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It Is So Ordered: Appellate Court Affirms Dismissal of Plaintiff's Action for Violation of Discovery Orders, Including Orders Precluding Deletion of Facebook Posts and Attendance at Medical Evaluations

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In *Gee v Citizens*, an unpublished opinion per curiam of the Court of Appeals, issued February 21, 2017 (Docket No. 329990), Plaintiff filed a lawsuit seeking various first-party benefits from Defendant Citizens following a motor vehicle accident. Throughout the course of discovery, Defendant noticed Plaintiff to undergo medical evaluations with Dr. John Baker, Dr. Elliot Wagenheim, and Dr. Gary Trock. After Plaintiff failed to appear for the scheduled medical evaluations, Defendant secured an order compelling Plaintiff to do so.

Despite the order compelling Plaintiff to appear, Plaintiff yet again failed to do so for two of three exams. Accordingly, the trial court entered a second order compelling Plaintiff to attend the medical evaluations with Dr. Wagenheim and Dr. Trock. Again, Plaintiff did not appear for the second court ordered examinations. Defendant filed a second motion to dismiss Plaintiff's claims for violation of the court's discovery order, which was denied by the court.

During discovery, Plaintiff was also ordered to provide information regarding her Facebook account to Defendant and was specifically instructed not to delete any material from her Facebook page. The trial court warned Plaintiff that any deleted material would be a deliberate defiance of the court's order. Defendant believed that Plaintiff had deleted some of her Facebook posts, and filed a motion to dismiss Plaintiff's claim for violating the court's discovery order. Even though Plaintiff submitted a sworn affidavit stating that she did not delete any information from her Facebook account, Defendant produced evidence to the contrary. Specifically, in its third renewed motion to dismiss, Defendant showed the difference between Plaintiff's Facebook page on varying dates, which confirmed that significant deletions occurred.

SECRET WARDLE NOTES

Dismissal is the harshest sanction a court may impose for discovery violations; such dismissals are often appealed. Nevertheless, defense litigants should be persistent in securing orders during discovery and filing motions to dismiss for violations of same. Arguing that the Plaintiff's actions were willful, deliberate, and *repetitive* are the most persuasive arguments in moving the court for dismissal. In *Gee v Citizens Ins. Co. of America* the appellate court upheld a trial court's dismissal of an action finding that the Plaintiff violated *three* court orders, demonstrating a complete lack of regard for the trial court's authority.

At Defendant's third motion to dismiss for violation of the court's discovery order, Defendant argued that it was incurring significant expenses as a result of Plaintiff's failure to attend the medical evaluations. Further, the trial court was cognizant that Defendant sought information from Plaintiff's Facebook account as necessary to Defendant's case. The trial court gave Plaintiff several opportunities to correct her behavior and provide the requested Facebook information, yet she yet again defied the court's order. Accordingly, the trial court dismissed Plaintiff's lawsuit as a sanction upon reviewing her disregard for the numerous court orders entered in the case.

On appeal, Plaintiff asserted that the trial court abused its discretion in dismissing her lawsuit on the basis of discovery violations. The appellate court disagreed and affirmed the holding of the trial court.

In doing so, the appellate court indicated that, in dismissing Plaintiff's lawsuit, the trial court relied upon MCR 2.313 and MCR 2.504. Indeed, MCR 2.313 provides, in pertinent part, as follows:

(B) Failure to comply with court order:

(2) Sanctions by Court in which Action is Pending. If a party or an officer, director, or managing agent of a party, or person designated under MCR 2.306(B)(5) or 2.307(A)(1) to testify on behalf of a party, fails to obey an order or 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 that are just, including but not limited to the following:

(a) an order that the matters regarding which the order was entered or other designated facts may be taken to be established for purposes of the action in accordance with the claim of the party obtaining the order;

(b) an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting the party from introducing designated matters into evidence;

(c) an order striking pleadings or parts of the 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 this obedient party.

Likewise, MCR 2.504 provides, in pertinent part, as follows:

(B) Involuntary Dismissal; Effect.

(1) If a party fails to comply with these rules or court order, upon motion by an opposing party, or sua sponte, the court may enter a default against the noncomplying party or a dismissal of the noncomplying party's action or claims.

In *Zantop International Airlines, Inc. v Eastern Airlines*, 200 Mich App 344 (1993), the appellate court observed that the dismissal of an action is a harsh consequence and set forth relevant factors for trial courts to consider before imposing dismissal as a sanction:

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. Degree of compliance with other parts of the court's orders;
6. Attempts to cure the defects; and
7. Whether a lesser sanction would better serve the interest of justice

See also, *Dean v Tucker*, 182 Mich App 27 (1990).

In light of these factors, the appellate court determined that the trial court considered the gravity of dismissal of a plaintiff's lawsuit in its entirety as a sanction. Indeed, the trial court first evaluated whether Plaintiff's behavior was willful or accidental. The trial court further took note that Plaintiff engaged in a "repeated abuse of its discovery process." Plaintiff deleted information from her Facebook account and did so with the intention to evade discovery. Furthermore, Plaintiff engaged in a pattern of deliberate delay by refusing to attend her medical evaluations, some of which were court ordered, and repeatedly refused to provide information to discovery requests. In light of these factors, Plaintiff's behavior exhibited a complete failure to show any regard to the trial court's authority. Accordingly, dismissal of Plaintiff's claim was warranted.

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