**[Cite as *Dray v. Gen. Motors Corp.*, 2006-Ohio-347.]**

**IN THE COURT OF APPEALS**
**THIRD APPELLATE DISTRICT**
**ALLEN COUNTY**

**ROBERT W. DRAY**

**PLAINTIFF-APPELLANT** **CASE NO. 1-05-35**

**v.**

**GENERAL MOTORS CORPORATION, ET AL.** **O P I N I O N**

**DEFENDANTS-APPELLEES**

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**CHARACTER OF PROCEEDINGS:** **Civil Appeal from Common Pleas Court**

**JUDGMENT:** **Judgment Affirmed**

**DATE OF JUDGMENT ENTRY:** **January 30, 2006**

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**ATTORNEYS:**

**ROBERT W. DRAY**
**In Propria Persona**
**525 North Main Street**
**Delphos, Ohio 45833**
**Appellant**

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**For Appellees**

**SHAW, J.**

**{¶1}** Plaintiff-appellant, Robert W. Dray ("Dray"), appeals the April 27, 2005 judgment of the Court of Common Pleas of Allen County, Ohio granting the mistrial and dismissal of this case with prejudice.

**{¶2}** On April 26, 2002, Dray purchased a used Oldsmobile Aurora from defendant-appellee, Lee Kinstle Chevrolet Olds ("Kinstle"). The cash price of the Aurora was $21,950.00. The used Aurora had been previously owned by Madge Brickner of the Brickner Funeral Homes. When she owned the car, she had a 1967 General Electric business radio installed. The Brickner family never had any problems with the vehicle, including electrical concerns due to the radio being installed.

**{¶3}** Prior to purchasing the Aurora, Dray did not take the opportunity to test drive the vehicle even though he was provided with such an opportunity. However, after purchasing the Aurora but before taking delivery of the vehicle at Kinstle's, Dray noticed a few things that he believed Kinstle to have misrepresented. First, he noticed that the vehicle was not equipped with OnStar which was supposed to be standard equipment in the vehicle. Next, he noticed that the car had almost 18,000 miles on it and he had been told that it had under 10,000 miles on it. Upon leaving Kinstle on April 26, Dray discovered other things that he believed did not conform to the contract of sale because of defects

that occurred due to extensive electrical alterations. These defects included brackets left in the trunk, standing water in running lights and license plate light, running lights and license plate light working intermittently, defective wiring, factory brackets hanging loose and sagging in the trunk, hood not shutting, drivers side heat switch malfunctioning, and heating and air conditioning fan not working.

**{¶4}** On April 29, 2002, Dray returned the Aurora to Kinstle with a long list of problems that he had found after a full inspection of the vehicle. Kinstle stated that it would not accept the Aurora back at that time but was willing to fix it and issue a letter stating that it would stand behind any factory warranty refusal due to the installation and removal of the business radio. On May 3, 2002, Kinstle returned the Aurora to Dray. However, Dray was not pleased with the work that had been done because everything on the list of problems had not been fixed. Dray made a call to Kinstle informing them of his dissatisfaction.

**{¶5}** On August 2, 2002, Dray initially filed a suit complaining of the problems with the Aurora that had not been fixed by Kinstle. Dray sought damages pursuant to R.C. 1345.73, 1345.75 and U.C.C. 2-608. On July 17, 2003, Dray filed a Notice of Voluntary Dismissal.

**{¶6}** On August 14, 2003, Dray filed this case against Kinstle and General Motors setting forth numerous causes of action. Dray asserted that he was entitled to cancellation of the contract pursuant to U.C.C. 2-601 or 2-608 due to

breach of express warranty, breach of implied warranty, breach of implied warranty of fitness, rejection and revocation of acceptance. In addition, he asserted fraud, violation of the Consumers Sales Practices Act and cancellation under the Magnuson-Moss Act.

**{¶7}** On October 24, 2003, Kinstle filed a Motion for Summary Judgment. On February 23, 2004, the trial court granted partial summary judgment on all of Dray's claims against Kinstle except the revocation of acceptance claim. On March 24, 2004, Dray filed a Notice of Appeal appealing the February 23, 2004, partial summary judgment. However, this appeal was dismissed on April 7, 2004 as being prematurely filed. Therefore, the trial date was set for April 19, 2004 but was vacated and rescheduled for September 13, 2004.

