2013 IL App (1st) 120113-U

No. 1-12-0113

FIFTH DIVISION
August 30, 2013

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ENAS SALEH IBRAHIM and ABDULLAH ABDULMOHSEN,	)	Appeal from the Circuit Court of Cook County.
Plaintiffs-Appellants,	)	
v.	)	No. 09 L 012831
REPRODUCTIVE GENETIC INSTITUTE (RGI) a.k.a. INSTITUTE FOR HUMAN REPRODUCTION (IHR), and ILAN TUR-KASPA, M.D.,	)	Honorable Eileen Brewer,
Defendants-Appellees.	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Justices Palmer and Taylor concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court abused its discretion in sanctioning plaintiffs with dismissal of their case for a discovery violation where plaintiffs' counsel's claim that plaintiff was unable to comply due to circumstances beyond her control was facially credible but counsel failed to provide sufficient evidence in support of her reason for non-compliance. The cause is remanded to permit evidence on whether

plaintiff's failure to comply was deliberate and contumacious under the circumstances and a new determination on sanctions.

¶ 2 The circuit court of Cook County entered an order dismissing plaintiffs' complaint with prejudice as a sanction under Supreme Court Rule 219 (Ill. S. Ct. R. 219 (eff. Jan. 1, 1967)) for plaintiffs' failure to appear for discovery depositions as ordered by the court. Subsequently, the court denied plaintiffs' motion to vacate the dismissal and motion to allow depositions by telephone or videoconferencing. For the reasons that follow, we reverse the court's orders.

¶ 3 BACKGROUND

¶ 4 1. Plaintiffs' Claim

¶ 5 Because the trial court dismissed plaintiffs' complaint at the pleading stage, the factual allegations underlying plaintiffs' cause of action are derived from plaintiffs' complaint and are taken as true. See *Mandelke v. International House of Pancakes, Inc.*, 131 Ill. App. 3d 1076, 1079 (1985). The complaint alleges that defendant Reproductive Genetic Institute (RGI), a.k.a. Institute for Human Reproduction (IHR) (hereinafter RGI), is a professional organization engaged in preimplantation genetic diagnosis (PGD) and in vitro fertilization (IVF) to assist couples who are carriers of inherited genetic disorders in delivering healthy babies free of the inheritable disorder. The process involves testing embryos created by IVF for a genetic disorder prior to implantation in the womb. Defendant Ilan Tur-Kaspa, M.D. is RGI's employee. Plaintiff Enas Saleh Ibrahim is the wife of plaintiff Adbullah Abdulmohsen, and they are residents of Riyadh, Saudi Arabia. Ms. Ibrahim carries Fragile-X syndrome, a genetic trait she inherited from her parents.

¶ 6 On November 19, 2007, defendants informed plaintiffs that the DNA of embryos that resulted from the fertilization of Ms. Ibrahim's oocyte (egg) did not match Mr. Abdulmohsen's DNA. Plaintiffs had traveled to Chicago from Saudi Arabia to have an embryo implanted but, based on the information RGI provided, the implantation did not occur. On November 19, 2007, defendants denied making a mistake. Plaintiffs' complaint alleges that defendants cryopreserved embryos from a IVF-PGD process that occurred prior to the process at issue in the complaint. Plaintiffs claim their confidence in defendants' IVF-PGD process and candor was shaken as a result of defendants' conduct. Plaintiffs allege that as a result of defendants' negligent acts or omissions, plaintiffs suffered injures and damages including but not limited to emotional distress, pain and mental anguish, expenses, travel, and the couple's shattered dream of having a healthy child together.

¶ 7 2. History of the Litigation

¶ 8 The trial court expressed understandable concern with the pace of litigation in this matter. A somewhat detailed recitation of the history of this case is warranted to demonstrate the source of those delays and, more importantly, that the delay in this case was not primarily the result of plaintiffs' failure to abide by the rules of discovery or the court's discovery orders, which was the basis for sanctioning plaintiffs.

