STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY	)	CIVIL ACTION NO.: 2014-CP-26-6593
Michael Moely as Special Administrator of the Estate of Donelle Bronstein a/k/a Donelle M. Ruiters a/k/a Donelle Moley Bronstein,	)	**ORDER GRANTING MOTION TO DISMISS OF VIRGINIA BELL, F.N.P. AND INLET MEDICAL ASSOCIATES, P.A.**
Plaintiff,	)	
vs.	)	
Virginia Bell, F.N.P. and Inlet Medical Associates, P.A.,	)	

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SC Court of Appeals

Defendants Virginia Bell, F.N.P. ("Bell") and Inlet Medical Associates, P.A. moved for an order pursuant to South Carolina Rules of Civil Procedure 37(b) and 41(b) dismissing the above-captioned litigation with prejudice for Plaintiff's failure to prosecute the case and/or as a sanction for failure to comply with discovery orders of this Court and failure to permit discovery.

The Motion was heard in open court on January 20, 2016. Thomas W. Winslow of Goldfinch Winslow LLC appeared on behalf of Plaintiff. Marian W. Scalise of Richardson, Plowden & Robinson, P.A. appeared on behalf of Defendants. The Court had before it the pleadings and motions filed in the above-captioned litigation, as well as the Defendants' memoranda, exhibits, affidavits, and case law attached thereto.

Based upon this Court's review of the documents filed in this litigation and the testimony and other evidence presented at the hearing, including additional e-mail correspondence between Plaintiff's counsel and Defendant's counsel in January 2016 and Plaintiff's new expert's affidavit, the Court hereby grants Defendants' motion to dismiss Plaintiff's action with prejudice under Rules 37(b) and 41(b), SCRCP for the reasons set forth herein.

I. FACTUAL FINDINGS AND PROCEDURAL HISTORY

Plaintiff filed this medical malpractice action on October 8, 2014. Plaintiff's decedent was seen by Defendant Bell, was diagnosed with depression, and prescribed an anti-depressant. Five days later, Plaintiff's decedent died as a result of asphyxiation. Initial photographs and documents indicate Plaintiff's decedent may have been engaging in self-pleasure through autoerotic asphyxiation when she died. Plaintiff's theory, however, is that his decedent experienced suicidal ideation that either went undiagnosed by Defendant Bell or that Defendant Bell failed to warn decedent's friends and family of signs and symptoms to look for in case decedent became suicidal.

Plaintiff's suit was initially brought by Fayrell Furr, who filed the expert affidavit of Dr. Wayne Blount ("Dr. Blount"). Dr. Blount's affidavit supported both the Notice of Intent and the Summons and Complaint. Dr. Blount is the only expert Plaintiff has timely named in this matter.[1]

The Court finds that Defendants have sought to depose Dr. Blount for the better part of a year; however, Plaintiff has failed to make Dr. Blount available pursuant to this Court's Scheduling Order or the repeated requests of Defendants.

On February 27, 2015, this Court issued a Scheduling Order in this matter which required Plaintiff to name all expert witnesses no later than August 14, 2015, and further ordered that the Plaintiff's experts shall be deposed by October 23, 2015. This Scheduling Order and the deadlines contained therein have not been amended, despite the attorneys appearing before the

[1] Plaintiff's attorney forwarded to defense counsel an Affidavit of a psychiatrist on the evening prior to this Court's January 20, 2016 hearing on the motion to dismiss. Plaintiff did not send a supplemental discovery response identifying this psychiatrist as a replacement expert or as a new expert. In addition, the Scheduling Order entered in this case required Plaintiff to name all experts by August 14, 2015.

Chief Administrative Judge to set this case as a day certain. [2]

In reviewing the exhibits before the Court, this Court finds that Defendants' counsel timely communicated with Plaintiff's counsel Fayrell Furr on at least five occasions seeking to depose Plaintiff's expert, even noticing Dr. Blount's deposition, which was then canceled by Plaintiff's counsel due to Dr. Blount being unavailable. All of these attempts at deposing Dr. Blount were prior to the expiration of the Scheduling Order deadline. Counsel for Defendants repeatedly underscored to Plaintiff's counsel via emails the Scheduling Order's deadline of October 23, 2015 to depose Plaintiff's experts.

