

STATE OF MICHIGAN  
IN THE MICHIGAN COURT OF APPEALS

TAMARA FILAS,

Plaintiff-Appellant,

vs.

Court of Appeals Case No. 317972  
Lower Court Case No. 13-000652-NI  
Honorable Susan D. Borman

KEVIN THOMAS CULPERT and  
EFFICIENT DESIGN, INC. a  
Michigan Corporation,

Defendants-Appellees.

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**DEFENDANT-APPELLEE EFFICIENT DESIGN, INC.'S, BRIEF  
ON APPEAL TO MICHIGAN COURT OF APPEALS**

**ORAL ARGUMENT REQUESTED**

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**STATEMENT OF JURISDICTION**

Jurisdiction is proper in this Court, pursuant to MCR 7.203(A).



## **STANDARD OF REVIEW**

A trial court's findings of fact in a discovery dispute are reviewed for clear error. *Traxler v Ford Motor Co.*, 227 Mich App 276, 282 (1998). This Court is to review a trial court's decision to assess discovery sanctions for an abuse of discretion. *Id* at 286. An abuse of discretion occurs when the decision of the trial court results in an outcome falling outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Company*, 476 Mich 372, 388 (2006).

**COUNTER-STATEMENT OF QUESTION INVOLVED**

- I. **Plaintiff-Appellant filed suit alleging she has suffered personal injury, thereby placing her physical and mental condition at issue. Defendants-Appellees sought the release of Plaintiff-Appellant’s medical and employment records to prepare a defense to the allegations. Plaintiff-Appellant repeatedly refused to obey the trial court orders to sign authorizations, claiming that she did not have to produce any records until it was proven that Defendant-Appellee was liable due to privacy concerns. Even after being ordered to sign authorizations presented by Defendant-Appellee, Plaintiff refused to sign claiming that she could create her own authorizations and limit the scope of discovery. Where Plaintiff-Appellant repeatedly refused to sign authorizations as directed by the trial court, and where she obstinately refused to sign the authorizations at a final hearing on whether her case should be dismissed based on claims that she should be entitled to limit the extent of the authorizations after the trial court rejected Plaintiff-Appellant’s objections, did the trial court properly dismiss Plaintiff-Appellant’s case for her ongoing refusal to participate in discovery?**

Defendant-Appellees answer: “Yes”

Trial court would answer: “Yes”

Plaintiff-Appellant would answer: “No”

## COUNTER-STATEMENT OF FACTS AND PROCEEDINGS

Plaintiff-Appellant's "Statement of Facts" fails to meet the requirements of MCR 7.212(C)(6), in that she does not put forth all material facts, she fails to cite specific page references to the transcript, pleadings, or other documents, and she fails to present her "facts" without bias or argument. As such, Plaintiff-Appellant's "Statement of Facts" should be stricken and the following relevant facts apply to the decision of these issues.

It is undisputed that the underlying suit is for personal injury allegedly suffered in an automobile accident that occurred on January 15, 2010. (See Complaint). It is undisputed that Plaintiff filed a prior suit, which was dismissed without prejudice. It is undisputed among the parties that the present action was filed on Plaintiff's behalf by attorney Daryle Salisbury on January 14, 2013. (See Summons). In the Complaint, Plaintiff alleged she was injured as a result of the negligence of Co-Defendant-Appellee Kevin Thomas Culpert ("Culpert"). Plaintiff alleges Culpert was in the course of scope of his employment with Efficient Design, Inc., ("Efficient") by talking on the telephone at 7:29 a.m. (See Complaint at ¶¶ 3-5, 10-13). Plaintiff put her medical condition at issue in this case when she alleged injury to "her head, neck, back and other parts and portions of her body". (See Complaint at ¶ 14.a.).

After the inception of the case, and after initial discovery requests were served upon attorney Salisbury, Plaintiff discharged her attorney and filed an appearance on March 11, 2013. (See March 11, 2013, Appearance, attached as **Exhibit 1**). Attached to her appearance, Plaintiff supplied "Exhibit A", a copy of correspondence to Daryle Salisbury discharging him from service. (Exhibit A to Plaintiff's March 11, 2013, Appearance). Relevant to the issues on appeal, Plaintiff referenced a request for the



return of “the two binders [Plaintiff provided her counsel] (MEEMIC records and medical records)”); evidencing that Plaintiff-Appellant was in possession of a significant amount of medical records. (See **Exhibit 1**). Eventually, Mr. Salisbury was dismissed via Order (consistent with the Court Rules) on May 3, 2013; at which time the discovery was stayed to allow Plaintiff to retain new counsel. (See May 3, 2013, Order of trial court). Plaintiff did not, and has not, retained new counsel and continued to represent herself in this matter.

