

STATE OF MICHIGAN  
COURT OF APPEALS

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TRACY DRAKE, Personal Representative for the  
Estate of ROBERT DRAKE, Deceased,

UNPUBLISHED  
November 20, 2007

Plaintiff-Appellant,

v

No. 270225  
Jackson Circuit Court  
LC No. 03-001785-NH

AMY SCHANTZ-RONTAL, M.D., ROLANDO  
BEREDO, M.D., DOWNTOWN MEDICAL,  
P.L.L.C., VASUDEV ANANTHRAM, M.D.,  
SADASIVA REDDY, M.D., JACKSON  
RADIOLOGY CONSULTANTS, P.C.,  
TIMOTHY MURRAY, M.D.,  
CHAKRAVARTHY KANDURU, M.D., and W.A.  
FOOTE MEMORIAL HOSPITAL,

Defendants-Appellees.

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Before: Talbot, P.J., and Fitzgerald and Kelly, JJ.

PER CURIAM.

Plaintiff appeals as of right the order granting defendant Chakravarthy Kanduru, M.D.'s motion to dismiss. Plaintiff also challenges a related order for discovery sanctions, which precluded plaintiff's expert witnesses from testifying at trial. We affirm.

Plaintiff filed this medical malpractice and wrongful death action against defendants for failing to timely and properly evaluate, diagnose, and treat the decedent Robert Drake for a dissecting thoracic aortic aneurysm. Because of problems encountered in scheduling the depositions of defendants' and plaintiff's witnesses, on May 3, 2004 the trial court ordered that the depositions of plaintiff's experts were to be completed by December 31, 2004. However, before those depositions could occur, defendants were granted summary disposition based on deficiencies in the affidavits of merit submitted. This initial dismissal led to an appeal to this Court and a stay of proceedings.<sup>1</sup>

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<sup>1</sup> *Drake v Beredo*, unpublished order of the Court of Appeals, entered May 18, 2005 (Docket No. 259680).

After the stay was lifted, the proceedings reinstated and discovery again commenced,<sup>2</sup> Dr. Kanduru, joined by other defendants, sought to compel the deposition of plaintiff's experts, asserting that plaintiff was not cooperating in scheduling these depositions. During the hearing conducted on November 18, 2005, the trial court ordered<sup>3</sup> plaintiff to identify in writing the expert witnesses she intended to call at trial by November 30, 2005. Plaintiff was instructed to try scheduling the depositions for those experts and to appear on December 2, 2005 prepared to schedule the depositions if she had been unsuccessful in confirming deposition dates.

Contrary to the trial court's order, plaintiff failed to submit a written list of the experts she intended on calling at trial. In addition, plaintiff appeared before the court on December 2, 2005, unprepared to schedule the depositions. The trial court then ordered plaintiff to provide the list of experts to defendants by 5:00 p.m. that day or risk having her witnesses precluded from testifying. In response, plaintiff facsimiled correspondence to the trial court stating that she had complied with the prior order, citing letters dated October 25, 2005 and November 17, 2005. The referenced letters were sent to defendants and identified possible deposition dates for seven of the 28 experts included on her witness list. The trial court subsequently granted Dr. Kanduru's motion to strike plaintiff's experts and for dismissal based on her failure to comply with the discovery orders in accordance with MCR 2.313(B)(2) and MCR 2.504(B). Plaintiff moved for reconsideration, which the trial court denied, stating in relevant part:

While the Court understands the position of the Plaintiff who suggests that the Court was misled at the time of the motion and as a result dismissed Plaintiff's case, a review of the pleadings of all parties and a review of the Register of Actions, which alone takes up 22 pages, convinces the Court that it was not misled into dismissing Plaintiff's case. The Court well recalls the several motions that took place over a considerable period of time in which the Defendants tried to obtain an actual list of the expert witnesses to be called at trial by the Plaintiff so that their depositions could be obtained. A review of the file and Register of Actions shows that the Court, on May 3, 2004, entered an Order extending the discovery time in this cause because the Plaintiff had not made their experts available for deposition, and at that time the discovery period had expired and case evaluation was set to take place within a couple of weeks. This of course, resulted in a new trial date having to be set. The Court subsequently ordered on or about November 18, 2005, that the Plaintiff was to notify the Defendants which expert witnesses were to testify at trial by December 2, 2005, and to appear in Court with dates for the depositions to be taken. On December 2, 2005, the Plaintiff had not notified Defendants as to the actual expert witnesses that would testify and no dates for depositions thus had been provided or were available at the time of the hearing on December 2, 2005, and the Court then ordered that such a witness list be served upon the Defendants by 5:00 p.m. on that same day or the experts would not be allowed to testify at the time of trial. On December 16,

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<sup>2</sup> This Court lifted the stay and denied the application for leave to appeal. *Drake v Beredo*, unpublished order of the Court of Appeals, entered August 16, 2005 (Docket No. 259680).

