STATE OF MICHIGAN

COURT OF APPEALS

SUSAN RUTH RIGGS,

Plaintiff-Appellant,

v

TRINITY HEALTH-MICHIGAN/SAINT MARY'S HOSPITAL; ADAM MICHAEL ANDERSON, M.D.; JENNIFER LYNELL MACEK, PA-C; SPARTA HEALTH CENTER; MERCY HEATH, SPARTA FAMILY HEALTH CENTER; MERCY HEALTH PHYSICIAN PARTNERS; JOHN HENRY SCHNEIDER, JR., M.D.; and GRAND RIVER EMERGENCY MEDICAL GROUP PLC,

Defendant-Appellees.

UNPUBLISHED
October 19, 2017

No. 334641
Kent Circuit Court
LC No. 15-007439-NH

Before: BOONSTRA, P.J., and METER and GADOLA, JJ.

PER CURIAM.

Plaintiff appeals by right the trial court's opinion and order granting the motion of defendants Adam Anderson, M.D.; Jennifer Macek PA-C; and Grand River Emergency Medical Group PLC (hereinafter the "Grand River defendants") to strike plaintiff's expert witnesses and imposing the following discovery sanctions upon plaintiff: (1) striking plaintiff's expert witnesses under MCR 2.313(B)(2)(b) and (2) dismissing plaintiff's case with prejudice under MCR 2.313(B)(2)(c). We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

Plaintiff filed this medical malpractice action asserting direct and vicarious liability arising from the alleged failure to timely diagnose and treat her lumbar disc herniation. The procedural history of the case, rather than the underlying factual situation, is at issue in this appeal.

On November 24, 2015, defendants Trinity Health, Saint Mary's Health Care, Sparta Health Center, Mercy Health Sparta Family Health Center and/or Mercy Health Physician Partners, and John Schneider, M.D. (hereinafter the "Trinity Health defendants") filed a motion to compel discovery. Defendants Anderson and Macek contemporaneously filed their own

motion to compel discovery.[1] The motions alleged that plaintiff had refused to schedule various depositions and had failed to respond to defendants' interrogatories and requests for admission. The trial court granted both motions and issued a December 4, 2015 order requiring that plaintiff provide complete answers to defendants' outstanding discovery requests within 10 days, that defendants provide timely answers to plaintiff's discovery requests, that the deposition of plaintiff be completed by January 9, 2016,[2] and that defendants provide dates for their depositions (although no deadline for this requirement was specified).

On December 16, 2015, the trial court issued a scheduling order providing in part for plaintiff to disclose its expert witnesses by February 1, 2016,[3] and for discovery to close on June 13, 2016. Three months later, on March 16, 2016, the parties stipulated (because of plaintiff's counsel's unexpected medical issues) to a stay of proceedings and to an extension of all deadlines in the scheduling order by six weeks; the trial court entered an order to that effect. At the time the parties entered into the stipulation, plaintiff has already missed the February 1, 2016 deadline to file an expert witness list.

On May 16, 2016, the Trinity Health defendants jointly moved to preclude plaintiff from calling expert witnesses, arguing that plaintiff had still not provided an expert witness list, and was therefore in violation of the scheduling order. Plaintiff filed a lay and expert witness list on May 23, 2016. On May 26, 2016, plaintiff filed a motion to extend discovery, as well as a motion to compel defendants to provide deposition dates for certain defense witnesses.