Prior to the May 2, 2013, status conference hearing, co-counsel for Efficient filed a Motion to Compel Discovery. (See **Exhibit 2** – April 30, 2013, Motion to Compel Discovery from Plaintiff, with exhibits). Included as an exhibit to the motion was a copy of Efficient’s February 7, 2013, discovery requests. Included in the discovery was a request for Plaintiff to sign medical authorizations. (**Exhibit 2**, Interrogatory No. 49). Not knowing the entirety of Plaintiff’s complaints, the discovery sought blanket medical releases.

Plaintiff filed an Answer to Efficient’s motion on June 18, 2013. (See **Exhibit 3** – Plaintiff’s Answer to Defendant Efficient Design’s Motion to Compel Discovery from Plaintiff). In the first paragraph, Plaintiff asks that the trial court “require ... [Efficient], show cause before requesting Plaintiff to produce her medical records.” (**Exhibit 3**, p. 1). Consistently, Plaintiff argued in her Answer that “until it is established through discovery that Efficient Design is liable for harm caused by Kevin Culpert while in the course and scope of his employment, Plaintiff should not be required to release her medical information to Defendant, Efficient Design, Inc.” (**Exhibit 3**, p. 2). She continued with the argument, stating “Plaintiff does not believe it is reasonable for the Court to require her to provide medical records to Efficient Design, Inc. a party that has

not yet admitted any responsibility in the case.” (**Exhibit 3**, p. 3).

While not part of the record in this case, Plaintiff appears to have made similar arguments in her suit for no-fault benefits, as well. (Hearing transcript of June 21, 2013, at p. 6 In 20-23, p. 7 In 13-17). During oral argument on Efficient’s Motion to Compel, Plaintiff continued her argument that she was not obliged to provide medical records to Efficient unless or until Efficient Design admitted liability in this matter. (Hearing transcript of June 21, 2013, at pp. 6-7 In 24-3, p. 7 In 6-17, In 22-23). During the June 21, 2013, motion hearing, the trial court ordered Plaintiff-Appellant to sign Efficient’s medical authorizations. (Hearing transcript of June 21, 2013, at p. 14). Prior to the motion hearing, Plaintiff-Appellant provided some discovery responses, in which she identified approximately 27 treatment facilities. (Hearing transcript of June 21, 2013, at p. 6, In 12-19). At the hearing, counsel for Efficient requested that the trial court direct Plaintiff to provide authorizations for all of the medical providers identified in her discovery response. (Id).

Plaintiff represents in her Brief on Appeal that she “was denied due process when Judge Borman granted [Efficient’s] Motion to Dismiss on June 24, 2013 at a “special conference” without notification to Plaintiff-Appellant the “Special Conference” was being held on June 24, 2013”. (Plaintiff-Appellant’s Brief on Appeal at p. 5). This representation is not accurate. During the June 21, 2013, the trial court stated “I will adjourn this until Monday.” (Hearing transcript of June 21, 2013, at p. 8 In 12-13). The trial court reiterated: “[i]f he does not get those authorizations by Monday or you can come back Monday at 2 o’clock, and you can come back with the authorizations. No game playing, Ms. Filas.” (Id at In 15-18). After further discussion, the trial court again stated, “... I’ll see you Monday.” (Hearing transcript of June 21, 2013, at p. 12, In 6).



Relevant to Efficient Design's position, counsel for Efficient requested that the court order that "there can be no amendments to the authorizations". (Hearing transcript of June 21, 2013, at p. 14, In 5-6). The trial court granted the request and explained to the parties, "I said to Ms. Filas no game playing, no alterations, okay." (Id at In 11-12). In a related motion, heard the same day, Plaintiff agreed to accept return of prior discovery from a prior lawsuit via e-mail. (Hearing transcript of June 21, 2013, at p. 16, In 16-21). It is undisputed that counsel for Efficient would be e-mailing the requested authorizations to Plaintiff-Appellant.

