STATE OF MICHIGAN

COURT OF APPEALS

CHERYL GALE,

Plaintiff-Appellant,

v

LYNN MILLS, PATRICK MAHONEY, ANDREW BURNETTE, ADVOCATES FOR LIFE, OPERATION RESCUE, THE JOSHUA PROJECT, CHRISTIAN DEFENSE COALITION and COUNTY OF OAKLAND,

Defendant-Appellees.

UNPUBLISHED
September 20, 1996

No. 171661
LC No. 93-308305

Before: Cavanagh, P.J., and Marilyn Kelly and J.R. Johnson,* JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court order of dismissal with prejudice. We reverse and remand for proceedings consistent with this opinion.

On February 15, 1993, Hugh Gale, plaintiff's husband, took his own life in the presence of Jack Kevorkian. On March 22, 1993, plaintiff filed this lawsuit, claiming that defendants defamed her by stating that she "assisted, consented and/or acquiesced in the death of her husband." In addition, plaintiff alleged negligence, gross negligence, willful and wanton misconduct, false light, invasion of privacy, humiliation, personal injury, and intentional infliction of emotional distress. The law firm retained by plaintiff, Fieger, Fieger and Schwartz, also represents Kevorkian.

Defendants' counsel attempted to depose Kevorkian. According to defense counsel, attorney Geoffrey Fieger responded to her attempts by saying, "Ha, you'll never get Kevorkian."[1] Subsequently, according to defense counsel, on one occasion Fieger's secretary misrepresented Kevorkian's whereabouts, and on another Fieger falsely claimed that he could not attend the deposition because he was going to be in Connecticut. In a letter to defense counsel, attorney Michael Schwartz threatened to report her to the Attorney Grievance Commission if she did not cease her efforts to depose Kevorkian.

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* Circuit judge, sitting on the Court of Appeals by assignment.

Fieger argued that it would be unethical to call Kevorkian as a witness because the latter faced possible charges and was pleading the Fifth Amendment. At a pretrial conference on September 10, 1993, the trial court agreed with defense counsel that Kevorkian was a material witness. On September 26, 1993, a subpoena was issued and served upon Kevorkian. After Kevorkian moved to quash the subpoena, the trial court ruled that he was a material witness. In addition, the trial court ruled that Kevorkian was not entitled to refuse to answer questions about plaintiff's conduct and ordered the deposition to take place. Kevorkian was at that time in the Oakland County Jail on an unrelated matter, and defense counsel attempted to depose Kevorkian there. Counsel's efforts were unsuccessful; Kevorkian was at that time on a hunger strike and stated that he did not feel well enough to proceed with the deposition. However, the Oakland County sheriff submitted a letter to the trial court in which he stated that Kevorkian was ambulatory in his cell, was able to converse with deputies, and was making daily telephone calls.

In early December, the trial court held several hearings regarding Kevorkian's noncompliance with its previous order. On December 14, 1993, the trial court issued an opinion and order dismissing plaintiff's complaint pursuant to MCR 2.504(B)(1) and MCR 2.313(B)(2). The trial court found that Fieger and Schwartz defied the subpoena issued by the court, advised a witness not to comply with the subpoena, impeded the discovery of evidence essential to defendants' defense of the case, improperly threatened opposing counsel's license, and violated both the court rules and the Rules of Professional Conduct. The court further found that the actions of counsel could properly be charged to plaintiff.

On appeal, plaintiff argues that the trial court improperly invoked the sanction of dismissal for the actions of a non-party witness. A court's decision to dismiss an action is reviewed for an abuse of discretion. *Zantop Int'l Airlines, Inc v Eastern Airlines*, 200 Mich App 344, 359; 503 NW2d 915 (1993). An abuse of discretion exists when the result is so palpably and grossly violative of fact and logic that it evidences perversity of will or the exercise of passion or bias rather than the exercise of discretion. *Dacon v Transue*, 441 Mich 315, 329; 490 NW2d 369 (1992).