**{¶8}** On August 25, 2004, Dray filed a Motion for Partial Reconsideration of the Order Granting Partial Summary Judgment on the Motion of Lee Kinstle Chevrolet Olds, Inc. which was denied. The trial court then vacated the September jury trial and rescheduled the trial for April 25, 2005. On September 7, 2004, Dray filed a Motion of Plaintiff for Leave to File an Amended Complaint. On September 8, 2004, a Judgment Entry was filed granting plaintiff leave to file an amended complaint. On September 13, 2004, Dray filed an Amended Complaint. In the Amended Complaint, Dray added an additional defendant, Community First Bank and Trust, and alleged cancellation of the contract;

damages for breach of warranty; fraud; cancellation under Magnuson-Moss Act; unfair, deceptive acts and practices; consumer notice; civil conspiracy; aiding and abetting; other wrongs pursuant to R.C. 2307.60; and breach of contract. On September 20, 2004, Dray filed a second Amended Complaint.

**{¶9}** On November 5, 2005, General Motors filed a Motion for Summary Judgment. On January 14, 2005, the trial court granted General Motor's Motion for Summary Judgment. On February 9, 2005, Community First Bank and Trust filed a Motion for Summary Judgment. On March, 16, 2005, the trial court granted Community First Bank and Trust's Motion for Summary Judgment. Also, on March 16, 2005, the trial court issued a final order reiterating that: (1) partial summary judgment in favor of Kinstle pursuant to its February 23, 2004 Motion for Summary Judgment; (2) summary judgment in favor of General Motors; and (3) summary judgment in favor of Community First Bank and Trust, and provided certification of "no just reason for delay" pursuant to Civ.R. 54(B). However, Dray did not attempt to appeal this order until May 25, 2005.

**{¶10}** On April 25, 2005, the case went to a jury trial. However, after the trial court issued several instructions and warnings to Dray, the trial court declared a mistrial and dismissed the case with prejudice due to Dray's conduct. On April 27, 2005, the trial court issued its Judgment Entry granting the mistrial and dismissal with prejudice.

**{¶11}** On May 25, 2005, the plaintiff-appellant filed his notice of appeal and now raises the following assignments of error:

*Assignment of Error 1*

**AS STATED TO THE COURT MULTIPLE TIMES, ON PAGE 2. THIS WAS NOT A "BUSINESS RADIO RATHER THAN A FACTORY RADIO, THIS WAS A "HIGH POWERED" "AMBULANCE RADIO," BOLTED TO THE FLOOR IN THE TRUNK OF THE OLDS.**

*Assignment of Error 2*

**KINSTLE MADE NO WARRANTIES TO PLAINTIFF. THERE IS MULTIPLE AFFIDAVIT DOCUMENTATION ABOUT "6 WEEKS" OF PHONE CALLS TO PLAINTIFF DRAY'S HOME BY CHRIS MARTINEZ THE KINSTLE SALESMAN TELLING DRAY "HOW PERFECT" THIS CAR WAS.**

*Assignment of Error 3*

**PLAINTIFF DID NOT HAVE THE VEHICLE "INSPECTED" AND TOOK IT IN "AS IS" CONDITION. THIS IS UNTRUE. THIS CAR INSPECTED BY GM 4-26-02 BY RICHARD GERMAN, FOR GM DETROIT FACTORY WARRANTY, TRANSFER. *****

*Assignment of Error 4*

**I AT NO TIME IN MY DEPOSITION STATED THE "SPECIFICATIONS AND EQUIPMENT" WERE ACCURATE. *****

*Assignment of Error 5*

**JUDGE WARREN ALSO SAID, I ONLY TOOK THE CAR IN FOR REPAIR "ONCE," THAT IS BY MULTIPLE DOCUMENTATION UNTRUE. *****

*Assignment of Error 6*

**SEE JUDGMENT ENTRY DATED APRIL 18, 2003 AS TO THE APRIL 23, 2003 DEPOSITION, (SEE SUPREME COURT AFFIDAVIT DATED APRIL 5, 2005 ATTACHED) AFTER TELEPHONE DEPOSITION WAS "OVERRULED" BY JUDGE WARREN, EVEN WITH ME SENDING HIM, "51 PAGES OF SURGICAL REPORTS AND MEDICAL REPORTS ABOUT MY SPINAL CORD DAMAGE, I WENT TO FITZGERALD OFFICE IN A WALKER FOR DEPOSITION, THE PAIN WAS SO BAD, I FELL FROM MY WALKER TO THE FLOOR, IN FITZGERALD'S OFFICE. HE CALLED A "FAKE" AND WOULD NOT EVEN CALL 911 AMBULANCE. *****

*Assignment of Error 7*

**ALL THE MOTIONS I FILED TO JUDGE WARREN NOV. 18, 2004 AND DEC. 22, 2004, JAN. 14, 2005 AND MAR. 8, 2005, JUDGE WARREN DID NOT ANSWER MY MOTIONS NEEDED GREATLY TO PLEAD THE CASE.**

**{¶12}** Dray's assignments of error one, two, three, four and five allege factual disputes. In the first assignment of error, Dray claims that the radio that had been bolted to the trunk floor in the Aurora was an ambulance radio rather than a business radio. In the second assignment of error, Dray asserts that Martinez, a Kinstle salesman, called him for six weeks telling him how perfect the Aurora was. In the third assignment of error, Dray argues that he did have the Aurora inspected by General Motors for the factory warranty to transfer to him. In the fourth assignment of error, Dray claims that he did not state that the

"specifications and equipment" were accurate. In the fifth assignment of error, Dray asserts that he took the Aurora in for repair more than once.