Plaintiff did not appear for the June 24, 2013, hearing. Despite Plaintiff submitting some authorizations, it is undisputed that Plaintiff did not provide all authorizations that had been requested. (Hearing transcript of June 24, 2013, at p. 3, In 16-24). The trial court then dismissed Plaintiff's case, but directed that the order be submitted electronically and that it shall not be effective until July 1, 2013, to allow Plaintiff time to file objections. (Hearing transcript of June 24, 2013, at p. 6, In 1-6; see also Order of Dismissal).

Plaintiff filed objections on July 2, 2013. Relevant to the issues in this appeal, Plaintiff argued that she "provided her e-mail address to Mr. Wright, attorney for Defendant Efficient Design, so he could e-mail the authorization forms to her later that day." (Plaintiff's Objection to Defendant Efficient Design Inc.'s Proposed Order of Dismissal Without Prejudice, dated July 2, 2013, at p. 3, ¶ 8). It is indisputable that no specific time was directed by the Court or discussed on the record. Plaintiff argued that she did not have to sign the authorizations provided by counsel because she had not received them in her e-mail inbox by 5:00 pm on June 21, 2013. (Id at p. 4, ¶ 10). At that time, Plaintiff "decided it would be foolish to count on [counsel] to provide the



forms necessary” and decided to obtain and prepare her own authorizations. (Id at ¶¶ 11, 12). Throughout her Objection filing, Plaintiff conceded knowledge of the 2:00 pm, June 24, deadline. (Id., *passim*). Plaintiff does not dispute that she did not check her e-mail, again, throughout the weekend of June 22-23, 2013 for the required authorizations. Plaintiff argued that she did not need to sign the authorizations provided by counsel because of an alleged failure to “meet [the] obligations of getting the e-mailed forms to her before the close of the business day on Friday, June 21, 2013, as promised.” (Id at p. 7, ¶20).

In the Objection and the subsequently filed Reply to Plaintiff’s Objection (filed on August 7, 2013), Plaintiff admitted to having received the authorizations; but not having checked her e-mail after 5:00 pm on June 21, 2013. In her Reply, Plaintiff admitted that she used her own authorizations and “tried to include every record that the Defendant was entitled to under the no-fault law.” (August 7, 2013, Reply to Plaintiff’s Objections, at p. 8, ¶17). Implicit in the statements made by Plaintiff-Appellant is the continuation of her prior arguments that Efficient is not entitled to every record requested due to a failure to establish liability. Counsel for Efficient explained during the June 21 hearing that authorizations were not available for all providers because Plaintiff had only identified her, approximately 27, providers earlier in the morning on June 21. (Hearing transcript of June 21, 2013, at p. 6, ln 12-19). Plaintiff added objections to the production of “new” medical providers because they had not been specifically requested in the original discovery requests; although they were identified in Plaintiff’s discovery responses from June 21, 2013. (Plaintiff’s Reply to Objection, at pp. 9-11, ¶¶ 20-25). Despite the trial court’s directive to the contrary, Plaintiff, again, objected that she “contends she should not have to provide records beyond the

medical records ordered to be provided at the 6-21-13 hearing, until it has been determined whether or not Kevin Culpert was in the scope of his employment, and that Efficient Design would therefore be liable for damages to the Plaintiff.” (Id. at p. 10, ¶ 23).

Counsel for Efficient filed a Response to Plaintiff’s Objection on July 16, 2013. Attached to the Response, as Exhibit B, was a copy of an e-mail from June 21, 2013, showing that the authorizations had been sent by 5:06 pm and that the authorizations had been received by 5:25 pm (although the receipt notification had not been sent). (See Exhibit B to Efficient Design’s Response to Plaintiff’s Objection, dated July 16, 2013, attached as **Exhibit 4**). Plaintiff does not deny that the requested authorizations were sent; only that she did not check her e-mail after 5:00 pm on June 21, 2013.

It is undisputed, and not mentioned by Plaintiff, that she had more opportunities to provide the requested authorizations. Plaintiff admits she was in possession of the requested authorizations by June 24, 2013. Plaintiff appeared for the hearing on her Objections on August 9, 2013, where the trial court gave Plaintiff another opportunity to comply with her directive on discovery. The trial court was very specific during the hearing, giving Plaintiff every opportunity to sign the authorizations and have her case reinstated. Despite multiple opportunities to comply with the trial court, Plaintiff refused to sign the authorizations and her case was dismissed. The exchange went as follows:

THE COURT:           Okay, Ms. Filas, if you want to proceed with your case, you’ll have to sign these authorizations. They have them with them today. If you want to proceed and you want the Court to reinstate the case, sit down and sign the authorizations. I’m going to give you one last chance.

