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ARKANSAS COURT OF APPEALS

DIVISION III
No. CA10-172

LAWRENCE YOUNG, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF VIRGINIA CASTLEBERRY, DECEASED APPELLANT	**Opinion Delivered** November 17, 2010 APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT, THIRD DIVISION [NO. CV2008-12574]
V.	HONORABLE JAMES MOODY, JR., JUDGE
OUMITANA KAJKENOVA, M.D. APPELLEE	REVERSED & REMANDED

RAYMOND R. ABRAMSON, Judge

Lawrence Young, as personal representative of the estate of Virginia Castleberry, deceased, initially filed this medical malpractice suit in 2006. On the eve of trial, he voluntarily nonsuited the case, but later refiled it in November 2008. Dr. Oumitana Kajkenova answered the complaint, and the circuit court entered a scheduling order, setting the case for a jury trial on October 27, 2009, with all discovery due thirty days earlier. Dr. Kajkenova propounded her set of interrogatories and requests for production on Young in January 2009. By June 2, 2009, Dr. Kajkenova had not received any responses to the interrogatories and requests for production and her attorney sent Young's attorney a letter requesting that Young respond. In the letter, Dr. Kajkenova's attorney also informed Young's

attorney that she wanted to schedule the deposition of any experts Young expected to testify at trial.

Young's attorney responded to the letter on June 18, 2009, stating that the responses were nearly complete and would be delivered in the next few days. Young, however, failed to deliver on this promise, prompting Dr. Kajkenova's attorney to send Young's attorney a second letter on July 20, 2009. In the letter, Dr. Kajkenova's attorney warned that she would seek court intervention if the responses were not received by July 27, 2009. She also reiterated that she wanted to depose any expert Young planned on calling at trial, including Dr. James Sexson, whom she had earlier deposed before Young nonsuited the first case. Still, Young did not respond or schedule any depositions.

Dr. Kajkenova's attorney filed a motion to compel on August 10, 2009, to which Young never responded. The court entered an order granting the motion on September 4, 2009. Pursuant to the order, Young had until September 10, 2009 to respond to the interrogatories and requests for production and had to produce any and all witnesses listed in discovery for deposition by September 25, 2009. The order closed with a warning: "Plaintiff's claims against Defendant are subject to dismissal for failure to comply with the deadlines ordered and adjudged herein."

According to Dr. Sexson's affidavit, Young's counsel contacted his office on September 9, 2009, wanting to schedule his deposition for September 21, 22, or 23, 2009. Due to Dr. Sexson's full schedule, however, the earliest date that he was available for the

deposition was October 5, 2009. Young was therefore unable to produce Dr. Sexson by the deposition deadline, and Dr. Kajkenova then moved for sanctions against Young. After a hearing on the sanctions motion, the court granted the motion and prohibited Dr. Sexson from testifying at trial. Because Dr. Sexson was Young's only medical expert, Young acknowledged that he could not prove his case, and the court ultimately dismissed the lawsuit with prejudice.

Young then filed a motion for reconsideration of the court's order granting Dr. Kajkenova's sanctions motion. At the hearing on the motion, Young's counsel argued, in part, that the court's decision was highly prejudicial to Young and that there were other less severe options available. In response, the following colloquy occurred:

> THE COURT: Well . . . I will tell you that striking the witness for failure to produce him before trial is an action that I have consistently taken in every case.
>
> [YOUNG'S LAWYER]: I understand.
>
> THE COURT: And rarely do I do that without somebody having a heads up that they should produce him or that they didn't have a fair opportunity. And in this situation, we have an order to compel, a scheduling order. And the best reason I've got is, all our lawyers weren't on the same page and so we didn't do it.
>
> And so while [Young's counsel] wants to characterize this as a dismissal of his case, that may be the result of it. But I am merely following my general rule of thumb with regard to experts and witnesses who have not been produced to the other side in a timely manner.

The court denied Young's motion for reconsideration. On appeal, Young argues 1) that the court misapplied Arkansas Rule of Civil Procedure 37 by adhering to its "general rule of thumb" without weighing and balancing the facts, circumstances, and equities of the case; and 2) that the sanction, in any event, was too severe.

Analysis

If a party fails to comply with an order compelling discovery, the court "may make such orders in regard to the failure as are just" and may enter, among other options, "[a]n order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence." Ark. R. Civ. P. 37(b)(2)(B). "The imposition of sanctions, including dismissal, for failure to provide discovery rests in the trial court's discretion; this court has repeatedly upheld the trial court's exercise of such discretion in fashioning severe sanctions for flagrant discovery violations." *Southern College of Naturopathy v. State ex rel. Beebe*, 360 Ark. 543, 558, 203 S.W.3d 111, 120 (2005). But "[w]hen a decision is within the discretion of the trial court, the trial court abuses that discretion by failing to exercise it." *Lawrence v. Crafton*, 2010 Ark. App. 231, at 13, ___ S.W.3d ___, ___. However, "[t]here is no requirement under Rule 37, or any of our rules of civil procedure, that the trial court make a finding of willful or deliberate disregard under the circumstances before sanctions may be imposed for the failure to comply with the discovery requirements." *Calandro v. Parkerson*, 333 Ark. 603, 608, 970 S.W.2d 796, 799 (1998).

In its order granting Dr. Kajkenova's motion for sanctions, the court found that Young had "failed to present [it] with good cause as to why Dr. Sexson was not produced on or before September 25, 2009." This finding seems to indicate that the court was exercising its discretion and was weighing the facts and circumstances in making its decision. But the court's comments at the hearing on Young's motion to reconsider show otherwise. As quoted above, the court stated that striking a witness in these circumstances "is an action that [it has] consistently taken in every case." It went on to note that it was following its "general rule of thumb." These comments indicate that the court's decision to strike Dr. Sexson was not the product of careful consideration and discretion exercised, but was instead a mechanical application of its "general rule of thumb." By failing to exercise its discretion in granting Dr. Kajkenova's sanctions motion, the court abused its discretion. *Lawrence*, 2010 Ark. App. 231, at 13, ___ S.W.3d at ___. We therefore reverse and remand for further proceedings consistent with this opinion. *Id.* Because of our decision on this first point, we do not reach Young's second point on appeal—that the sanction was too severe.

Reversed and remanded.

ROBBINS and KINARD, JJ., agree.