STATE OF MICHIGAN

COURT OF APPEALS

In re Estate of HUTCHINGS.

CHERYL K. STREET, Personal Representative of the Estate OF JEANETTE HUTCHINGS, Petitioner-Appellant,	UNPUBLISHED October 30, 2012
v	No. 306162 Calhoun Circuit Court
TAMMY GLEESON, D.O., ABEDELKARIM KHALIL ABUSHMAIES. M.D., and VHC, P.C. d/b/a VASCULAR HEALTH CENTER, Respondent-Appellees.	LC No. 2010-002336-NH

Before: SHAPIRO, P.J., and GLEICHER and RONAYNE KRAUSE, JJ.

PER CURIAM.

In this medical malpractice wrongful death case, plaintiff, the personal representative of the estate of Jeanette Hutchings, appeals by right an order granting defendants' motion to dismiss for plaintiff's failure to comply with discovery after her expert witness, Dr. Sasan Najibi, abandoned her. We reverse and remand.

This action arises from Jeanette Hutchings's death due to acute hemorrhagic shock while a patient of defendant Vascular Health Center (VHC). According to the complaint, defendant Abedelkarim Khalil Abushmaies, M.D. lacerated Hutchings's femoral artery during a surgical procedure and failed to notice that he had done so; during Hutchings's post-operative care, defendant Tammy Gleeson, D.O., likewise failed to detect the laceration. Plaintiff originally filed a complaint against only Dr. Abushmaies and VHC. However, that action was dismissed by stipulation of the parties on May 10, 2010. On July 26, 2010, plaintiff filed a complaint naming as defendants Dr. Abushmaies, VHC, and Dr. Gleeson. In both cases, plaintiff submitted an affidavit of merit signed by Sasan Najibi, M.D. Plaintiff later identified Dr. Najibi as her only expert witness.

On December 6, 2010, the trial court entered a scheduling order requiring the parties to complete discovery on or before June 5, 2011. The scheduling order recited that case evaluation would occur in July 2011; no definite trial date was identified. On March 29, 2011, well in

advance of the date discovery would close, Dr. Abushmaies and VHC filed a motion to compel Dr. Najibi's discovery-only deposition. Dr. Abushmaies and VHC asserted that they had contacted plaintiff's counsel numerous times to schedule a deposition but had not been provided any dates. Dr. Gleeson joined in the motion to compel.

Plaintiff's counsel responded that he had been making increasingly-desperate attempts to contact Dr. Najibi. Counsel attached to his response brief copies of e-mails and a letter sent to Dr. Najibi requesting his cooperation with scheduling a deposition, and explained that he hoped to accommodate Dr. Najibi rather than put his client to the expense of finding a new expert. At the April 11, 2011 motion hearing counsel elaborated:

> Judge, I've done everything except fly out to California to try to get this expert's deposition scheduled. I've called him, I've emailed him, I've written him snail mail letters, and I have not heard from him. … I'm making my last effort today, to his office and to his assistant Cathy. We have two more months of discovery. Of course [defense counsel] ought to be entitled to hear what my expert has to say. The reason I haven't amended my expert witness list is because Doctor Najibi has already caused [sic] several thousand dollars to get his review time, spent – time … editing and drafting the affidavits of merit, plural, and I don't want to have to reinvent the wheel and impose those costs on my clients if I can avoid it. I recognize however, that of course this case has to be moved along. I don't think we've asked for any extensions of time in this case. I'm not even suggesting to you that I think we need one now. But with two months of discovery, I think we have time left to do it. If I don't get a response out of Dr. Najibi with a commitment this week that he will give us a deposition in the near future, I'll immediately send out the medical records and pertinent deposition transcripts to find another expert.

The trial court expressed sympathy for plaintiff's plight, stating that "they're in a bit of a box here" and the situation was "not of his doing necessarily." However, the trial court granted defendants' motion to compel and ordered that a deposition take place on or before May 31, 2011. The trial court explained that the motion hearing was the first time it had been made aware of plaintiff's problems, that "we need to move forward on this," and that its order would hopefully give plaintiff "enough time to figure out whether this guy's going to come through, your present expert, or whether you need to . . . have someone else."

Dr. Najibi proved resolutely uncooperative. Plaintiff was unable to produce him for deposition on or before May 31, 2011, and on June 8, 2011, defendants filed a motion to dismiss. On July 8, 2011, plaintiff filed a notice of substitution of expert witness naming Robert Wagmeister, M.D. as her new expert. At a motion hearing conducted on July 11, 2011, defendants' counsels recounted the attempts they had made to obtain a deposition date from plaintiff and pointed out that the prior action had been dismissed after plaintiff failed to produce Dr. Najibi for deposition. Plaintiff's counsel again explained the significant amount of money that had been invested in Dr. Najibi and the lengths he had gone in an attempt to obtain Dr. Najibi's cooperation, including sending a five-pound box of chocolates to Dr. Najibi's staff. Dr. Najibi entirely ignored these entreaties. Plaintiff's counsel also took issue with defendants' summary of the events surrounding the dismissal of the first case, asserting that the matter was

voluntarily dismissed precisely because the parties had agreed not to depose Dr. Najibi until Dr. Gleeson was joined as a defendant.

Plaintiff's counsel stated that Dr. Wagmeister had offered to be deposed on the date of the hearing and on "six other dates between now and the end of the month." Counsel continued, "I … also want to point out that all of [those dates] would be before the currently-scheduled case evaluation date … in this case." The trial court took the matter under advisement and promised to review the file from the prior case.