MS. FILAS:           I have a problem with some of the clauses.

THE COURT:           All right, I’ve already ruled on that. I’m not going to go back to that. You’ve changed them. You got it changed to different forms. They’ve got the

authorizations today. Last chance. Sit down and sign the authorizations. I'll reinstate your case, otherwise I'm dismissing this case.

MS. FILAS: I have some problems with some of the clauses they're asking for in the forms.

THE COURT: I'm sorry. We've already done this. I'm not reconsidering it, so sit down today and sign the authorizations.

MS. FILAS: Not for some of the things that they're asking.

THE COURT: The dismissal stands. Call the next case.

(Hearing transcript of August 9, 2013, at pp. 3-4).

Based upon Plaintiff's refusal to comply with the trial court's orders, the court refused to rescind the dismissal and this appeal followed.



## LAW AND ARGUMENT

Plaintiff attempts to make this an issue of form over substance. In her Brief on Appeal, the argument is that this is a “battle of the forms” (whereas she chose a SCAO form over signing authorizations provided by counsel for the Defendant-Appellee), attempting to misdirect this Court from looking at the substance of her discovery abuses. This is, instead, a case of Plaintiff blatantly disregarding the authority of the trial court regarding its decisions on discovery issues. Plaintiff has continually attempted to obstruct the discovery process, throughout the case. From the outset, Plaintiff has refused to provide open access to her medical, employment, and insurance records based upon her perception that she is entitled to “privacy”. As the record reveals, Plaintiff has continually disregarded the trial court’s directive based upon her misguided attempts to control the course of discovery. To the last, Plaintiff refused the trial court’s offer to reinstate her case if she were to simply sign the provided releases. Instead, Plaintiff, for the final time refused to sign the proffered medical authorizations due to complaints about the clauses in the release. Plaintiff’s case was not dismissed due to the choice of forms. Her Complaint was dismissed for her willful refusal to follow the orders of the trial court and engage in the discovery process. This Court should uphold the decision.

- I. Plaintiff-Appellant has failed to provide any citation to the record or applicable law in support of her Appeal. This Court should affirm the dismissal due to Plaintiff’s failure to perfect her appeal.**

Part of the reason Plaintiff-Appellant’s case was dismissed by the trial court is her refusal to follow the Court Rules; a pattern she continues in her appellate filings. Plaintiff-Appellant’s “Statement of Facts” is wanting for reference or citation to the

record, as required by MCR 7.212(C)(6). [“A statement of facts ... must contain, with specific page references to the transcript, the pleadings, or other document or paper filed with the trial court”.] Her “facts” are nothing more than her recollection and perception of events. Many of her alleged “facts” are patently false or misleading. Similarly, Plaintiff’s Brief is devoid of cogent analysis, almost no citation to supporting authority, and no applicable standard of review. An issue is abandoned where plaintiff fails to properly argue the merits of the issues. See generally *Yee v Shiawassee Co Bd of Comm’rs*, 251 Mich App 379, 406 (2002). An appellant may not merely assert an error and leave it to the appellate court to search for authority to sustain or reject this position. *Wilson v Taylor*, 457 Mich 232, 243 (1998). Similarly, a party may not give issues cursory treatment with little or no citation to supporting authority. *Silver Creek Twp v Corso*, 246 Mich App 94, 99 (2001).

In the present matter, Plaintiff makes bold allegations that the trial court erred by requiring her “to provide her medical records to Efficient Design without establishing that they were a liable party to the case.” (Plaintiff’s Brief at p. 19) [underscore in original]. Plaintiff cites no court rule, statute or case law supporting this proposition.<sup>1</sup> Instead, she relies exclusively on rhetoric. Plaintiff-Appellant’s argument continues that she is not required to provide discovery until she receives her own discovery responses and is satisfied that she has a valid claim against Efficient. (Plaintiff’s Brief, *passim*). Meanwhile, the Court Rules provide that Efficient is fully within its rights to seek Plaintiff’s medical records (MCR 2.314(A)(1)). Moreover, Plaintiff cannot stall

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<sup>1</sup> Unfortunately, Defendant-Appellee is unable to provide citations beyond the Court Rules; mostly because Plaintiff’s position is, simply, unsupported by law. It is nearly impossible to find case law on baseless positions. Liability is one issue that is addressed during discovery, along with issues of damages.

