

STATE OF MICHIGAN
COURT OF APPEALS

DENISE M. PAGURA,

Plaintiff-Appellant,

v

EDWARD J. MCNEELY, III, and
MCNEELY LAW OFFICE, PC,

Defendants-Appellees.

UNPUBLISHED
January 22, 2013

No. 307870
Kent Circuit Court
LC No. 10-011460-NM

Before: OWENS, P.J., and FITZGERALD and RIORDAN, JJ.

PER CURIAM.

Plaintiff, Denise M. Pagura, appeals as of right the order dismissing her action against defendants, Edward J. McNeely, III, and McNeely Law Office, PC. We affirm.

I. FACTUAL BACKGROUND

Plaintiff was involved in a separate lawsuit with the Department of Environmental Quality beginning in 2002, where defendants provided her legal representation. During the appeal of that case, plaintiff retained a different attorney, Dennis Kolenda. Plaintiff then initiated the instant lawsuit against defendants, raising a legal malpractice claim. She claimed that defendant McNeely suffered from alcoholism and depression and violated his duty to behave with the ordinary judgment, learning, or skill that a reasonable attorney would use in similar circumstances. While defendants filed a motion for summary disposition based on the statute of limitations, the trial court denied the motion, finding that there was a genuine issue of material fact regarding when plaintiff's claim accrued.

During discovery, the parties repeatedly attempted to obtain interrogatories and schedule depositions. On April 20, 2011, defense counsel sent plaintiff's attorney a message that deposition dates of May 12, 13, 19, or 20, were acceptable. Plaintiff eventually filed her expert witness list, although it was past the deadline, and she only identified Kolenda as an expert witness. She eventually submitted a supplemental expert witness list, adding one other attorney.

Further difficulties arose during discovery, as defendants filed a motion for sanctions or to compel discovery, alleging that they served plaintiff with a first set of interrogatories and request for production but she had yet to respond and the deadline in MCR 2.309(B)(4) and MCR 2.310(C)(2) had passed. Ultimately, the parties stipulated to an order extending the

deadline for the responses to the interrogatories and scheduling various depositions. The parties agreed that plaintiff would fully and completely answer defendants' first set of interrogatories.

Despite this stipulated order, the difficulties continued, and defendants filed a motion to sanction plaintiff for failure to comply with the court's order compelling discovery. Defendants asserted that plaintiff's expert witness disclosures were untimely, the answers to defendants' interrogatories were inadequate, and that plaintiff failed to produce evidence that her malpractice claim was brought within the applicable two-year filing period. While plaintiff attempted to schedule depositions, defendants declined the offer due to the inadequacy of the interrogatories. The trial court agreed with defendants that plaintiff's responses were wholly inadequate and found that the appropriate sanction was dismissal. Plaintiff now appeals.

II. DISCOVERY SANCTION

A. Standard of Review

Discovery sanctions are reviewed for an abuse of discretion. *Kalamazoo Oil Co v Boerman*, 242 Mich App 75, 89; 618 NW2d 66 (2000). An abuse of discretion occurs "when the trial court's decision is outside the range of reasonable and principled outcomes." *Saffian v Simmons*, 477 Mich 8, 12; 727 NW2d 132 (2007). A trial court's factual findings underlying a discovery ruling are reviewed for clear error. *Traxler v Ford Motor Co*, 227 Mich App 276, 282; 576 NW2d 398 (1998). "A finding of fact is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made." *Id.*

B. Analysis

Pursuant to MCR 2.313(B)(2)(c), a trial court has the discretion to dismiss an action if a party fails to obey an order to provide or permit discovery. However, "[b]ecause the imposition of sanctions is discretionary, the trial court should carefully consider the circumstances of the case to determine whether a drastic sanction, such as dismissing a claim, is appropriate." *Richardson v Ryder Truck Rental, Inc*, 213 Mich App 447, 451; 540 NW2d 696 (1995). Furthermore, "[s]evere sanctions are generally appropriate only when a party flagrantly and wantonly refuses to facilitate discovery, not when the failure to comply with a discovery request is accidental or involuntary." *Kalamazoo Oil Co*, 242 Mich App at 86 (citations omitted). In this context, willful does not necessarily require a wrongful intent, but need only be conscious or intentional rather than accidental. *Welch v J Walter Thompson USA, Inc*, 187 Mich App 49, 52; 466 NW2d 319 (1991). Lastly, "[t]he record should reflect that the trial court gave careful consideration to the factors involved and considered all its options in determining what sanction was just and proper in the context of the case before it." *Kalamazoo Oil Co*, 242 Mich App at 86 (citations omitted). Relevant factors for a trial court to consider "include, but are not limited to[:]"

- (1) whether the violation was wilful or accidental;
- (2) the party's history of refusing to comply with discovery requests (or refusal to disclose witnesses);
- (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's 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[;] and (8) whether a lesser sanction would better serve the interests of justice. This list should not be considered exhaustive. [*Duray Dev, LLC v Perrin*, 288 Mich App 143, 165; 792 NW2d 749 (2010) (footnote omitted).]