At the June 10, 2016 hearing on the motions, the trial court ruled that although it would normally grant a motion to exclude witnesses under the circumstances presented, it would not do so in light of plaintiff's counsel's medical issues, and that it would instead grant a "final extension" of discovery for another six weeks. The court further ruled that the depositions of plaintiff's experts should take place before the deposition of defendants' experts, and admonished counsel to set them up, to get them taken, and that "if they're not taken, unless there's an agreement between you folks, then they will be excluded very – very simply from trial." Following the hearing, the parties each submitted a proposed order for entry under MCR 2.602(B) and objections to the opposing order. A hearing was held regarding the proposed orders on July 8, 2016, at which hearing plaintiff's counsel failed to appear. The trial court entered the order that had been proposed by defendants following the June 10, 2016 hearing. The order granted plaintiff's motion to extend discovery (extending discovery to September 5, 2016), ordered that plaintiff file an expert witness list in accordance with the court's scheduling order, provided that "[p]laintiff's expert witnesses shall be deposed prior to defendants' expert witnesses," provided specific deadlines for the depositions of defendant John Schneider, Jr.,

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[1] Plaintiff's complaint was subsequently amended by stipulation to add Grand River Emergency Medical Group, PLC as a party.

[2] The December 4, 2015 order errantly identified the deadline for plaintiff's deposition as "January 9th 2015."

[3] The scheduling order further expressly provided, "*Absent a showing of good cause, expert witnesses not identified as required hereby will not be allowed to testify at trial.*"

M.D. and an emergency department technician at defendant Saint Mary's Health Care,[4] and otherwise denied defendants' motion to preclude plaintiff from calling expert witnesses and plaintiff's motion to compel or for sanctions.

On July 15, 2016, the Grand River defendants filed another motion with the trial court to strike plaintiff's expert witnesses or to compel expert depositions. The moving defendants asserted that from May 2, 2016 to July 13, 2016 they had sent five letters to plaintiff's counsel requesting dates for plaintiff's experts' depositions, and that they had received no response. They argued that plaintiff's counsel had repeatedly and willfully violated the court's scheduling order and that they had been prejudiced by the resulting delays. They requested that the trial court either strike plaintiff's experts or compel defendants to provide dates for their depositions.

A hearing on the motion was held on July 22, 2016. At the hearing, the trial court noted that plaintiff's counsel had not responded to the motion. Plaintiff's counsel indicated that he had been in trial during the previous week. He asserted that the scheduling of the depositions was delayed because it was necessary first to take defendant Schneider's deposition, which was taken on June 30, 2016. Plaintiff's counsel further stated he had received the transcript of that deposition while he was in trial and had only "opened the envelope last night. Plaintiff's counsel informed the court that he had potential dates for plaintiff's four experts to be deposed. The trial court reiterated the directives and admonishments that it had provided at the June 10, 2016 hearing and noted that, since that time, plaintiff's counsel nonetheless had not even responded to multiple inquiries from defendants or scheduled any depositions. The trial court ruled that it was granting the motion to strike plaintiff's expert witnesses and consequently dismissing plaintiff's case with prejudice, and stated that it would issue a written opinion providing the reasoning behind its decision.

That same day, the trial court issued its written opinion and order, which included the following recitation and analysis:

> This Court first takes note that it has generously extended the deadlines in its original Scheduling Order by a total of twelve weeks to accommodate Plaintiff's counsel and his personal medical condition. Yet, Plaintiff's counsel continually appears to engage in gamesmanship with defense counsel at nearly every stage of discovery in this matter ranging from disregarding deadlines to refusing to respond to various requests without the intervention of this Court.
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> Most recently, which is the subject of the present Motion before this Court, Defendants' requests for deposition dates appear to be met with radio silence from Plaintiff's counsel--behavior which this Court finds distasteful. As of the date of this Opinion and Order, the parties now would merely have a total of 45 days to schedule and conduct the depositions of both the Plaintiff's and

[4] These deadlines, while ordered by the court orally at the June 10 motion hearing, had passed by the time defendant's proposed order was entered.

Defendants' expert witnesses before the close of discovery. This is simply unacceptable.

