

STATE OF MICHIGAN
COURT OF APPEALS

JENNIFER GAGERN,

Plaintiff-Appellant,

v

DR. IAN MCLAREN, M.D., and NORTHLAND
ANESTHESIA ASSOCIATES, PC,

Defendants-Appellees,

and

PROVIDENCE HOSPITAL AND MEDICAL
CENTER, doing business as PROVIDENCE
PARK HOSPITAL,

Defendant.

UNPUBLISHED
December 2, 2014

No. 317732
Oakland Circuit Court
LC No. 2012-125804-NH

Before: O'CONNELL, P.J., and CAVANAGH and FORT HOOD, JJ.

PER CURIAM.

In this medical malpractice action, plaintiff appeals as of right an order granting summary disposition in favor of defendants, Dr. Ian McLaren, M.D., and Northland Anesthesia Associates, PC (Northland), which followed an order granting their motion to strike plaintiff's standard of care expert for failure to provide his deposition as ordered. We affirm.

On March 23, 2012, plaintiff filed her complaint. On August 29, 2012, the trial court entered an order extending its scheduling dates. On October 10, 2012, the trial court entered another order extending its scheduling dates.

On February 22, 2013, defendants filed a motion to compel the depositions of plaintiff's expert witnesses and to extend discovery. Defendants alleged significant difficulties with plaintiff's counsel with regard to their discovery efforts, including their necessity to send numerous emails to plaintiff's counsel with several potential dates for the deposition of defendant Dr. McLaren, which were attached as exhibits. Although Dr. McLaren's deposition finally occurred on February 13, 2013, plaintiff's counsel also failed to respond to defendants' several requests for potential deposition dates for plaintiff's experts. Plaintiff did not respond to

defendants' motion, and did not attend the hearing on March 6, 2013. The trial court entered an order granting defendants' motion to compel, holding that plaintiff must provide deposition dates for her expert witnesses on or before March 15, 2013, and that the failure "to do so will result in the expert witness being struck." The trial court also entered its third order extending its scheduling dates.

On March 18, 2013, defendants filed a motion to strike plaintiff's expert witnesses arguing that, despite their many requests and reminders of the trial court's order, plaintiff's counsel failed to provide any potential deposition dates for plaintiff's experts. Plaintiff responded, acknowledging that deposition dates were not provided in conformity with the trial court's order, but claiming that it was not a willful violation because plaintiff's "counsel thought deposition dates were being offered." Plaintiff argued: "As Plaintiff's counsel was out of town almost the entire week of March 11, to the 15th she was unaware that the depositions had not been scheduled or that there was any difficulty contacting the experts intended to be utilized in this case." On March 27, 2013, the trial court entered an order denying defendants' motion to strike plaintiff's expert witnesses, but holding that plaintiff's expert witnesses would be struck "unless [plaintiff] provides depositions for these experts on or before April 17, 2013 by 5 pm."

On May 20, 2013, defendants filed a second motion to strike plaintiff's expert witnesses and a motion to dismiss, arguing that the parties had agreed to a deposition date of April 11, 2013, for one of plaintiff's experts, Dr. Tom Mitros, and the parties agreed to split the payment of his fees. However, on April 5, 2013, when defendants attempted to confirm the deposition, plaintiff's counsel advised that the date was no longer available. On April 11, 2013, the parties agreed to a deposition date of May 17, 2013 at 1:00 p.m. On April 26, 2013, defendants were informed that Dr. Mitros was not available on the scheduled date, but eventually it was agreed that the deposition would occur at 9:30 a.m. on May 17, 2013, at the Philadelphia Airport Marriott. Defendants secured a conference room at the hotel at a cost of \$500, and forwarded a check to Dr. Mitros in payment for half of his fees. On May 16, 2013, however, defendants were advised by plaintiff's counsel that Dr. Mitros cancelled the deposition because he did not receive payment for his fees. Defendants incurred the cost of the hotel conference room because of the late cancellation, as well as airfare cancellation fees. Moreover, defendants argued, plaintiff provided no potential deposition dates for Dr. Mitros or plaintiff's other expert witness; therefore, plaintiff's expert witnesses should be struck for failure to comply with the court's discovery orders.

