* at 1047. Then, after their counsel withdrew, they ignored more interrogatories and a court order which they acknowledged receiving. *Id.* at 1048.

115. *Id.* at 1048-49.

116. *Id.* at 1049.

117. *Id.* The court of appeals is also satisfied that Judge Greene considered lesser penalties. *See id.* at 1048 ("Faced with this situation, and reminded . . . that the court had a range of Rule 37 sanctions . . . , Judge Greene [issued a default judgment] in the event [defendants] failed to comply with the discovery order"); *id.* at 1049 ("Judge Murphy stated that he would follow Judge Greene's directive unless given a reason [to impose a lesser sanction])." *National Hockey League* recognized the penalizing purpose of dismissals. *See supra* note 63.

118. *Hinkle,* 507 A.2d at 1050. "[W]e observe that [plaintiff] suffered prejudice due to [defendants'] failure to make discovery."

119. *See supra* notes 104-10 and accompanying text.

120. *Hinkle,* 507 A.2d at 1050.

121. *See supra* notes 24-25 and accompanying text.

122. Massengale v. 3M Business Prods. Sales, Inc., 504 A.2d 574, 579 (D.C. 1985); Braxton v. Howard Univ., 472 A.2d 1363, 1366 n.4 (D.C. 1984).

123. Hinkle v. Sam Blanken & Co., 507 A.2d 1046, 1049 (D.C. 1986); Henderson v. District of Columbia, 493 A.2d 982, 989-93 (D.C. 1985).

124. This approach would deter and punish abuse by making it easier to establish.

ward delay alone as prejudicial. That case involved outrageous disregard of discovery rules for a period of nearly seventeen months.[125] In *Henderson*, the sanction was not dismissal and, therefore, the comparison to *Braxton* reveals less of the court of appeals' philosophy. The defendants in *Henderson* engaged in repeated violations of discovery rules and court orders lasting approximately one year,[126] a time period almost identical to that in *Braxton* where the strict rule was upheld. The delay in *Hinkle* was only eight months,[127] less than either *Massengale* or *Braxton*. Nowhere did the court indicate that *Hinkle* is considered as a *Braxton* exception.

Analyzed under the severe circumstances test, *Henderson* established willfulness by the defendant's intentional failure to act,[128] despite the court's silence on this element. As to the prejudice element, the court stated that it was clearly established both because the trial date was postponed for approximately six months and because the plaintiff was denied pay.[129] The court emphasized the delay, however.[130] In the past, neither of these factors would have established prejudice alone or together.[131] In *Hinkle*, the court of appeals stated that the severe circumstances test was also met.[132] The court found that defendants' conscious failure to comply with the discovery orders was willful, and stated that prejudice resulted from the trial postponement and months of waiting for responses.[133] Again, these factors would not have been adequate in previous cases. Therefore, in both *Henderson* and *Hinkle*, the District of Columbia Court of Appeals used a new, unarticulated formulation of the prejudice element, modifying the severe circumstances test. Taken together, these opinions imply that delay will satisfy the preju-

125. *Massengale*, 504 A.2d at 578. Because of the great leniency shown by the superior court, however, the actual discovery period lasted approximately 43 months, from April 1980 to November 1983. Also, the court dodged the application of *National Hockey League*. *Id.* at 578.

126. *Henderson*, 493 A.2d at 990-91.

127. *Hinkle*, 507 A.2d at 1050.

128. *Henderson*, 493 A.2d at 990-91, 93.

129. *Id.* at 993.

130. *See supra* note 74.

131. *See supra* notes 24-25 and accompanying text.

132. *Hinkle*, 507 A.2d at 1049.

133. "Our review of the record . . . persuades us that this is a case where 'severe circumstances' existed." *Id.* at 1049 (quoting previous cases). Interestingly, the court stated that this formulation of the prejudice element was not necessary to uphold the dismissal. *Id.* Therefore, the formulation may be dictum. *See* BLACK'S LAW DICTIONARY 409 (5th ed. 1979). "Statements and comments in an opinion concerning some . . . legal proposition not necessarily involved nor essential to determination of the case in hand are obiter dicta, and lack the force of adjudication." Nevertheless, the court did find prejudice from the delay and their holding was grounded on the presence of both elements of the severe circumstances test. *Hinkle*, 507 A.2d at 1050.

dice prong. Separate harm directly affecting the litigation is no longer necessary. In short, delay—plus the ordinary consequences of delay—will create the necessary prejudice.

The modified severe circumstances test is the better test. It will enable the District of Columbia Superior Court to force parties to cooperate in discovery and reduce the number of unexcused, lengthy delays. The new test will also discourage discovery abuse as a trial tactic. The court of appeals will still scrutinize these cases for willfulness and prejudice, and may still reverse if a dismissal appears too severe. But dismissal will not automatically be reversed on the grounds that there is no separate prejudice other than delay. Punishment will be a legitimate reason for dismissals as language in *Massengale* and *Hinkle* intimates.[134] In any event, the traditional reluctance to dismiss cases before trial[135] makes it unlikely that dismissals will be too frequent.

IV. CONCLUSION

The District of Columbia Court of Appeals has implicitly adopted the view that delay resulting from violations of discovery rules can be so prejudicial as to warrant dismissal of a case. The new view enables discovering parties to establish the severe circumstances necessary for dismissal and gives the superior courts real discretion to control abuse. Because of the uncertainty of the court's prior decisions in the area of discovery abuse, the appellate court should explicitly adopt the rule providing for dismissals based on discovery abuse prejudicial to the opposing party.

Michael Forrester

134. *Massengale,* 504 A.2d at 578. "Judge Scott might well have been justified in dismissing appellants' complaint with prejudice in early 1981 [rather than three years later]. *See, e.g., National Hockey League,* . . . (no abuse of discretion in dismissal for failure to answer interrogatories over a period of seventeen months despite several admonitions by the court) . . . ." *Hinkle,* 507 A.2d at 1048. "Our review of the record, which bristles with instances of appellants' disregard of the rules and orders of the court, persuades us that no abuse of discretion occurred."

135. While the District of Columbia Court of Appeals hasn't implied that deterrence of discovery violations will occur, this will almost certainly be a natural consequence of the new test for prejudice. *See supra* notes 50-53 and accompanying text.