**{¶13}** It is axiomatic that allegations and issues of fact are to be determined by the trier of fact. An appellate court will not make such a determination on appeal. Specifically, the factual disputes and allegations asserted by Dray would have been presented and decided by the trial court had the case been tried. However, these issues of fact were never presented in evidence at trial due to the trial court declaring a mistrial early in the proceedings. Accordingly, these allegations are not properly before this Court. Therefore, assignments of error one, two, three, four, and five are overruled.

**{¶14}** In the sixth assignment of error, Dray essentially asserts that Judge Warren abused his discretion in overruling Dray's request for a telephone deposition in the April 18, 2003 Judgment Entry.

**{¶15}** An appellate court will not reverse a trial court's decision regarding disposition of discovery issues absent an abuse of discretion. *State ex rel. The V. Companies, et al. v. Marshall* (1998), 81 Ohio St.3d 467, 469, 692 N.E.2d 198. An abuse of discretion constitutes more than an error of law or judgment and implies that the trial court acted unreasonably, arbitrarily, or unconscionably. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140. When

applying the abuse of discretion standard, a reviewing court may not simply substitute its judgment for that of the trial court. Id.

**{¶16}** Upon review of the record in this case, we find that the trial court did not abuse its discretion in determining that Dray's request for a telephone deposition be overruled. Moreover, the issue of whether the deposition should have been held telephonically is moot because the deposition of Dray was taken on May 21, 2003. Accordingly, the sixth assignment of error is overruled.

**{¶17}** In the seventh assignment of error, Dray asserts that Judge Warren did not answer numerous motions he filed throughout the proceeding of the case. Three of these motions relate to General Motors and/or Community Bank and Trust. However, both of these defendants were granted Summary Judgment and both judgments were certified as final pursuant to Civ.R. 54(B). No timely notice of appeal was filed from the final judgment dismissing all claims against General Motors and Community Bank and Trust. App.R. 4 applies to an order made appealable under Civ.R. 54(B). *Grabill v. Worthington Ind., Inc.* (1993), 89 Ohio App.3d 485, 488, 624 N.E.2d 1105. Specifically, App.R. 4(B)(5) requires that an appeal be filed within thirty days from a certified judgment entry or order appealed or the judgment or order that disposes of the remaining claims. No timely notice of appeal having been filed from those final orders, this Court is now without jurisdiction to address those issues and therefore, Dray's claims may not

be raised against General Motors and/or Community Bank and Trust pursuant to the doctrine of res judicata. See *In re Adoption of Greer* (1994), 70 Ohio St.3d 293, 638 N.E.2d 999, fn. 1.

**{¶18}** Thus, the only issue remaining is whether Judge Warren ruled on the December 22, 2004 motion as it relates to Kinstle. Specifically, Dray filed this motion as an Addendum to the motion that had previously been filed on November 18, 2004. Therefore, Judge Warren ruled upon the motions of both November 18, 2004 and the December 22, 2004 Addendum in his Judgment Entry granting General Motor's Motion for Summary Judgment on January 14, 2005.

**{¶19}** Accordingly, we find that the motion that is properly before this Court was ruled upon by Judge Warren. Therefore, assignment of error seven is overruled.

**{¶20}** Finally, despite the lack of a specific assignment of error on the issue, it is apparent that Dray disagrees with and essentially challenges the trial court's granting a mistrial and dismissing the case with prejudice. Accordingly, in the interest of justice and because it involves an important question going to the inherent authority of the trial court to conduct a trial, we will address this overall issue.

**{¶21}** Civ. R. 41(B)(1) governs involuntary dismissals for failure to prosecute. Specifically, Civ.R. 41(B)(1) provides:

> **Where the plaintiff fails to prosecute, or comply with these rules or any court order, the court upon motion of a defendant or on its own motion may, after notice to the plaintiff's counsel, dismiss an action or claim.**

A condition precedent to dismissal of an action for failure to prosecute is notice to the plaintiff or plaintiff's counsel of the court's intention to dismiss. Civ.R. 41(B)(1). Notice is an absolute prerequisite for dismissal for failure to prosecute. *Perotti v. Ferguson* (1983), 7 Ohio St.3d 1, 2-3, 454 N.E.2d 951, 952.