Plaintiff responded to defendants' second motion to strike her expert witnesses, arguing that plaintiff's counsel's failure to comply with the court's orders was inadvertent and that she "did everything possible to facilitate its completion." Nevertheless, Dr. Mitros cancelled his deposition, not plaintiff's counsel. Therefore, plaintiff argued, defendants' motion to strike her expert witnesses should be denied.

At the hearing on defendants' motion, plaintiff's counsel advised the trial court that she did not know what happened with Dr. Mitros. The court asked counsel if he was paid, and counsel responded: "My secretary said it was sent to him. I did not send it overnight; I didn't track it, so I don't know if he - - ." The court then asked counsel if she had communications with him with regard to whether he received plaintiff's portion of his fees, and counsel responded: "He didn't tell me anything, because he - - he was angry. He said I don't have the full fee - - ."

Plaintiff's counsel continued: "Well, apparently he did receive [defendant's portion of the fees], because they tracked it, so my - - presumption is somewhere along the way he didn't - - receive ours. But we sent it." Plaintiff's counsel advised the court that she believed Dr. Mitros did not want to go forward with his deposition because it was on the same date as his son's wedding. The trial court responded that the issue was not Dr. Mitros' commitment because he agreed to the date at long as it was completed by 11:30 a.m.; rather, the issue was that plaintiff failed to send her portion of his fees, which prompted Dr. Mitros to cancel his deposition. Accordingly, the trial court granted defendants' motion to strike Dr. Mitros as an expert witness, consistent with the court's previously entered orders. Defendants' motion with respect to plaintiff's other expert witness, an economist, was denied because it appeared that an illness made him unavailable. And defendants' motion to dismiss was denied. Subsequently, plaintiff filed a motion for reconsideration, which was denied.

Thereafter, defendants filed a motion for summary disposition under MCR 2.116(C)(8) and (C)(10), arguing that plaintiff could not establish a breach of the standard of care as required in medical malpractice claims because her expert witness was stricken; therefore, her claims should be dismissed. Plaintiff responded to defendants' motion, arguing that she would establish a breach of the standard of care through defendants' witnesses. During the hearing on defendants' motion, plaintiff's counsel admitted, however, that she failed to depose defendants' experts; therefore, she did not know their testimony and discovery was closed. The trial court granted defendants' motion for summary disposition under MCR 2.116(C)(10), holding that "plaintiff failed to present any competent evidence regarding the standard of care." This appeal followed.

Plaintiff argues that "the trial court erred in striking plaintiff's expert witness, then granting summary disposition, for the failure to take the doctor's deposition as planned." We disagree.

We review the imposition of discovery sanctions, including orders striking expert witnesses, for an abuse of discretion. *Local Area Watch v City of Grand Rapids*, 262 Mich App 136, 147-148; 683 NW2d 745 (2004). An abuse of discretion occurs when the trial court's decision results in an outcome falling outside the principled range of outcomes. *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006). We review de novo a trial court's decision on a motion for summary disposition. *Debano-Griffin v Lake Co*, 493 Mich 167, 175; 828 NW2d 634 (2013). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint and is properly granted if there is no genuine issue of material fact upon which reasonable minds could differ. *Id.*; *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 206; 815 NW2d 412 (2012).

Plaintiff does not dispute that the trial court had the discretion to strike her expert witness; but, she argues, the sanction was not warranted in this case. Plaintiff argues that analysis of the factors set forth by this Court in *Dean v Tucker*, 182 Mich App 27, 32-33; 451 NW2d 571 (1990), support her argument. In that case, we held that the following non-exhaustive list of factors should be considered in determining the proper sanction for a discovery violation:

(1) whether the violation was wilful or accidental; (2) the party's history of refusing to comply with discovery requests []; (3) the prejudice to the defendant; (4) actual notice to the defendant of the witness and the length of time prior to trial that the defendant received such actual notice; (5) whether there exists a history of plaintiff engaging in deliberate delay; (6) the degree of compliance by the plaintiff with other provisions of the court's order; (7) an attempt by the plaintiff to timely cure the defect; (8) and whether a lesser sanction would better serve the interests of justice. [*Id.* (footnotes omitted).]