Defendants' discovery while she attempts to engage in her own. MCR 2.302(D). [The fact a party is conducting discovery does not operate to delay another party's discovery].

While Plaintiff does, in fact, cite a Court Rule relating to the use of SCAO forms for the release of medical information; she provides no authority to allow her to refuse to sign authorizations or limit the information sought. (See Plaintiff's Brief, *passim*). The crux of Plaintiff's argument is that she supplied authorizations and, therefore, her case cannot be dismissed. What Plaintiff does not address, however, is the fact that she did not provide all of the authorizations requested, she served the authorizations upon her medical providers directly, and she limited the information to that which she deemed to be relevant. (**Exhibit 4**, attachment B showing Plaintiff-Appellant's "releases" with specified dates of service identified).

Even on appeal, Plaintiff-Appellant maintains her argument, without citation or support, that a party "is justified in refusing to agree to additional language and/or missing information on a medical or employment authorization form ... (i.e. allowance of photocopies, use of an expiration event instead of a date, allowance of records to be released "for copying purposes")." (Plaintiff's Brief at p. 32, Heading 6). Plaintiff-Appellant's position is clear from the filings in this Court and in the trial court: she had no intention of allowing a full and complete release of her records for purposes of discovery. Plaintiff has failed to cite any statute or other authority for her position.

Based upon the failure to cite applicable authority, the dismissal should be affirmed.



**II. The trial court properly dismissed Plaintiff-Appellant's Complaint for her willful refusal to comply with discovery and the orders of the court.**

Plaintiff filed this auto negligence suit claiming that she has suffered personal injury out of the alleged negligence of Co-Defendant-Appellee, Kevin Culpert ("Culpert"). In her Complaint, Plaintiff alleged that this Defendant, Efficient Design, Inc. ("Efficient") was his employer. Plaintiff alleged that Culpert was on a work related call at the time of the rear-end collision. As a result, Plaintiff allegedly suffered "injuries to her head, neck, back and other parts and portions of her body", resulting in pain, suffering, work loss, and loss of earning capacity; some of which is permanent in nature. (See Complaint at Para. 14). As such, Plaintiff has put her physical and mental condition at issue.

The applicable law is simple: Michigan has "an open, broad discovery policy that permits liberal discovery of any matter, not privileged, that is relevant to the subject matter involved in the pending case." *Reed Dairy Farm v Consumers Power Co*, 227 Mich App 614, 616 (1998). The "discovery rules are to be construed ... to further the ends of justice." *Domako v Rowe*, 438 Mich 347, 359 (1990), citing *Prentis v Yale Mfg Co*, 421 Mich 670 (1984). The adoption of the Michigan Court Rules in 1985 eliminated any "good cause" requirement for the production of documents. *Domako* at 360, n10. Contrary to Plaintiff's hyper-technical argument on appeal that she is not obliged to sign additional authorizations because Efficient originally asked for fewer providers, the Supreme Court has stated:

Restricting parties to formal methods of discovery would not aid in the search for truth, and it would only serve to complicate trial preparation. MCR 1.105 expressly states that the court rules are "to be construed to secure the just, speedy, and economical determination of every action ... . *Domako* at 360.

It became clear as the case progressed, evidenced by Plaintiff-Appellant's filings and statements during oral arguments, that Plaintiff intended to take every effort to preclude discovery of medical and employment information. At the outset of the case, counsel for both defendants served various discovery requests. Shortly thereafter, Plaintiff discharged her attorney and Plaintiff undertook the prosecution of her own case. At that time, Plaintiff-Appellant began to assert her continuing objections to the production of medical records. Again, the issue in this case is not the format of the medical authorizations, but the fact that Plaintiff continually refused to produce open access to her medical records; as required by the Court Rules.

A review of the hearing transcripts shows that Plaintiff never objected to the form of the releases produced by Efficient's attorneys (at least not until her case had been dismissed). Her objections were that she was not required to produce her medical records to a defendant where "they haven't admitted any liability." (Hearing transcript of June 21, 2013, at p. 7, ln 11-12). Plaintiff-Appellant's protestations are indicative of her efforts to subvert the discovery process. A reading of the record shows Plaintiff continually objects to the production of *any* records to Efficient. It became clear to all involved that Plaintiff-Appellant's motivation was to manipulate the process; and to potentially "cherry-pick" the records. The clear attempts by Plaintiff to avoid the production of records is why Efficient's attorneys asked that the trial court order her to sign *their* authorizations with "no amendments". (Hearing transcript of June 21, 2013, at p. 14, ln 4-6).