MCR 2.313(B)(2) states in pertinent part:

> If a party or an officer, director, or managing agent of a party, or a person designated under MCR 2.306(B)(5) or MCR 2.307(A)(1) to testify on behalf of a party, fails to obey an order to provide or permit discovery, including an order entered under subrule (A) of this rule or under MCR 2.311, the court in which the action is pending may order such sanctions as are just, including but not limited to the following:
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> * * *
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> (c) an order striking pleadings or parts of pleadings, staying further proceedings until the order is obeyed, dismissing the action or proceeding or a part of it, or rendering a judgment by default against the disobedient party[.]

MCR 2.504(B)(1) provides:

> If the plaintiff fails to comply with these rules or a court order, a defendant may move for dismissal of an action or a claim against that defendant.

This Court construes court rules according to the same basic principles that govern statutory interpretation. If the language of a court rule is clear and unambiguous, we apply its plain and ordinary meaning. *People v McEwan*, 214 Mich App 690, 694; 543 NW2d 367 (1995). The language of MCR 2.313(B) indicates that it applies to parties or to persons acting in the capacity of a party. Similarly, MCR 2.504 deals addresses involuntary dismissal as an appropriate sanctions when "the *plaintiff* fails to comply with these rules or a court order." Because the court rules cited on by the trial court deal with the noncompliance of a party, rather than a nonparty witness, we conclude that the trial court erred in relying on them in support of its order dismissing plaintiff's complaint.

The trial court is vested with the authority to dismiss a lawsuit. However, this authority must be exercised with caution. The trial court must evaluate all available options on the record before concluding that the drastic sanction of dismissal is just and proper. *Hanks v SLB Management, Inc*, 188 Mich App 656, 658; 471 NW2d 621 (1991). Factors that should be considered by the trial court in determining the appropriate sanction include (1) whether the violation was willful or accidental, (2) the party's history of refusing to comply with discovery requests or disclosure of witnesses, (3) prejudice to the defendant, (4) actual notice of the witness to the defendant and the length of that notice, (5) the plaintiff's history of intentional delay, (6) the degree of plaintiff's compliance with the orders of the court, (7) any attempt by plaintiff to timely cure the defect, and (8) whether a lesser sanction would better serve the interests of justice. *Dean v Tucker*, 182 Mich App 27, 32-33; 451 NW2d 571 (1990).

After carefully reviewing the record, we agree with the trial court that the actions of plaintiff's attorneys "show[ed] a bad faith effort to avoid compliance with the lawful process" of the court. Fieger and Schwartz's actions were dilatory, unprofessional, and in complete disregard of their position as officers of the court. However, since the offending conduct was that of plaintiff's counsel, we nonetheless conclude that the trial court abused its discretion in dismissing the plaintiff's lawsuit without first considering lesser sanctions. Although the trial court's frustration with plaintiff's attorneys was justified, by dismissing the lawsuit the trial court in effect penalized plaintiff for the conduct of her attorneys. There is no indication she knew of, or condoned, their conduct.

Therefore, we reverse the trial court's dismissal of the lawsuit and remand for consideration of other available sanctions. The trial court recognized some of his options at pages 9 and 10 of his opinion. MCR 2.313(B) provides an array of options, including an order directing the attorney advising the party to pay reasonable expenses, including attorney fees. As the trial court recognized, it also has the option of contempt proceedings. See MCL 600.1701; MSA 27A.1701. Case law also suggests other options the court may wish to explore. See, e.g., *In Re Contempt of Dougherty*, 429 Mich 81, 98; 413 NW2d 392 (1987); *Homestead Development Co v Holly Twp*, 178 Mich App 239, 245-247; 443 NW2d 385 (1989). We do not intend to preclude the ultimate sanction of dismissal, but merely decide today that the exercise of that sanction was premature.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ J. Richardson Johnson

I concur in result only.

/s/ Marilyn Kelly

[1] Fieger denies that he made this statement.