In light of these factors, we find that the trial court did not abuse its discretion in sanctioning plaintiff. The stipulated order the trial court entered compelled plaintiff to "fully and completely" respond to defendants' interrogatories. Despite this clear language, several of plaintiff's answers were evasive and unresponsive. Plaintiff repeatedly expressed her apparent ignorance about the evidence she might present at trial. For example, in response to a question about whether Kolenda had any personal knowledge of the services defendants rendered, plaintiff responded that she was unsure what knowledge Kolenda had of the case or what documents were in his possession. Yet, plaintiff disclosed Kolenda as an expert witness, and it was incumbent on her to disclose the nature of the expected testimony. As provided in MCR 2.302(B)(4)(a)(i), one party may require the other party through interrogatories "to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter about which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion." Plaintiff's responses regarding Kolenda, her expert witness, utterly failed to meet this standard. Plaintiff's response to other questions were likewise inadequate and consisted of claims that she did not understand many of the questions asked and did not know what type of documentation would support particular allegations in her complaint.

Plaintiff also had a history of noncompliance with discovery requests. She filed expert witness lists late and failed to respond to the first set of interrogatories timely, necessitating the stipulated order that extended the time for responding. Her "failure to adequately respond to discovery requests extended over several months, even after an order to compel was entered." *Hardrick v Auto Club Ins Ass'n*, 294 Mich App 651, 662; 819 NW2d 28 (2011). Thus, nothing suggests that the degree to which her answers were unresponsive was accidental or involuntary, and the trial court's finding that her inadequate answers were willful was not error.

Defendants also were prejudiced by plaintiff's failure to comply with discovery. Among other things, pretrial discovery of expert witnesses is intended to narrow the issues, help the opposing party prepare for cross-examination, and eliminate surprise at trial. *Nelson Drainage Dist v Bay*, 188 Mich App 501, 506-507; 470 NW2d 449 (1991). By providing such cursory answers, plaintiffs subverted the very purpose of pretrial discovery. While defendants may have known the identity of the witnesses, plaintiff's responses did little to provide notice of what evidence the witnesses would produce, which impeded defendants' preparations for trial as well as for depositions.

Plaintiff, however, suggests that she complied with the trial court's order by making herself and her witnesses available for depositions and she stood ready to cure any defect if defendants would have moved to compel more specific responses. However, the trial court had no reason to expect that plaintiff would comply with yet another discovery order, and the availability of depositions does not excuse plaintiff from complying with her obligation to

provide appropriate responses to defendants' interrogatories under MCR 2.302(B)(4)(a)(i) or the trial court's order compelling discovery.

Plaintiff also argues that dismissal was improper because defendants interfered with discovery by failing to make McNeely available. However, defendants offered times for McNeely's availability in a correspondence dated April 20, 2011, and only declined to conduct the depositions in light of plaintiff's inadequate responses to the interrogatories. Plaintiff also fails to point to any evidence that defendants did not provide her with the properly requested documents. Further, a trial court's factual findings underlying a discovery ruling are reviewed for clear error, *Traxler*, 227 Mich App at 282, and we are not left with the definite and firm conviction that a mistake has been made.

Finally, plaintiff claims that a lesser sanction would have better served the interests of justice. However, the trial court meticulously went through the relevant factors to justify its decision and explained that a lesser sanction such as excluding plaintiff's expert witness was inadequate because that would likely be fatal to her action anyway. To prevail on a claim of legal malpractice, expert testimony is generally required to establish standard of conduct, breach, and causation unless the issue is so manifest that an ordinary person is capable of determining whether defendants behaved carelessly. *Law Offices of Lawrence J Stockler, PC v Rose*, 174 Mich App 14, 48; 436 NW2d 70 (1989). In the instant case, it is not clear that a lesser sanction such as exclusion of the expert witness would have better served the interests of justice as the effect on plaintiff's case likely would have been the same. Further, considering plaintiff's continual failure to comply with discovery, it cannot be said that a lesser sanction was justified.

III. CONCLUSION

The trial court's order sanctioning plaintiff for discovery abuses and dismissing the case was not in error. We affirm.

/s/ Donald S. Owens
/s/ E. Thomas Fitzgerald
/s/ Michael J. Riordan