Forty-two days ago, on June 10, 20l6, this Court verbally ordered at a motion hearing that Plaintiff's counsel must first schedule the depositions of his expert witnesses before the depositions of the Defendants' experts can take place. This Court specifically admonished counsel that failure to do so would result in the exclusion of his expert witnesses at trial. To date, no depositions of Plaintiff's experts have been scheduled. This is in violation of this Court's discovery order. Plaintiffs counsel's failure to comply with this discovery order is just the latest in a history of failure to cooperate with discovery in this case. Defendants have been repeatedly prejudiced by Plaintiff's counsel's tactics, and have had to bring four motions to force Plaintiff's counsel to comply with discovery requests. This repeated conduct belies any suggestion that such failures have been accidental or involuntary.

Given that Plaintiff's counsel has violated this Court's discovery order, this Court is permitted to impose an appropriate sanction authorized by MCR 2.313(B)(2). The pertinent sanctions include exclusion of the Plaintiff's expert witnesses at trial--as this Court already established as a consequence for violating its order at the June 10, 2016, hearing--and dismissal of Plaintiff's case. Considering that this is a medical malpractice lawsuit, both sanctions would have the same result.

As evidenced by Plaintiff's counsel's inaction, this Court first finds that his conduct is conscious or intentional, not accidental or involuntary, and therefore can be considered "willful." Furthermore, this Court finds that Plaintiff's counsel's protracted delays and denials of discovery have consumed the majority of the duration of this litigation, and these delays have frustrated Defendants' attempts to discover vital information to establish their defense.

This Court also notes that Plaintiff's counsel has a history of refusing to comply with previous discovery requests in this matter, as evidenced by the repeated discovery motions brought by Defendants, and there exists a history of Plaintiff's counsel's deliberate delays throughout the course of this litigation. This Court further finds that a mere 45 days left before the close of discovery in which the parties are to conduct the remaining depositions of expert witnesses is prejudicial to Defendants in this matter. Finally, this Court notes that Plaintiff's counsel has made no attempt to timely cure this defect, as plainly displayed by the preceding 42 days of inaction on his part with regard to scheduling the pertinent depositions.

Therefore, this Court finds that it is appropriate to exclude all of Plaintiff's expert witnesses from trial as a sanction for Plaintiff's counsel's failure to comply with this Court's discovery order, pursuant to MCR 2.313(B)(2)(b). Taking into consideration that this matter is a medical malpractice dispute, Plaintiff is unable to establish causation or the standard of care necessary to maintain this lawsuit

without the testimony of expert witnesses. As a result, dismissal of Plaintiff's claims is warranted.

Additionally, this Court also finds that it is appropriate to impose the sanction of dismissal for Plaintiff's counsel's failure to comply with this Court's discovery order. Dismissal is warranted where a party's protracted delays and denials of discovery consume the duration of litigation and frustrates the opposing party's attempts to discover vital information to establish their case. Therefore, this Court finds dismissal is warranted as a sanction, pursuant to MCR 2.313(B)(2)(c). [Opinion and order, 4-5 (footnotes omitted).]

The trial court granted the motion to strike plaintiff's expert witnesses and dismissed plaintiff's case as described above. This appeal followed.

II. STANDARD OF REVIEW

We review for an abuse of discretion a trial court's imposition of a discovery sanction. *Dean v Tucker*, 182 Mich App 27, 32; 451 NW2d 571 (1990). An abuse of discretion occurs when the trial court's decision falls outside the range of principled outcomes. *Barnett v Hidalgo*, 478 Mich 151, 158; 732 NW2d 472 (2007).

III. ANALYSIS

Plaintiff argues that the trial court abused its discretion in striking her expert witnesses (and in consequently dismissing her case). Plaintiff maintains that she could not have violated the July 8, 2016 discovery order as of the issuance of the July 22, 2016 opinion and order, because the discovery period had not yet ended, and because the July 8, 2016 order did not provide specific dates by which the depositions of plaintiff's experts were to be scheduled or taken. Plaintiff further argues that there was no prejudice to defendants. We disagree.