Plaintiff-Appellant does not address the fact that she was ordered to sign all of the authorizations presented to her. The trial court was very clear in the process:

THE COURT: We're going to give her the authorizations. She's going to sign them. Either she signs them or she



doesn't sign them. I said to Ms. Filas no game playing, no alterations, okay.

(Hearing transcript of June 21, 2013, at p. 14, ln 9-12).

Despite the trial court's clear directive, Plaintiff refused to sign the authorizations and, instead, provided her own and sent directly to her healthcare providers. (**Exhibit 4**, attachment B showing Plaintiff-Appellant's "releases" with specified dates of service identified). The content of Plaintiff's amended (and incomplete) authorizations indicates that she clearly intended to 1) hide certain records as she did not request authorizations for all treatment providers, and 2) the authorizations imply that providers should include only certain dates of treatment and could mislead providers into producing the records to Plaintiff and not Defendants-Appellees. The trial court understood what Plaintiff was doing and reacted accordingly.

In response to the dismissal, and continuing on appeal, Plaintiff-Appellant argues that she did not receive the authorizations from Efficient's attorneys and was 'forced' to handle things on her own. This argument is simply not true. In fact, Plaintiff admits that she received the authorizations; only after the June 24 hearing. Moreover, Plaintiff overlooks the fact that Efficient's attorney did, in fact, e-mail all of the requested authorizations to Plaintiff on June 21. She cites no rule that she is not obliged to check her e-mail beyond 5:00 pm. She cites no valid reason why she could not check her e-mail over the weekend or even on Monday, June 24, after the start of business hours. She provides no excuse as to why she could not have called counsel later in the afternoon to check on the status of the releases; if she truly was worried about complying with the trial court. Similarly, Plaintiff gives no valid reason why she did not sign the proffered authorizations between the receipt on June 24, 2013, and the hearing on her motion to reinstate the case on August 9, 2013.

At its core, Plaintiff's argument is, 'I provided discovery in the manner that I decided I want and you cannot throw my case out'. However, from the inception, Plaintiff has refused to allow open discovery and, instead, attempts to manipulate the process. Plaintiff-Appellant's filings and her actions show that she has intended to avoid producing medical records until she was satisfied that they were relevant. There is no basis in the law for this position. The trial court was aware of this and, after giving the Plaintiff-Appellant multiple opportunities to comply with her directives, eventually dismissed her case.

The imposition of discovery sanctions is reviewed for an abuse of discretion. *Bass v Combs*, 238 Mich App 16, 26 (1999), *overruled on other grounds Dimmitt & Owens Fin, Inc v Deloitte & Touche, LLC*, 481 Mich 618 (2008). A trial court may impose the sanction of dismissal for discovery abuse. *Id.* The trial court is to be given regard for the special opportunity it has to judge the credibility of witnesses who appear before it. MCR 2.613(C). An abuse of discretion occurs when the decision of the trial court results in an outcome falling outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Company*, 476 Mich 372, 388 (2006). Further, the trial court has inherent authority to dismiss a lawsuit as a sanction for litigant misconduct. *Bloemendaal v Town & Country Spts Ctr, Inc.*, 255 Mich App 207, 211 (2003).

MCR 2.313(B)(2)(c) allows trial courts to enter "an order ... dismissing the action or proceeding ... ." A panel of this Court has noted that dismissal is the harshest sanction available. *Schell v Baker Furniture Co*, 232 Mich App 470, 475 (1998). However, the imposition of the sanction is warranted where "there has been a flagrant and wanton refusal to facilitate discovery, and where the failure has been conscious or



intentional, rather than accidental or involuntary.” *Frankenmuth Mut Ins Co v ACO, Inc.*, 193 Mich App 389, 396-397 (1992). Included in the factors that apply to dismissal are: 1) whether the violation was willful or accidental; 2) whether there exists a history of engaging in deliberate delay; 3) the degree of compliance by the party with other provisions of the court’s order; 4) an attempt to timely cure the defect; and 5) whether a lesser sanction would better serve the interests of justice. *Bass* at 26-27.