In August, the trial court issued a written opinion and final order granting defendants' motion to dismiss. The trial court acknowledged awareness that dismissal "is the most extreme sanction" and "should be granted only with a great deal of caution." It explained that before dismissing the prior action, the court had granted defendants' motion to compel plaintiff to produce her expert for discovery. The trial court also recounted that in the instant action, plaintiff had been afforded the opportunity to obtain a substitute expert but failed to do so until after the deadline had passed, necessitating that defendants file another motion to compel. The trial court concluded that when plaintiff's failure to comply with the discovery order was viewed in light of the history of the instant case and its predecessor, dismissal was warranted.

Plaintiff contends that the trial court abused its discretion by dismissing her complaint. "A party may take the deposition of a person whom the other party expects to call as an expert witness at trial." MCR 2.302(B)(4)(a)(*ii*). Upon a party's failure "to obey an order to provide or permit discovery," the trial court may impose sanctions, including dismissal of the action. MCR 2.313(B)(2)(c). We review any such dismissal for an abuse of discretion. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). The abuse of discretion standard is a deferential one and recognizes that there is no single correct outcome; rather, there will likely be a range of possible outcomes. *Id.* '"When the trial court selects one of these principled outcomes, the trial court has not abused its discretion and, thus, it is proper for the reviewing court to defer to the trial court's judgment."' *Id.* (citation and internal quotation marks omitted).

"Dismissal is a drastic step that should be taken cautiously," *Vicencio v Ramirez*, 211 Mich App 501, 506; 536 NW2d 280 (1995), and "should be reserved for the most egregious violations of the court rules." *Schell v Baker Furniture Co*, 232 Mich App 470, 477; 591 NW2d 349 (1998). "Before imposing such a sanction, the trial court is required to carefully evaluate all available options on the record and conclude that the sanction of dismissal is just and proper." *Vicencio*, 211 Mich App at 506-507. A trial court's failure to evaluate other options on the record constitutes an abuse of discretion. *Id.* The nonexhaustive list of factors a trial court must consider on the record when dismissing a case, includes:

> (1) whether the violation was willful 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. [*Vicencio*, 211 Mich App at 507.]

The trial court concluded that plaintiff's violation of its April 26, 2011 order was not "accidental or excusable," and observed that "[t]here is a history of Plaintiff not making available her expert witness to the defense not only in this case, but also in the predecessor case … ." However, the trial court made no mention of plaintiff's thwarted attempts to obtain Dr. Najibi's cooperation, whether a lesser sanction might be appropriate, or whether defendants would suffer prejudice if the plaintiff were afforded more time to produce her new expert for deposition.

The record reflects that plaintiff's counsel strenuously and in good faith attempted to produce Dr. Najibi for deposition. Counsel cannot be faulted for Dr. Najibi's irresponsible behavior. In retrospect, it is clear that plaintiff's counsel should have named a new expert more quickly than he did. We hesitate to characterize this judgment, made with 20-20 hindsight, as consistent with a finding of willful non-compliance with a court order. While counsel should have notified the trial court before May 31 that all efforts to obtain Dr. Najibi's appearance had failed, this error does not qualify as deliberate disobedience, bad faith, or contumacious conduct.

Nor did the trial court properly conclude that the events of the previous case supported dismissal. In the 2008 matter, defendants Abushmaies and VHC moved to compel Dr. Najibi's deposition but subsequently stipulated to dismiss the action without prejudice so that Dr. Gleeson could be added as a party defendant. According to plaintiff's counsel's recapitulation at the final motion hearing, the parties and the court determined that it would be inefficient to depose Dr. Najibi twice.[1] The record simply does not support that plaintiff's counsel willfully disobeyed a previous court order.

Furthermore, we are hard-pressed to find that defendant or the trial court would have been prejudiced by a short delay in the proceedings to enable the parties to complete discovery.[2] The original scheduling order contemplated that discovery would end on May 31, 2011. Less than two months later, plaintiff's new expert was available for deposition. The trial court did not evaluate whether a brief adjournment of the previously-scheduled dates would serve the ends of justice, or whether a lesser sanction, such as a fine or payment of defendants' reasonable expenses, would have sufficed to punish counsel for failing to more expeditiously produce a new expert witness.

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[1] Defendants have never challenged the accuracy of this version of the events. Consequently, we find disingenuous defendant's contention that the prior case was dismissed due to plaintiff's noncompliance.

[2] In a somewhat analogous context involving motions to amend, the Supreme Court has explained that "'prejudice' exists if the amendment would prevent the opposing party from receiving a fair trial, if for example, the opposing party would not be able to properly contest the matter raised in the amendment because important witnesses have died or necessary evidence has been destroyed or lost." *Weymers v Khera,* 454 Mich 639, 659; 563 NW2d 647 (1997). Other than briefly slowing the proceedings, defendants have failed to identify any manner by which a delay would frustrate their ability to obtain a fair trial.

Absent the trial court's full consideration of the *Vicencio* factors and given that the trial court inaccurately determined that plaintiff had a history of delay, we conclude that it was outside the range of principled outcomes for the trial court to resort to the most drastic penalty possible. Plaintiff's counsel's conduct was not so egregious or deliberate as to warrant the imposition of a sanction that denied his client her day in court.

We therefore reverse the trial court's order dismissing the case and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Douglas B. Shapiro
/s/ Elizabeth L. Gleicher
/s/ Amy Ronayne Krause