Plaintiff argues that: (1) she did not "willfully" prevent the deposition of Dr. Mitros, (2) she had no history of refusing to provide discovery, (3) defendants were not significantly prejudiced, (4) defendants had ample notice of the witness, (5) there was no history of deliberate delay by plaintiff, (6) plaintiff "complied with other aspects of the Court's discovery orders," (7) plaintiff was prepared to "promptly reschedule the deposition," and (8) a lesser sanction would have served the interests of justice. After analysis of the *Dean* factors, we conclude that the trial court's decision to strike plaintiff's expert witness did not constitute an abuse of discretion.

First, because of plaintiff's failure to cooperate with defendants' numerous attempts to schedule the depositions of plaintiff's expert witnesses, a motion to compel discovery and two motions to strike plaintiff's expert witnesses were filed by defendants. The trial court issued two orders requiring plaintiff to produce her expert witnesses for depositions and warning that they would be stricken as witnesses if plaintiff failed to comply. Nevertheless, plaintiff failed to cooperate with defendants' attempts to schedule the depositions and failed to communicate with her standard of care expert, which resulted in the cancellation of his scheduled deposition the day before it was to occur because plaintiff failed to pay her portion of his fees. Further, after the deposition was cancelled, plaintiff failed to attempt to reschedule the deposition by providing potential dates in which it could be completed. In light of the record evidence, we conclude that plaintiff's violations of the court's discovery orders were wilful, not accidental. See *Welch v J Walter Thompson USA, Inc*, 187 Mich App 49, 52; 466 NW2d 319 (1991).

Second, as set forth above, plaintiff had a history of refusing to comply with defendants' discovery requests which necessitated the filing of three motions, court hearings, and the issuance of court orders, despite three extensions of the trial court's scheduling deadlines.

Third, defendant was prejudiced by plaintiff's consistent failure to cooperate with the discovery process which delayed the adjudication of this matter, hampered defendants' ability to prepare a defense, and caused defendants to incur costs.

Fourth, while defendants had actual notice of plaintiff's standard of care expert witness, they were prevented from deposing him and, thus, could not learn the substance of his opinions within an adequate time to prepare a defense to plaintiff's claims.

Fifth, as set forth above, plaintiff had a history of engaging in deliberate delay of the discovery process by failing to cooperate with defendants' reasonable discovery efforts, failing to comply with the trial court's scheduling deadlines, and failing to comply with the trial court's orders.

Sixth, plaintiff completely failed to comply with either the March 6, 2013 or March 27, 2013 orders of the trial court.

Seventh, plaintiff did not attempt to “cure the defect” of failing to provide the deposition testimony of Dr. Mitros as ordered. And, after the scheduled deposition was cancelled by Dr. Mitros because plaintiff did not pay him, plaintiff provided no potential deposition dates.

And, eighth, after plaintiff violated the trial court’s March 6, 2013 discovery order, the trial court afforded plaintiff leniency by issuing a second discovery order on March 27, 2013, which extended the time in which plaintiff had to produce her expert witnesses for depositions. Both court orders provided that if plaintiff failed to produce Dr. Mitros for deposition by the specified time, he would be stricken as an expert witness. Nevertheless, plaintiff failed to comply with the court’s orders. Under these circumstances, we cannot conclude that a lesser sanction would have served the interest of justice.

Accordingly, the trial court’s decision to strike plaintiff’s standard of care expert did not constitute an abuse of discretion. See *Woodard*, 476 Mich at 557. Further, because plaintiff presented no evidence that would establish the applicable standard of care required for her medical malpractice claim, the trial court properly granted defendants’ motion for summary disposition. See *Debano-Griffin*, 493 Mich at 175.

Affirmed.

/s/ Peter D. O’Connell
/s/ Mark J. Cavanagh
/s/ Karen M. Fort Hood