On October 7, 2015, Mr. Furr informed the relevant parties that Thomas Winslow would be substituted as counsel for Plaintiff in this matter. That same day, counsel for Defendants contacted Mr. Winslow seeking availability for Dr. Blount's deposition and again stressed the Scheduling Order's October 23, 2015 deadline for Plaintiff's expert's deposition to be completed. On October 19 and 30, 2015, counsel for Defendants again contacted Mr. Winslow seeking to depose Dr. Blount.

By this point, this Scheduling Order deadline for the deposition of Plaintiff's expert had expired. There was no amendment of the Scheduling Order or the deadlines contained therein. Counsel for Defendants nevertheless again reached out on November 12, 2015; November 16, 2015; November 18, 2015; and November 20, 2015 seeking days to depose Dr. Blount, to no avail.

On November 20, 2015, Defendants again noticed for November 30, 2015 the deposition of Dr. Blount to take place at his Atlanta, Georgia office. Plaintiff's counsel contended they

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[2] The Honorable William Seals held a master day certain roster meeting on October 27, 2015. Both Attorney Winslow and Attorney Scalise participated in the roster meeting wherein the case was set for trial June 6, 2016, but Attorney Winslow never asked for additional time to name or depose experts. Plaintiff also never filed a motion to amend the Scheduling Order.

were unable to get in contact with Dr. Blount but suggested that fact witness depositions could be taken that day instead. Despite Plaintiff's counsel's suggestion on November 23, 2015, Plaintiff's counsel had previously noticed the depositions of certain fact witnesses for November 30, 2015 *on November 17, 2015*—ostensibly with full knowledge that Dr. Blount would not be available on November 30, 2015. On November 23, 2015, Defendant's counsel again sought deposition dates for Dr. Blount.

On November 25, 2015, Mr. Winslow advised Defendants' counsel that he learned Dr. Blount had not returned his telephone calls because Dr. Blount had moved to Florida. Mr. Winslow advised he was awaiting forwarding contact information for Dr. Blount and would try to give Defendants' counsel the correct information and a date for Dr. Blount's deposition. Despite this assurance, Plaintiff's counsel did not make Dr. Blount available for his deposition. Furthermore, despite the apparent unavailability of Dr. Blount, Plaintiff also made no significant efforts to locate Dr. Blount and made no efforts to obtain and identify a new expert.

After Plaintiff failed to make Dr. Blount available for his deposition despite repeated requests by Defendants and despite this Court's deadline of October 23, 2015 for the deposition of Plaintiff's experts, Defendants moved on December 10, 2015 to dismiss Plaintiff's action with prejudice for failure to prosecute and/or as a sanction for Plaintiff's failure to comply with discovery orders of this Court and failure to permit discovery.

The hearing on Defendants' motion was scheduled for January 20, 2016. Plaintiff retained a new expert himself and sent his new expert's affidavit to Mr. Winslow the evening before the scheduled hearing. The Scheduling Order, which again had not been amended, required Plaintiff to name all expert witnesses no later than August 14, 2015. Defendants opposed any attempt of Plaintiff to untimely name a new expert at the hearing.

II. LEGAL STANDARD

A defendant may move for dismissal of an action for the plaintiff's failure to prosecute an action. *See* Rule 41(b), SCRCP ("For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him."). "The plaintiff has the burden of prosecuting [his] action, and the trial court may properly dismiss an action for plaintiff's unreasonable neglect in proceeding with [his] cause." *McComas v. Ross*, 368 S.C. 59, 62, 626 S.E.2d 902, 904 (Ct. App. 2006) (citing *Don Shevey & Spires, Inc. v. Am. Motors Realty Corp.*, 279 S.C. 58, 60, 301 S.E.2d 757, 758 (1983)). In granting dismissal for failure to prosecute, there must be some showing of indifference to the rights of the defendant. *E.g., Orlando v. Boyd*, 320 S.C. 509, 511, 466 S.E.2d 353, 355 (1996) (holding that precluding a witness from testifying was an abuse of discretion without a showing of willful disobedience when exclusion amounted to a judgment of default or dismissal).