It is within a trial court's authority to dismiss an action as a sanction for discovery violations. MCR 2.313(B)(2)(c). However, " '[d]ismissal is the harshest sanction that the court may impose on a plaintiff.' " *Donkers v Kovach*, 277 Mich App 366, 369; 745 NW2d 154 (2007). Accordingly, the sanction of dismissal should be "exercised cautiously" by the trial court, *Dean*, 182 Mich App at 32, after engaging in "a consideration of the circumstances of each case to determine if such a drastic sanction is appropriate." *Id*., see also *Richardson v Ryder Truck Rental, Inc*, 213 Mich App 447, 451; 540 NW2d 696 (1995). "[T]he record should reflect that the trial court gave careful consideration to the factors involved and considered all of its options in determining what sanction was just and proper in the context of the case before it." *Dean*, 182 Mich App at 32. Among the factors that should be considered are (1) whether the discovery violation was willful or accidental, (2) the party's history of refusing to comply with discovery requests, (3) the prejudice to the opposing party, (4) whether there exists a history of the party engaging in deliberate delay, (5) the degree of compliance by the party with other provisions of the court's order, (6) any attempts by the party to timely cure the defect, and (7) whether a lesser sanction would better serve the interests of justice. *Id*. at 32-33.

Here, the trial court made clear in its opinion that it had considered the *Dean* factors in determining what sanctions to impose. It found that plaintiff's counsel's had "continually"

engaged in "gamesmanship," and that his conduct in not even responding to defendants' multiple inquiries or offering dates for depositions, much less conducting them, for 42 days after the hearing in which a second extension of discovery had been granted, was intentional and was not accidental, and was "just the latest in a history of failure to cooperate with discovery in this case." We agree. Plaintiff's counsel admitted that he had been unresponsive and had not proceeded to schedule any depositions of plaintiff's experts, claiming that defendant Schneider's deposition needed to be taken first. He further delayed, after that deposition was taken, until receiving the deposition transcript, and then did not even open the envelope containing the transcript until the night before the July 22, 2016 hearing. At no time did he contact or respond to defendants' counsel to schedule the depositions of plaintiff's experts, choosing instead to await the filing of yet another motion to strike the experts, and then to come to court purportedly with dates in hand. Plaintiff's counsel does not explain why, as the trial court noted, counsel could not have at least communicated with defendants and attempted to schedule dates for depositions to be taken. It is clear that plaintiff's counsel's long-standing foot-dragging behavior was "conscious or intentional, not accidental or involuntary." See *Bass v Combs*, 238 Mich App 16, 34 n 7; 604 NW2d 727 (1999), overruled in part on other grounds by *Dimmit & Owens Financial, Inc v Deloitte & Touche (ISC), LLC*, 481 Mich 618 (2008), quoting *Krim v Osborne*, 20 Mich App 237, 241; 173 NW2d 737 (1969). Further, this conduct occurred after the trial court expressly admonished plaintiff's counsel that the failure to promptly schedule and take the depositions would result in the striking of plaintiff's experts.

We are not persuaded by plaintiff's argument that plaintiff's counsel had not yet violated the July 8, 2016 order because the discovery period had not yet expired. The trial court did not premise its decision on plaintiff's counsel having rendered it impossible to conduct expert witness depositions before the close of discovery; rather, it held that plaintiff's counsel's continual gamesmanship, delays, unresponsiveness, failure to follow the trial court's directives, and conduct in allowing nearly half of the second discovery extension to expire without so much as even responding to defendants or attempting to schedule depositions was itself a violation of the trial court's order requiring that plaintiff's experts be deposed first and requiring that all expert depositions be conducted by a specific deadline. It was unnecessary for the trial court to specifically write into its order that plaintiff's counsel should act in good faith in timely scheduling depositions in order to accommodate the deadline; plaintiff's counsel was in any event under the obligation to behave fairly toward opposing counsel. See MRPC 3.4. We therefore conclude that the trial court did not abuse its discretion when, at the time of the hearing, and although it remained theoretically possible for expert depositions to be conducted before the close of discovery, it determined that plaintiff's counsel was in violation of the trial court's July 8, 2016 order at the time of the July 22, 2016 hearing by failing to have taken even the barest step toward scheduling plaintiff's expert witness depositions.

