STATE OF MICHIGAN

COURT OF APPEALS

ERIC W. SKOLNIK,

Plaintiff-Appellant,

v

RICHARD A. WANDZEL, D.O.,

Defendant-Appellee.

UNPUBLISHED
April 18, 1997

No. 193689
Oakland Circuit Court
LC No. 94-486562 NH

Before: McDonald, P.J., and Reilly and O'Connell, JJ.

PER CURIAM.

In this medical malpractice action, plaintiff appeals as of right the March 6, 1996, order of the Oakland Circuit Court dismissing his complaint for failure to comply with the court's earlier order compelling the deposition of plaintiff's expert witness, Dr. Mitchell Sachs. We reverse and remand.

Plaintiff filed the instant medical malpractice case on November 4, 1994, alleging that defendant negligently performed corrective plastic surgery on plaintiff's nose. Plaintiff filed an amended complaint on November 10, 1994, along with an affidavit of merit signed by Dr. Mitchell Sachs, stating that he reviewed plaintiff's medical records, and that he believed defendant breached the applicable standard of care. Defendant asserts that he contacted plaintiff's counsel several times between October 2, 1995, and December 20, 1995, to schedule Dr. Sachs' deposition, but that plaintiff's counsel never provided him with any dates on which Dr. Sachs was available for deposition. Therefore, on January 8, 1996, defendant filed a motion to compel the discovery deposition of Dr. Sachs. The trial court granted the motion on February 7, 1996, and ordered that the deposition of Dr. Sachs "be scheduled forthwith." Defense counsel asserts that he thereafter contacted the office of plaintiff's counsel several more times, but that he received no response as to the dates of Dr. Sachs' availability. Consequently, on February 20, 1996, defendant filed a motion to dismiss or, in the alternative, to strike Dr. Sachs as a witness, for plaintiff's failure to comply with the court's order compelling the deposition. On February 26, 1996, plaintiff filed a motion to adjourn the trial date to permit him to substitute a new expert. Plaintiff explained that the failure to comply with the discovery order was not the fault of plaintiff, but was the fault of Dr. Sachs, who refused to agree to the deposition unless he was paid a $6,000 fee in advance. Defendant's motion to dismiss and plaintiff's motion to adjourn were both scheduled to be heard on

March 6, 1996. After hearing both parties' arguments, the trial judge granted defendant's motion to dismiss.

Plaintiff now argues that the trial judge erred in dismissing the case as a sanction for plaintiff's failure to comply with the court's discovery order without finding that the failure to comply with the order was willful, and without evaluating the other available sanctions on the record. We agree.

A trial court's decision to impose discovery sanctions is reviewed for an abuse of discretion. *Richardson v Ryder Truck Rental, Inc*, 213 Mich App 447, 450; 540 NW2d 696 (1995). An abuse of discretion will only be found where the result so violates fact and logic that it constitutes a perversity of will, a defiance of judgment, or an exercise of passion or bias. *Wojas v Rosati*, 182 Mich App 477, 480; 452 NW2d 864 (1990).

MCR 2.313(B)(2) provides that a court may impose discovery sanctions on a party who fails to comply with the court's discovery order. The imposition of sanctions is discretionary and the trial court should carefully consider the circumstances of the case to determine whether a drastic sanction, such as dismissal, is appropriate. *Richardson, supra,* 213 Mich App 451. When determining whether to impose discovery sanctions, the factors the court should consider include 1) whether the violation was willful or accidental, 2) the party's history of refusing to comply with discovery requests, 3) the prejudice to the party, 4) whether the party has a history of engaging in deliberate delay, 5) the degree of compliance by the party with other provisions of the court's order, 6) an attempt by the party to cure the defect, and 7) whether a lesser sanction would better serve the interests of justice. *Id.* Furthermore, the drastic sanction of dismissal should be employed only where there has been a flagrant and wanton refusal to facilitate discovery, and where the failure has been conscious or intentional, rather than accidental or involuntary. *Frankenmuth Mutual Insurance Company v ACO, Inc*, 193 Mich App 389, 396-397; 484 NW2d 718 (1992).

Before imposing the sanction of dismissal for a party's failure to comply with an order compelling discovery, the judge must evaluate on the record the appropriateness of the less drastic sanctions available to it, and must find on the record that the party's failure to comply with the discovery order was willful. *Adams v Perry Furniture Company (On Remand),* 198 Mich App 1, 18; 497 NW2d 514 (1993). The trial judge in this case failed to do so, stating only the following:

> It has been more than enough time; it has been more than a year since this [case was filed], and the defendant shouldn't be put to the expense that is really plaintiff's problem with their experts. I am going to grant [defendant's] motion.

Pursuant to *Adams, supra*, these findings were insufficient to justify the sanction imposed. Therefore, we reverse the trial court's grant of dismissal, and remand to the circuit court for a rehearing on the imposition of appropriate sanctions, including the possibility of dismissal.

Reversed and remanded. We do not retain jurisdiction.

/s/ Gary R. McDonald
/s/ Maureen Pulte Reilly
/s/ Peter D. O'Connell