The United States Court of Appeals for the Fourth Circuit has said that "dismissal is generally permitted only in the face of a clear record of delay or contumacious conduct by the plaintiff" and "discretion should be exercised discreetly and only after due consideration of the availability of sanctions less severe than dismissal." *McCargo v. Hedrick*, 545 F.2d 393, 396 (4th Cir. 1976). The Fourth Circuit has also held a trial court must consider four factors before dismissing a case for failure to prosecute: (1) the plaintiff's degree of personal responsibility; (2) the amount of prejudice caused the defendant; (3) the presence of a drawn out history of deliberately proceeding in a dilatory fashion; and (4) the effectiveness of sanctions less drastic than dismissal. *See McComas* 368 S.C. at 63, 626 S.E.2d at 904 (citing *Hillig v. Comm'r of Internal Revenue*, 916 F.2d 171, 174 (4th Cir. 1990)).

"Whether an action should be dismissed for failure to prosecute is left to the discretion of the trial court judge, and his decision will not be disturbed, except upon a clear showing of an

abuse of discretion." *McComas,* 368 S.C. at 61, 626 S.E.2d at 904 (Ct. App. 2006); *see also* *Small v. Mungo*, 254 S.C. 438, 442, 175 S.E.2d 802, 804 (1970).

An action may also be dismissed under Rule 37(b)(2)(C), SCRCP for a party's failure to comply with discovery:

> If a party ... fails to obey an order to provide or permit discovery, ... the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
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> ...
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> An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party.

See Davis v. Parkview Apartments, 409 S.C. 266, 282, 762 S.E.2d 535, 544 (2014) (holding dismissal of limited partners' five actions as sanctions for refusing to comply with discovery orders was not unduly harsh).

A party must show "bad faith, willful disobedience or gross indifference to its rights" to justify the sanction of dismissal. *Id.* "In determining the appropriateness of a sanction, the court should consider such factors as the precise nature of the discovery and the discovery posture of the case, willfulness, and degree of prejudice." *Griffin Grading and Clearing, Inc. v. Tire Serv. Equip. Mfg. Co.*, 334 S.C. 193, 199, 511 S.E.2d 716, 719 (Ct. App. 1999) (affirming striking of defendant's answer as a discovery sanction).

"The imposition of sanctions is generally entrusted to the sound discretion of the Circuit Court. Therefore, an appellate court will not interfere with a trial court's exercise of its discretionary powers with respect to sanctions imposed in discovery matters unless the court abuses its discretion." *Davis*, 409 S.C. at 281, 762 S.E.2d at 543 (internal citations omitted).

III. LEGAL ANALYSIS

The Court finds that under Rule 41(b), SCRCP, Plaintiff has failed to prosecute this

action by precluding Defendants from deposing Plaintiff's sole expert witness. The Court further finds that Plaintiff has failed to obey a Scheduling Order and has failed to permit discovery under Rule 37(b)(2)(C), SCRCP. Therefore, under Rule 37(b)(2)(C), Rule 41(b), this State's case law, and the factors established by the Fourth Circuit, it is clear that dismissal is warranted in this matter.

While Defendants were unable to discern Plaintiff's degree of personal responsibility in this matter, there is ample evidence in the record supporting the remaining factors under the Fourth Circuit's standard and this State's required showing of bad faith, willful disobedience or gross indifference to Defendants. This Court finds that Defendants have been severely prejudiced in having to continually defend themselves in this lawsuit which has been pending since October 2014. Defendants have had to defend this suit while being deprived of the opportunity and right to depose Plaintiff's sole expert. Defendants cannot properly mount a defense to this action as Plaintiff has not allowed his sole expert to testify as to his opinions on the standard of care, opinions which are necessary and critical in a medical malpractice action.