**{¶22}** Generally, dismissal with prejudice is an extremely harsh sanction and contrary to the fundamental preference for deciding cases on their merits. *Jones v. Hartranft* (1997), 78 Ohio St.3d 368, 371, 678 N.E.2d 530. Accordingly, a court should not order a dismissal with prejudice unless the plaintiff's conduct is so "negligent, irresponsible, contumacious, or dilatory as to provide substantial grounds" for such a dismissal. *Tokles & Son, Inc. v. Midwestern Indemn. Co.* (1992), 65 Ohio St.3d 621, 632, 605 N.E.2d 936; *Willis v. RCA Corp.* (1983), 12 Ohio App.3d 1, 2, 465 N.E.2d 924, 926; *Schreiner v. Karson* (1977), 52 Ohio App.2d 219, 223, 369 N.E.2d 800, 803. Despite the heightened scrutiny to which dismissals with prejudice are subject, this Court will affirm the dismissal of an action when the conduct of the parties provides "substantial grounds for a dismissal with prejudice for a failure to prosecute or obey a court order." *Tokles & Son, Inc.*, 65 Ohio St.3d at 632, quoting *Schreiner*, 52 Ohio App.2d at 223.

**{¶23}** It is within the sound discretion of the trial court to dismiss an action for lack of prosecution. *Pembaur v. Leis* (1982), 1 Ohio St.3d 89, 91, 437 N.E.2d 1199. The appellate court is confined solely to whether the trial court abused that discretion. Id. An abuse of discretion constitutes more than an error of law or judgment and implies that the trial court acted unreasonably, arbitrarily, or unconscionably. *Blakemore*, 5 Ohio St.3d at 219.

**{¶24}** In this case, the April 27, 2005 Judgment Entry (Trial Proceedings, Mistrial & Dismissal with Prejudice) provides the following chronology of events leading to the dismissal:

> **Whereas, after many cautionary instructions and admonitions by the Court, the defendant requested a mistrial and the Court for the following reasons grants the same and dismisses the within action with prejudice.**
>
> **Whereas, prior to trial, defendant had requested certain Orders in limine which the Court granted. Review of the file and documents filed by the plaintiff necessitated the Court approving and filing such Orders. Initially, the Court had granted partial summary judgment to other defendants and many of the issues had been resolved and were not issues to be decided in this particular case. The Court specifically set forth what the issues were and plaintiff was well aware of same. Further the Court had instructed the plaintiff about irrelevant matters that would not be presented to the jury. In addition, the Court in its discretion conducted voir dire examination but allowed the parties to supplement and ask questions as indicated by the record. In addition, the Court, prior to trial commencing on this date, instructed plaintiff about matters that would be prohibited.**

> **Whereas, plaintiff during opening statement had to be cautioned and instructed numerous times about matters that were evidentiary in nature and not relevant to the within case. In fact, during a recess the Court specifically admonished the plaintiff concerning matters that were not to be presented since they were irrelevant and prejudicial.**
>
> **Whereas, even after plaintiff's opening statement, defendant requested a directed verdict because of the plaintiff's statements and actions, and the Court, in its attempt to conduct a trial to conclusion, overruled the same.**
>
> **Plaintiff then called his first witness. Numerous times during the attempted examination of said witness, the Court had to admonish the plaintiff in regards to matters that he had been previously instructed to not bring up and mention, but plaintiff ignored the instructions and persisted in asking questions and making testimonial statements which the Court was required to strike and instruct the jury of same.**
>
> **The Court then for the third and fourth time had to admonish the plaintiff again outside the presence of the jury in regards to irrelevant and prejudicial matters in which plaintiff was attempting to testify and not allow the witness [to] complete his answer if it was not to his liking and then calling the witness and defendant's employees "liars". Plaintiff was also warned about a mistrial.**
>
> **In addition, the record would show herein that the Court admonished the plaintiff at least ten (10) times during the presentation of evidence about his method of presenting evidence and matters that were irrelevant and prejudicial statements and testimonial matters that were not proper.**

**{¶25}** Upon careful review, we find that the record is consistent with and supports the findings and conclusions of the April 27, 2005 Judgment Entry. Based on Dray's continued pattern of conduct in persistently refusing to follow

instructions and admonitions of the court, we can not say that the trial court erred in granting a mistrial and dismissing the case with prejudice.

**{¶26}** Therefore, Dray's seven assignments of error are overruled and the April 27, 2005 judgment of the Court of Common Pleas of Allen County, Ohio granting the mistrial and dismissal of this case with prejudice is affirmed.

***Judgment affirmed.***

**BRYANT, P.J. and CUPP, J., concur.**

**/jlr**