¶ 9 Plaintiffs filed their original complaint on October 28, 2009. Attorney 'Lanre O. Amu represented plaintiffs. On November 30, 2009, the trial court granted plaintiffs' emergency motion to file a first amended complaint *instanter*. On December 9, 2009, defendant Ilan Tur-Kaspa, M.D. filed a motion to dismiss plaintiffs' complaint pursuant to section 2-619 and 2-

622(a) of the Code of Civil Procedure (Code). On December 22, 2009, the court granted RGI's motion to join the motion to dismiss and ordered a briefing schedule. On January 15, 2010, the court granted plaintiffs' emergency motion for leave to file a report of healthcare professional instanter, struck the existing status date, and continued the matter granting defendants leave to file any new motions by February 11, 2010. On February 2, 2010, Dr. Tur-Kaspa filed a second motion to dismiss plaintiffs' complaint pursuant to sections 2-619 and 2-622(a).

¶ 10 On February 4, 2010, plaintiffs' counsel filed a notice of deposition of defendants' "agent or entity most knowledgeable about the treatment alleged in the complaint." On February 9, 2010 the trial court denied the motion to dismiss without prejudice. On February 23, 2010, Dr. Tur-Kaspa filed another motion to dismiss plaintiffs' complaint and the trial court entered a briefing schedule on the motion the same day. On March 23, 2010 plaintiffs filed a response to the motion to dismiss and on April 7, 2010, Dr. Tur-Kaspa replied.

¶ 11 On April 7, 2010, defendant RGI filed and served plaintiffs with a request for production of documents pursuant to Illinois Supreme Court Rule 214 (Ill. S. Ct. R. 214 (eff. Jan. 1, 1967)), interrogatories to plaintiffs, and interrogatories pursuant to Rule 213(f) (Ill. S. Ct. R. 213(f) (eff. eff. Jan. 1, 1967). On April 12, 2010, certain non-physician employees of RGI, who plaintiffs named in their complaint, filed a motion to dismiss the claims against them pursuant to sections 2-619 and 2-1010 of the Code. On May 11, 2010, plaintiffs filed a motion to voluntarily dismiss those defendants. The court continued the motions to June 14, 2010.

¶ 12 On June 14, 2010, defendant RGI filed an answer. On the same day, the trial court granted the non-physician employees' motion to dismiss. On June 25, 2010, having taken the

matter under advisement, the court denied Dr. Tur-Kaspa's motion to dismiss and ordered him to file an answer to the amended complaint by July 23, 2010. On July 19, 2010, another member of the RGI staff filed a motion for summary judgment on the grounds he was not involved with plaintiffs' procedure.[1] On August 3, 2010, the court continued the motion for summary judgment. On September 16, 2010, the court again continued the motion for summary judgment to October 13, 2010. On August 13, 2010, defendant Tur-Kaspa filed a motion to dismiss certain counts (II, III, and IV). On September 21, 2010, plaintiffs filed a response to Dr. Tur-Kaspa's second motion to dismiss. Tur-Kaspa relied on October 4, 2010, and on October 13, 2010, the court granted Tur-Kaspa's motion to dismiss counts II, III and IV without prejudice. The court also granted the motion for summary judgment in favor of the deceased RGI employee.

¶ 13 In its October 13, 2010 order, the court granted plaintiffs 21 days to answer discovery and 14 days to propound discovery. The court continued the matter to November 16, 2010 "at which time a schedule for party depositions should be presented to the court."

¶ 14 On November 16, 2010, plaintiffs filed answers to RGI's interrogatories and Rule 214 request for production. The trial court scheduled a case management conference for January 25, 2011. The order states the matter was continued for status on discovery. On December 2, 2010, plaintiffs filed a motion to leave to have defendants transcribe six pages of their progress notes. The court granted the motion on December 15, 2010. Also on December 2, 2010, plaintiffs filed their second amended complaint. On December 23, 2010, defendant Tur-Kaspa filed a motion to

[1] The employee was a Ph.D. and had recently died, therefore the action had been filed against his estate.

dismiss count II of plaintiffs' second amended complaint, and on December 28, 2010 defendant RGI filed a motion to dismiss counts II, III and IV of plaintiffs' second amended complaint.

¶ 15 On January 5, 2011 the trial court entered a case management order continuing the matter for a case management conference for discovery status on January 25, 2011. The court's order stated that counts II, III, and IV against RGI and count II against Dr. Tur-Kaspa are voluntarily dismissed without prejudice. The order stated plaintiffs are to issue subpoenas for defendant depositions and plaintiffs are to provide dates for plaintiffs' depositions. The order specifically continued the matter for "status on party depositions."