Plaintiff did not attempt to identify another expert[3] until the evening prior to this Court's scheduled hearing on the Defendants' motion to dismiss; however, this attempt came too late as the Scheduling Order entered in this matter, which had not been amended, required Plaintiff to name all experts no later than August 14, 2015. Therefore, Dr. Blount is the only witness who can provide testimony as to the standard of care and any alleged deviation on the part of Defendants. Defendants are entitled to explore Dr. Blount's opinions and methodologies. By not making Dr. Blount available for his deposition or attempting to secure his availability prior to the Scheduling Order's deadline and/or the hearing date in this matter, Plaintiff has demonstrated

[3] Plaintiff's counsel forwarded defense counsel the Affidavit and Curriculum Vitae but did not supplement his discovery to formally name the witness as an expert.

gross indifference to Defendants' rights, and this matter must therefore be dismissed. *See Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 410 S.E.2d 537 (1991); *see also McComas* at 62-63; 626 S.E.2d at 904 ("In granting dismissal for failure to prosecute, there must be some showing of indifference to the rights of the defendant.").

Moreover, there exists evidence that there is a drawn out history of Plaintiff proceeding in a dilatory fashion.[4] The Scheduling Order in this matter, establishing the deadline for the deposition of Plaintiff's expert, has been in place since February of 2015. Every month since July of 2015 Defendants have sought dates to depose Dr. Blount and at each turn Defendants have been rebuffed, with Plaintiff having continually failed to produce Dr. Blount. Defendants have even attempted to single-handedly schedule the deposition, only to have Plaintiff twice call off the deposition as the date approaches. The email correspondence demonstrates Defendants' constant attempts at scheduling the deposition and Plaintiff continuing to proceed in a dilatory fashion with regard to the deposition of Dr. Blount. *See Georganne Apparel, Inc. v. Todd*, 303 S.C. 87, 92, 399 S.E.2d 16, 19 (Ct. App. 1990) ("There is a limit beyond which the court should allow a litigant to consume the time of the court and to prolong unnecessarily time, effort, and costs to defending parties."); *see also Orlando*, 320 S.C. at 511, 466 S.E.2d at 355 (recognizing that a sanction of dismissal is only too severe if there is no evidence of intentional misconduct).

While the Court recognizes that Mr. Winslow did not become attorney of record until October 2015 and did not realize that Dr. Blount had relocated to Florida, this Court finds that such failure of Plaintiff and his counsel to remain in communication with the sole named expert and the failure of Plaintiff and his counsel to exercise reasonable diligence in locating the sole

[4] At the hearing, defense counsel also advised the court that Plaintiff had not answered the Defendants' Supplemental Requests for Production (served July 13, 2015), Second Supplemental Requests for Production (served August 20, 2015), or Third Supplemental Requests for Production (served December 3, 2015).

named expert at a minimum constitutes unreasonable neglect justifying dismissal of this case for failure to prosecute. Plaintiff's counsel never informed defense counsel that he was unable to locate Dr. Blount; in fact, he led defense counsel to believe he had found a specific new address for Dr. Blount in Florida. Further Plaintiff's counsel never informed defense counsel he was trying to retain a new expert. In addition, even though Mr. Winslow only became attorney of record in October 2015, Plaintiff is nevertheless bound by the acts of his previous counsel in failing to secure the deposition of Dr. Blount. *See Griffin Grading and Clearing, Inc.*, 334 S.C. at 200, 511 S.E.2d at 719.

Furthermore, in accepting the case, Mr. Winslow was aware of the Scheduling Order's mandate that the deposition of Plaintiff's expert occur by October 23, 2015, and was timely reminded of same by defense counsel. Mr. Winslow did not thereafter attempt to secure the deposition of Dr. Blount prior to this deadline or at any time before this Court's scheduled hearing on the motion to dismiss and instead led Defendants' counsel to believe that Plaintiff might consent to the dismissal, requesting Defendants' counsel to "bring the dismissal paperwork" to the hearing. Once again, such actions exhibit a gross indifference to the rights of Defendants to mount a defense to Plaintiff's allegations.

