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ARKANSAS COURT OF APPEALS

DIVISION II
No. CA11-1170

LAWRENCE YOUNG, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF VIRGINIA CASTLEBERRY, DECEASED APPELLANT V. OUMITANA KAJKENOVA APPELLEE	**Opinion Delivered** October 24, 2012 APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT, THIRD DIVISION [NO. CV-2008-12574/3] HONORABLE JAY MOODY, JUDGE AFFIRMED

RAYMOND R. ABRAMSON, Judge

In this medical-malpractice case, Lawrence Young, as personal representative of the estate of Virginia Castleberry, sued Dr. Oumitana Kajkenova. This is the second time this case has been before us. *See Young v. Kajkenova*, 2010 Ark. App. 783. In the first case, we reversed and remanded after the circuit court prohibited Young's medical expert from testifying because of discovery violations. Because of the posture of the case, the striking of the expert resulted in a dismissal with prejudice. We ruled that because the circuit court had mechanically and "as a rule of thumb" struck the expert, it had failed to exercise discretion. After the case was remanded, the circuit court held a hearing to determine the appropriate sanction for the discovery violation. The court again struck Young's expert. Because discovery was closed, Young could not obtain another medical expert to establish

causation—therefore, the case resulted in summary judgment in favor of Dr. Kajkenova. Young appeals, arguing that the circuit court misapplied Arkansas Rule of Civil Procedure 37 and imposed sanctions that were too severe. We disagree and affirm the circuit court.

Young originally filed the case in 2006, but nonsuited on the eve of trial. Young refiled in November 2008, and the circuit court, by scheduling order, set a trial date of October 27, 2009, with discovery to be completed thirty days prior to trial. Kajkenova propounded discovery in January 2009, received no response from Young, and sent a good-faith letter to Young's attorney on June 2, 2009. In this letter, Kajkenova's attorney informed Young that she wanted to depose his expert witness. Kajkenova's attorney sent a second good-faith letter July 20, highlighting her desire to redepose Young's expert witness, Dr. Sexson.[1] Kajkenova again received no response and filed a motion to compel on August 10, 2009. Young did not respond to the motion to compel, and the circuit court entered an order to compel on September 4, 2009. The order required that depositions be taken by September 25, 2009. Young contacted Dr. Sexson on September 9, 2009, but Dr. Sexson was unable to schedule a deposition until October 5, 2009. Because Young failed to timely comply with the order, Kajkenova filed a motion for sanctions. After a hearing, the circuit court struck Dr. Sexson as a witness and dismissed the case. On appeal, this court reversed and remanded.

At the hearing on remand, the court heard arguments from both Young's and Kajkenova's counsel. The court took the matter under advisement and issued a written order

[1]Dr. Sexson had been deposed in the 2006 case that was voluntarily dismissed.

on January 24, 2011, again striking Dr. Sexson as a witness. Additionally, the circuit court noted "that the sanctions imposed are appropriately tailored to address Plaintiff's failure to comply with this court's order." The case concluded by the granting of summary judgment in favor of Kajkenova on August 29, 2011.

If a party fails to comply with an order compelling discovery, the circuit court may enter "[a]n order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters into evidence." Ark. R. Civ. P. 37(b)(2)(B). The decision to impose sanctions for the violation of an order rests in the trial court's discretion. *Calandro v. Parkerson*, 333 Ark. 603, 970 S.W.2d 796 (1998). This discretion is broad, and there is no requirement that the court find willful or deliberate disregard before imposing sanctions. *S. Coll. of Naturopathy v. State ex rel. Beebe*, 360 Ark. 543, 203 S.W.3d 111 (2005). Arkansas courts have repeatedly upheld severe sanctions for flagrant discovery violations. *See, e.g.*, *id.* (upholding the imposition of a default judgment where the defendant redacted information in discovery responses the court ordered it to produce); *Nat'l Front Page, LLC v. State ex rel. Pryor*, 350 Ark. 286, 86 S.W.3d 848 (2002) (approving trial court's entry of default judgment where pro se defendant failed to answer any discovery requests, failed to appear at a hearing on a motion to compel, and failed to appear for trial); *Viking Ins. Co. of Wisconsin v. Jester*, 310 Ark. 317, 836 S.W.2d 371 (1992) (upholding lower court's striking the defendant insurance company's answer and entering a default judgment where defendant, after being ordered to produce its entire claim file, withheld portions containing pertinent information); *Coulson Oil Co. v. Tully*, 84 Ark. App.

241, 139 S.W.3d 158 (2003) (affirming the circuit court's sanction of striking the defendant's answer where the defendant included untruthful information in its discovery responses).

Sanctions for failure to comply with a discovery order may destroy a party's cause of action. *See* 2 David Newbern, John J. Watkins & D.P. Marshall Jr., *Arkansas Civil Practice and Procedure* § 27:5 (5th ed. 2010) ("Obviously, some of the available sanctions for failure to comply with a discovery order may be devastating to a claim or defense."). And, as we indicated in the earlier iteration of this case, the imposition of extraordinary sanctions should be the product of careful consideration and discretion. *See Young*, *supra*.

Here, the sanction was severe because it ultimately resulted in summary judgment against Young. Had Young not voluntarily dismissed his earlier suit against Kajkenova, the striking of Dr. Sexson would not have been fatal to Young's claim of negligence—he could have dismissed and refiled. But this is unavailing to Young. Young's attorneys were notified twice that Kajkenova's attorneys wished to redepose Dr. Sexson because the circumstances had possibly changed.[2] Then, Kajkenova filed a motion to compel, which Young ignored. Only after the order to compel was entered did Young's attorneys attempt to produce Dr. Sexson for deposition, but they were not able to do so before the ordered cut-off date. At that point, they had been on notice for over three months that Kajkenova wished to redepose Dr. Sexson. In *Calandro* our supreme court held as follows:

Appellants were the plaintiffs in this case and, as such, they chose to utilize the court

[2]According to Kajkenova, after Dr. Sexson gave his deposition, a nurse gave testimony in her deposition that allegedly contradicted Dr. Sexson's testimony. Therefore, Kajkenova desired to redepose Dr. Sexson to clarify his testimony in light of the nurse's deposition.

> system to attempt to redress alleged wrongs. To allow them to bog down the judicial system through their delay and willful noncompliance with the trial court's order would be imprudent.

Calandro, 333 Ark. at 612, 970 S.W.2d at 801. Young was the plaintiff and had the obligation to prosecute the case. Because he did not, and failed to comply with a court order, his medical expert was prohibited from testifying. The cases cited above would indicate that even more severe sanctions could have been authorized. For example, the court could have struck Young's pleadings and entered a default judgment. *See* Ark. R. Civ. P. 37(b)(2)(C). But, in its discretion, the court struck the expert. This was not an abuse of discretion, and we affirm.

Affirmed.

PITTMAN and MARTIN, JJ., agree.

David A. Couch, PLLC, by *David A. Couch*; *Brian G. Brooks, Attorney at Law, PLLC*, by: *Brian G. Brooks*, for appellant.

Mitchell, Williams, Selig, Gates & Woodyard, P.L.L.C., by: *Michelle H. Cauley* and *Delena C. Hurst*, for appellee.