¶ 16 On January 6, 2011 defendant RGI filed its response to plaintiffs' request for production and answers to plaintiffs' interrogatories. On January 10, 2011, defendant Tur-Kaspa filed his answer to plaintiffs' second amended complaint. On January 25, 2011, plaintiffs filed their answers to defendant Tur-Kaspa's interrogatories. Also on January 25, 2011, plaintiffs filed a motion for binding mediation or arbitration of this dispute. Plaintiffs' motion for mediation states, in part, as follows:

> "Given the fact that the parties are at different parts of the world, plaintiffs in Riyadh Saudi Arabia and the defendants in Chicago, Illinois, and the time zone is 9 hours between the two locations. It is desirable for the plaintiffs to resolve this matter by binding arbitration or mediation. The record speaks for itself concerning what happened. Plaintiffs really have nothing to add concerning the liability aspect of this case."

¶ 17 On January 24, 2011, plaintiffs served defendants with a motion for summary judgment on liability. On January 25, 2011, the trial court entered an order continuing the matter for case

management until March 14, 2011. The order stated that the parties are to find a mediator and that plaintiffs' motion for summary judgment is continued to the next case management conference "and status on plaintiffs' depositions."

¶ 18 On February 8, 2011 defendant RGI filed a motion to strike allegations of emotional distress from plaintiffs' second amended complaint and on February 16, 2011, defendant Tur-Kaspa filed his motion to strike emotional distress allegations in plaintiffs' second amended complaint. On February 16, 2011, the trial court set a briefing schedule on those motions and on March 2, 2011, plaintiffs filed their responses. On March 14, 2011 the court entered a case management order continuing the case to April 22, 2011 for status on mediation. On March 18, 2011 the court scheduled the case for hearing on the motions to strike and case management on March 29, 2011.

¶ 19 On March 29, 2011, the trial court entered an order granting defendants' motions to strike and granting plaintiffs leave to replead. The order states that defendants have until April 19 to file motions seeking plaintiffs' depositions and plaintiffs have until May 10, 2011 to respond, after which defendants have until May 24, 2011 to reply. The court scheduled the matter for status on May 26, 2011. The order states that status on mediation is continued to the next hearing date. The following pertinent exchange occurred at the hearing on March 29, 2011:

> "THE COURT: The record shall reflect that during a discussion with the attorneys in this case I said that depositions should be taken in this case.
>
> I looked at the rules for the taking of depositions, the Illinois Supreme Court Rules, and I asked the

> lawyers to review these rules and to come into court with some kind of motion in regard to taking the depositions in order to move a 2009 case, and the excuse has been from the plaintiff that the plaintiffs live in Saudi Arabia and a deposition cannot be taken.
>
> Apparently the defense attorneys have proposed to take videoconference depositions or other depositions, but the plaintiffs' attorney refused to do so, and now the plaintiffs' attorney is complaining that I am backpedaling from another–another court hearing in which I said mediation would be a good way to go."

¶ 20 Defense counsel for defendant RGI informed the court the parties agreed to May 25, 2011 for mediation, but inquired as to whether mediation should proceed before plaintiffs' depositions. The trial court responded: "I think at this point you deserve a deposition of the plaintiffs." Later in the exchange, plaintiffs' counsel asked "Why do they have to come all the way from Saudi Arabia if mediation can resolve this case?" The court responded:

> "THE COURT: The defense is entitled –the defense is entitled to have sworn testimony from the parties.
>
> It's not fair to the defense to tie the defenses' hands behind their back at this point."

¶ 21 Plaintiffs' counsel continued to argue the point, stating as follows:

> "MR. AMU [Plaintiffs' counsel]: The mediation is at RGI's lawyers' office. We have set a date, a time, a

room, and Judge, the facts of the record, the records speaks for itself, and that's what we mediate."

***

The records are what the case is all about. There is nothing they're going to say in this case that's absent to what's in the record.

***

The medical records of RGI are sufficient to mediate this case because we they're not contradicting anything there."

¶ 22 The trial judge stated that she needed to review the issue to determine if mediation was warranted "but I think at this point after today I see that a deposition really has to be taken." The court continued:

"THE COURT: Now, maybe you can take a videoconference deposition.

MR. AMU: No, Judge

***

THE COURT: A videoconference, I can't see what the problem would be with a videoconference.

MR AMU: Judge, I am familiar with the facts of this case. There is nothing in the plaintiffs'

> testimony. *** They have nothing else to say other than what's in the record. The record and the only witness they will call is the relative that's here that was a part of it."