Further, as the trial court noted, it possessed the "inherent power" to impose sanctions to deter misconduct, regardless of the violation of an explicit order. See *Maldonado v Ford Motor Co*, 476 Mich 372, 394; 719 NW2d 809 (2006). Plaintiff's case had been pending for nearly a

year,[5] and despite two discovery extensions, at the time of the hearing precisely zero of the 22 potential expert witnesses had been deposed. This delay, at least since the trial court granted the second discovery extension, was caused by plaintiff's counsel's determination to flaunt the court's directives, to not even respond to defendants' inquiries or to attempt to schedule any depositions until he was compelled, as a consequence of the filing of yet another motion to strike plaintiff's experts, to suggest at the motion hearing that he then was prepared to offer dates for depositions. Meanwhile defendants, after nearly a year, were unable to prepare their defense due to plaintiff's counsel's refusal to allow defendants to discover plaintiff's experts' opinions and the specific facts on which they relied in reaching those opinions, which of course are the "cornerstone" of a professional malpractice claim. *Bass*, 238 Mich App at 34. Accordingly, and even absent the violation of a specific order, the trial court did not abuse its discretion by striking plaintiff's experts in order to deter such conduct. *Maldonado*, 476 Mich at 394.

Further, the trial court did not err by determining that defendants had been prejudiced by plaintiff's counsel's actions. As noted, defendants were left in the dark about plaintiff's experts' opinions and the specific facts relied upon in reaching those opinions, and were thus severely hampered in their ability to prepare a defense to plaintiff's claims, especially in the areas of the applicable standard of care, the breach of the standard of care, and causation. See *Dean*, 205 Mich App at 550. Moreover, the record reveals that defendants were continually forced to file motions and to come to court to force plaintiff to comply with discovery obligations. As the trial court recognized, dismissal may be appropriate where "lengthy, protracted delays and denials of discovery consumed the duration of this litigation" and frustrated the other parties' "attempts to discover information vital to a proper defense of their case." *Bellok v Koths*, 163 Mich App 780, 783; 415 NW2d 18 (1987); *Welch v J. Walter Thompson U.S.A., Inc*, 187 Mich App 49, 54; 466 NW2d 319 (1991).

At the time of the July 22, 2016 hearing, plaintiff's counsel had made no attempts to cure his conduct; he merely stated that he then "had dates" for the deposition of plaintiff's expert witnesses. Particularly given the lateness of the hour, the trial court did not abuse its discretion by finding plaintiff's at best minimal curative efforts to be inadequate. *Dean*, 182 Mich App at 32.

While the trial court did not impose a series of escalating sanctions on plaintiff or her counsel before imposing the sanction of striking her experts, a trial court is not required to impose a "trail of lesser sanctions" before imposing severe sanctions, even dismissal, if such sanctions are warranted. *Bass*, 238 Mich App at 35. Again, plaintiff's counsel's failure to permit the scheduling of plaintiff's expert witness depositions undermined defendants' ability to defend against plaintiff's allegations. *Id*. We hold that the trial court did not abuse its discretion by imposing the sanctions it imposed, notwithstanding the lack of significant prior sanctions, where "defendants' attempts to discover information vital to a proper defense of the case were frustrated, the noncompliance was not inadvertent, and the imposition of alternate sanctions

[5] We recognize and do not hold against plaintiff the extension of discovery stipulated to by all parties as a result of plaintiff's counsel's medical issues.

would not have deterred plaintiff[‘s counsel] from continuing his dilatory course of conduct.” *Welch*, 187 Mich App at 54.[6]

Affirmed. As the prevailing party, defendants may tax costs. MCR 7.219(A).

/s/ Mark T. Boonstra
/s/ Patrick M. Meter
/s/ Michael F. Gadola

[6] We note the trial court did impose attorney fees as a sanction for failure to appear at a hearing, but did not previously impose any other sanctions for discovery violations.