In the instant case, the record is clear that Plaintiff refused to obey the orders of the trial court. At every turn, the trial court gave the Plaintiff-Appellant the opportunity to sign the authorizations. To the last, Plaintiff argued that she did not have to sign the authorizations provided by Efficient’s attorneys, despite the fact that her related PIP action was already dismissed for the same failure. There can be no question that Plaintiff’s abject refusal to sign the required authorizations was deliberate. The record is clear that Plaintiff had been deliberately delaying discovery from the outset. At each occasion, Plaintiff objected to producing *any* documents until Efficient admitted liability.

The trial court required Plaintiff to sign the authorizations provided by Efficient on June 21, 2013. The trial court specifically said, “no games”. Almost immediately, Plaintiff began ‘playing games’ with “I didn’t check my e-mail” or “I don’t have to sign those releases, I’ll sign my own”. The releases were provided. Despite the trial court’s direction, Plaintiff voluntarily chose not to appear on Monday, June 24<sup>th</sup>. Contrary to her arguments that she provided releases, Plaintiff did not provide all of the requested releases. In fact, she, again, attempted to change the release language to meet her own agenda and limit the scope of discovery. The trial court was very explicit: “We will provide releases ... she will sign them ...”. She did not sign them (and now hides behind a façade that she was unable to check her e-mail).

Even after the dismissal, Plaintiff-Appellant had over 4 weeks to sign the provided authorizations and have her case reinstated. With ample time, Plaintiff-Appellant still refused any attempt to cure the defect. At the Eleventh Hour, after the dismissal, Plaintiff defiantly rejected the trial court's one last opportunity

THE COURT: ... sit down today and sign the authorizations.  
MS. FILAS: Not for some of the things that they're asking.  
THE COURT: The dismissal stands. Call the next case.

(Hearing transcript of August 9, 2013, at p. 3, ln 2-7).

The record is clear: Plaintiff has flagrantly and defiantly ignored the directive of the trial court to provide medical authorizations. Discovery is open. Plaintiff-Appellant has refused to provide discovery; instead, demanding that she get her discovery on liability before she disclosed her records. Plaintiff-Appellant made every effort to forestall discovery. She invented excuses and reasons why she should not have to comply with the rules. She ignored the directives of the trial court, which gave her ample opportunity to conform to the Court Rules and put her case back on track. Despite every effort of the trial court in this case, and in her PIP case, Plaintiff willfully ignored the directives of the court, she made no effort to cure the defects, and she defiantly refused to provide the discovery. No lesser sanction would be sufficient in this case. The dismissal was appropriate and this Court should affirm the dismissal.

### **CONCLUSION AND RELIEF REQUESTED**

It is clear from her obstreperous behavior throughout the proceedings that Plaintiff had no intention of participating in the judicial process; at least not according to the rules. Plaintiff put her medical condition at issue in this matter. Despite the clear edict of the trial court that the Defendants were to have free access to her medical records, Plaintiff insisted that she must be in control and that she would be the ultimate



arbiter of what would be divulged and when. While she would attempt to divert the Court's attention to the "form" of the releases provided, the "substance" of this dispute (which was well known to the trial court) was that the Plaintiff would not divulge the discoverable information freely. She took every opportunity to obstruct the process. Eventually, the trial court gave her a last chance: sign the releases that are presented to you or I dismiss your case. Despite the ultimatum, Plaintiff took one last stab at maintaining control, herself. She has now paid the price for her willful violation of the discovery rules and the orders of the trial court. This Honorable Court should certainly not reinstate the case, as it is clear that the pattern will continue.

For the foregoing reasons, Defendant-Appellee, Efficient Designs, Inc., requests that this Honorable Court affirm the decision of the trial court.

VANDEVEER GARZIA, P.C.

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STATE OF MICHIGAN  
IN THE MICHIGAN COURT OF APPEALS

TAMARA FILAS,

Plaintiff-Appellant,

vs.

Court of Appeals Case No. 317972  
Lower Court Case No. 13-000652-NI  
Honorable Susan D. Borman

KEVIN THOMAS CULPERT and  
EFFICIENT DESIGN, INC. a  
Michigan Corporation,

Defendants-Appellees.

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**PROOF OF SERVICE**

The undersigned certifies that the foregoing was served on Clerk of the Court of Appeals, attorney James C. Wright and attorney Drew Broaddus via the court's efilings system on January 20, 2014 and on Plaintiff Tamara Filas at the address listed above with postage paid via the USPS on January 20, 2014.

I declare that the statement above is true to the best of my information,

knowledge and belief.

VANDEVEER GARZIA, P.C.

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