

STATE OF MICHIGAN
COURT OF APPEALS

NICK SCHUNCK,

Plaintiff-Appellant/Cross Appellee,

v

MARYSVILLE HIGH SCHOOL,

Defendant,

and

WALT BRAUN and JIM VENIA,

Defendants-Appellees/Cross
Appellants.

UNPUBLISHED

December 14, 2001

No. 225123

St. Clair Circuit Court

LC No. 98-002023-PZ

Before: Cooper, P.J., and Cavanagh and Markey, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting defendants' motion for dismissal after plaintiff violated an order in limine in this negligence action. We affirm.

Plaintiff raises several issues on appeal, however, only three dispositive issues warrant consideration. First, plaintiff argues that the trial court abused its discretion when it granted defendants' motion in limine precluding any reference to defendant Braun's employment problems and stroke. Plaintiff argues that the status of Braun's employment, particularly his termination, was relevant to the issue of damages. However, plaintiff did not file a response to defendants' motion in limine until after the hearing, did not appear for the hearing, and did not raise this argument in the trial court. Consequently, this argument is not preserved and may not be raised for the first time on appeal. See *Booth Newspapers, Inc v University of Michigan Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993); *Rainsberger v McFadden*, 174 Mich App 660, 667; 436 NW2d 412 (1989). Further, plaintiff has given cursory treatment to this argument on appeal and has merely announced his position without citation to supporting authority; therefore, the issue is not properly presented for review. See *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998); *Community Nat'l Bank v Michigan Basic Property Ins Ass'n*, 159 Mich App 510, 520-521; 407 NW2d 31 (1987). In sum, we decline to consider the issue. See *Eastway & Blevins & Blevins Agency v Citizens Ins Co of America*, 206 Mich App 299, 303; 520 NW2d 640 (1994).

Next, plaintiff argues that he did not violate the order in limine because the order did not prohibit him from introducing evidence referring to defendant Braun's termination from employment. We disagree.

The trial court granted defendant's motion in limine, pursuant to MRE 401, holding:

Plaintiff shall be precluded from making any reference during the trial to problems encountered by Defendant Walt Braun in his employment and relating to his stroke as referenced in Defendants' Motion which resulted in the termination of his employment.

The plain language of the order clearly prohibited evidence related to defendant Braun's termination. Consequently, when plaintiff's mother testified that "Walt Braun was fired from his position," the order was violated. Further, plaintiff's novel argument that the order only prohibited him, and not his witnesses, from introducing such evidence is without merit. First, again, plaintiff has given cursory treatment to the issue and has merely announced his position without citation to supporting authority. See *Wilson, supra*; *Community Nat'l Bank, supra*. Second, an order in limine applies to plaintiff, as well as his witnesses. See *Lapasinskas v Quick*, 17 Mich App 733, 737, n 1; 170 NW2d 318 (1969).

Finally, plaintiff argues that dismissal of his action for violating the order in limine was too harsh a sanction. See MCR 2.504(B)(1). We disagree. A trial court's decision to dismiss a case is reviewed on appeal for an abuse of discretion. *Bass v Combs*, 238 Mich App 16, 35; 604 NW2d 727 (1999); *Gruber Enterprises, Inc v Kortidis*, 201 Mich App 625, 630; 506 NW2d 614 (1993). An abuse of discretion will be found only where a neutral person would say that there is no justification or excuse for the ruling made, *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 188; 600 NW2d 129 (1999), or the result grossly violates fact and logic. *Barrett v Kirtland Community College*, 245 Mich App 306, 325; 628 NW2d 63 (2001).

Dismissal of a cause of action is a harsh remedy and the trial court should consider the circumstances of the case before imposing this sanction. *Richardson v Ryder Truck Rental, Inc*, 213 Mich App 447, 451; 540 NW2d 696 (1995). This Court articulated the following factors to consider before dismissal:

In *Dean v Tucker*, 182 Mich App 27, 32-33, 451 NW2d 571 (1990), we summarized some of the factors that a court should consider before imposing the sanction of dismissal: (1) whether the violation was wilful or accidental; (2) the party's history of refusing to comply with previous court orders; (3) the prejudice to the opposing party; (4) whether there exists a history of deliberate delay; (5) the degree of compliance with other parts of the court's orders; (6) attempts to cure the defect; and (7) whether a lesser sanction would better serve the interests of justice. [*Zantop Int'l Airlines, Inc v Eastern Airlines*, 200 Mich App 344, 360; 503 NW2d 915 (1993).]

In this case, the record indicates that the trial court properly considered the *Dean* factors and alternative ways to remedy the damage caused by plaintiff's misconduct. However, the court found that the appropriate remedy was dismissal and we cannot conclude that the trial court abused its discretion. The record includes that: (1) plaintiff's witness wilfully violated the order

in limine, (2) a curative instruction would not likely mitigate the prejudice caused by the testimony, (3) plaintiff had a history of failing to abide by the court's orders and of failing to honor defendants' discovery requests, and (4) defendant was prejudiced by plaintiff's actions and would be further prejudiced by permitting a new trial. In sum, the trial court did not abuse its discretion when it dismissed plaintiff's case.

In consideration of our resolution of these dispositive issues, we need not consider the other issues raised by plaintiff on appeal or defendants' cross-appeal.

Affirmed.

/s/ Jessica R. Cooper

/s/ Mark J. Cavanagh

/s/ Jane E. Markey