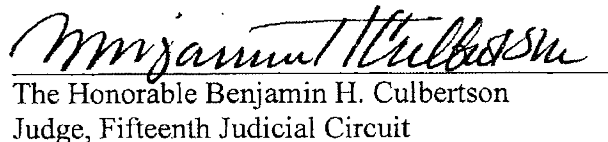
Finally, there exists no sanction less drastic than dismissal. First, Plaintiff has demonstrated a complete disregard for the Order of this Court by failing to adhere to the established Scheduling Order. Thus, Plaintiff has been willfully disobedient of this Court's Order. Even if this Court were to consider precluding Plaintiff from utilizing Dr. Blount as an expert, such action would have the same practical effect of dismissing the action since Plaintiff did not timely identify any other expert in this matter. "A plaintiff in a medical malpractice case must establish by expert testimony both the standard of care and the defendant's failure to conform to the required standard, unless the subject matter is of common knowledge or

experience so that no special learning is needed to evaluate the defendant's conduct." *Martasin v. Hilton Head Health Sy.*, 364 S.C. 430, 438, 613 S.E.2d 795, 799 (Ct. App. 2005). In this case, the Court finds that due to the nature and complexity of the issues raised, Plaintiff is required to establish the standard of care and Defendants' alleged failure to conform through expert testimony. Without such expert testimony, Plaintiff cannot maintain this action, and to preclude such expert from testifying is the equivalent of a dismissal. *See Orlando* 320 S.C. at 511, 466 S.E.2d at 355 (where the effect will be the same as granting judgment by default or dismissal, a preclusion order may be made if there is some showing of willful disobedience or gross indifference to the rights of the adverse party).

Plaintiff's conduct in this matter demonstrates a clear indifference to Defendants' rights and willful disobedience to Orders of this Court. Plaintiff has impeded Defendants' ability to take a critical deposition in this case – the deposition of an expert whose opinion will form the basis of Plaintiff's case. The Court finds that pursuant to South Carolina Rules of Civil Procedure 37(b)(2)(C) and 41(b), Plaintiff's claims against Defendants must be dismissed with prejudice.

IV. CONCLUSION

THEREFORE IT IS ORDERED that the Motion to Dismiss filed by Defendants Virginia Bell, F.N.P. and Inlet Medical Associates, P.A. be GRANTED for the reasons set forth herein and that Plaintiff's Complaint against Defendants be DISMISSED WITH PREJUDICE.



The Honorable Benjamin H. Culbertson
Judge, Fifteenth Judicial Circuit

April 25, 2016.

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SC Court of Appeals

April 25, 2016

The Honorable Melanie Huggins
Horry County Clerk of Court
P. O. Box 677
Conway, SC 29528

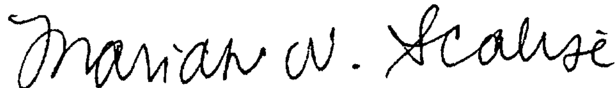
Re: Michael Moely as Special Administrator of the Estate of Donelle Bronstein a/k/a Donelle M. Ruiters a/k/a Donelle Moely Bronstein vs. Virginia Bell, F.N.P. and Inlet Medical Associates, P.A.
C/A No.: 2014-CP-26-6593
Our File No.: 5412-123

Dear Ms. Huggins:

Enclosed please find an original and one (1) copy of an Order Granting Motion to Dismiss of Virginia Bell, F.N.P. and Inlet Medical Associates, P.A. signed by Judge Culbertson in the above-captioned matter. I would appreciate your filing the original and returning a clocked-in copy to me in the enclosed, postage paid envelope.

Thank you for your assistance. With best regards, I am

Yours very truly,



Marian Williams Scalise

MWS/bh
Enclosures
cc: Thomas W. Winslow, Esquire

5.3.16