<sup>3</sup> The relevant order was entered November 29, 2005.

2005, the Court found and determined that the Plaintiff had not complied with the Orders of the Court and was satisfied at that time that the Plaintiff had failed to act in good faith and dismissed the case.

The Court is satisfied that it has acted with great restraint in extending time periods for discovery and thus extending the trial dates that were previously set in order for the Plaintiff to comply with the Court's Order to notify Defendants as to the expert witnesses to be called at trial and to allow the parties to take the necessary resulting depositions. The Plaintiff has failed consistently to comply with the Court's Orders. The Court is also satisfied that the only appropriate remedy at that point was to dismiss the case with prejudice.

Plaintiff argues that the trial court abused its discretion by prohibiting her witnesses from testifying at trial and dismissing this action. We disagree. A trial court's decision on whether to impose discovery sanctions is reviewed for an abuse of discretion. *Local Area Watch v Grand Rapids*, 262 Mich App 136, 147; 683 NW2d 745 (2004). An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

A trial court may order sanctions for failure to comply with a discovery order. MCR 2.313(B). Specifically, a court may preclude a party from introducing expert testimony at trial as a sanction for disobeying a discovery order. MCR 2.313(B)(2)(b); *LaCourse v Gupta*, 181 Mich App 293, 296; 448 NW2d 827 (1989). Severe sanctions, such as dismissing an action, are generally appropriate "only when there has been a flagrant and wanton refusal to facilitate discovery and not when failure to comply with a discovery request is accidental or involuntary." *Traxler v Ford Motor Co*, 227 Mich App 276, 286; 576 NW2d 398 (1998) (citation omitted). A trial court should consider the following non-exhaustive list of factors in determining an appropriate discovery sanction:

(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 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. [*Dean v Tucker*, 182 Mich App 27, 32-33; 451 NW2d 571 (1990) (footnotes omitted).]

Following a review of the lower court record, we find that the trial court did not abuse its discretion by prohibiting plaintiff's experts from testifying at trial and dismissing the cause of action. Although plaintiff attempted to comply with the May 3, 2004 discovery order, discovery was not successfully conducted because this action was stayed as a result of the initial grant of summary disposition and related appellate proceedings. However, this neither diminishes nor excuses the fact that the May 3, 2004 order arose, in part, because plaintiff failed to produce her expert witnesses for deposition. Further, plaintiff did not comply with the November 29, 2005

order because she failed to identify in writing the experts she intended to call at trial and was not prepared at the December 2, 2005 hearing to schedule their depositions.

While plaintiff argues that the letters dated October 25, 2005 and November 17, 2005, which were sent to defendants, constitute compliance with the November 29, 2005 order, those documents do not adequately address the concern that led to the discovery order, i.e., identifying which of plaintiff's experts would actually testify in order to permit defendants to adequately prepare for trial. Plaintiff's identification in these letters of certain experts and possible dates of availability for deposition did not comply with the trial court's order because they failed to verify whether the named individuals were the only experts plaintiff expected to testify.

Throughout the litigation, plaintiff provided conflicting indications regarding the number and identity of the named experts who would actually be called to testify. In 2004, plaintiff identified five experts who presumably she intended to call at trial. However, in later correspondence, plaintiff identified seven experts who presumably she intended to call at trial. Plaintiff added to the uncertainty by stating during the November 18, 2005 hearing that she would call no more than three experts in each area of expertise. Had plaintiff simply provided the court-ordered list that clearly identified those experts she intended to testify at trial, discovery sanctions would have been avoided. Additionally, plaintiff violated the trial court's very clear directive and was not prepared when she appeared at the December 2, 2005 hearing to schedule the depositions. Although plaintiff blames miscommunication for this failure, the lack of clarity in communication among her own counsel does not justify or explain plaintiff's failure to comply with the trial court's order to provide a written list of testifying experts.

The transcripts and lower court record clearly demonstrate that the trial court carefully considered the circumstances and history of noncompliance, which had occurred throughout the proceedings before implementing sanctions. See *Houston v Southwest Detroit Hosp*, 166 Mich App 623, 629-630; 420 NW2d 835 (1987). The court did not rush to dismiss the case. Rather, the trial court displayed great patience in providing plaintiff numerous opportunities to comply with its discovery orders and deadlines.

Plaintiff's dilatory actions prevented defendants from preparing for trial. Recognizing that "[d]ismissal is a drastic step that should be taken cautiously," *Vicencio v Ramirez*, 211 Mich App 501, 506; 536 NW2d 280 (1995), we find that the trial court did not abuse its discretion by prohibiting defendants from calling expert witnesses at trial. Given the nature of the case, not allowing plaintiff's experts to testify necessitated dismissal of the action. See MCR 2.313(B)(2)(b); *LaCourse*, *supra* at 296.

Affirmed.

/s/ Michael J. Talbot  
/s/ Kirsten Frank Kelly