¶ 23 The court made rulings on the record granting defendants' motions to strike and setting schedules for discovery motions and allowing plaintiffs to replead. The court concluded the hearing as follows:

> "THE COURT: I would like this discovery, this discovery intervention to be going on while the mediation is because it's an Illinois case and apparently it's not going to go anywhere."

¶ 24 The same day, March 29, 2011, plaintiffs filed a motion to reconsider the court's order of that date. The motion alleged that before granting defendants' motions to strike emotional distress allegations, "the court on its own volition interjected the issue of depositions of the plaintiffs." The motion to reconsider argues in part as follows:

> "[T]he records of this case and the evidence of what happened is all there is to depict the injury in this case. Plaintiffs do not have to testify. *** Moreover, none of this is at issue once the party [sic] went the mediation route."

The motion requests the court "affirm its prior decision that the parties try this mediation prior to deposition and further pleading or litigation. If mediation does not resolve the matter, then, further pleading would be appropriate at that point."

¶ 25 Plaintiffs' counsel attached his own affidavit in which he averred in part as follows:

> "[P]laintiffs through their lawyer had previously presented a motion that this matter be mediated in light of their situation, circumstance and

> geographical locations. We had stated that the issue in this case is contained within the medical records themselves. Plaintiffs themselves had nothing new to add. Judge Brewer had been gracious and fair enough to agree that the parties should attempt to resolve the matter by mediation."

¶ 26 On April 4, 2011 plaintiffs filed their third amended complaint. On April 7, 2011, the trial court entered an order denying plaintiffs' motion to reconsider the court's March 29, 2011 order, and entered a briefing schedule on motions to dismiss plaintiffs' third amended complaint.

¶ 27 On April 7, 2011, following a hearing on plaintiffs' motion to reconsider, the court denied the motion. In further colloquy, the following exchange occurred:

> "THE COURT: The defendants need the deposition of your clients in order to ascertain whether there is a viable case here and I need to see that in order to get this case moving. It's an '09 case. They have the right to take your clients' depositions.
>
> ***
>
> MR. AMU: Let's do that. If it [mediation] doesn't work, let's take depositions then. They have to come here from Saudi Arabia for the depositions then.
>
> THE COURT: Oh, no, we could–we could figure out other ways to take it.
>
> ***
>
> THE COURT: Have your firms taken depositions via electronic means?
>
> MS. HARSTEIN [Counsel for RGI]: Not of parties, your Honor. Our position is that we would like to have the depositions

of the plaintiffs proceed in Cook County.

***

MS. HARSTEIN: [I]f the party deponent files a case in the venue that he chooses, and it's Cook County, they must give their deposition in Cook County, and that's going to be part and parcel of our motion.

MR. AMU: In fact, I would agree with them, Judge. If we are unable to resolve this case by mediation on May 25, they–the parties have to come here from Saudi Arabia for deposition ***."

¶ 28 Defense counsel indicated they had not actually agreed to mediation. The trial judge informed plaintiffs' counsel she could not force defendants to mediate. The court concluded the hearing by ordering a briefing schedule on a motion for plaintiffs' depositions.

¶ 29 On April 18, 2011, defendants filed motions to compel depositions of plaintiffs to proceed in Cook County or to dismiss plaintiffs' third amended complaint with prejudice. Defendant RGI brought their motion to compel depositions to proceed in Cook County pursuant to Illinois Supreme Court Rules 201, 202, and 203, and to dismiss plaintiffs' third amended complaint pursuant to rule 219(c). RGI alleged plaintiffs "refuse to submit themselves for deposition." RGI asserts it never agreed and the court did not order that plaintiffs' depositions were waived when the court ordered mediation on January 25, 2011. Defendant Tur-Kaspa's motion sought relief "for failure to comply with the Illinois Supreme Court Rules and Procedure and this Court's Order." The motion alleges it is less expensive for plaintiffs to be deposed in Cook County than for them to remain in Saudi Arabia to be deposed by videoconference from the United States embassy. Defendant Tur-Kaspa's motion alleged plaintiffs' counsel is mistaken in

his understanding of prior court orders regarding mediation and that "depositions were never waived." Defense counsel for Dr. Tur-Kaspa also alleges "this defendant has not agreed to mediate this case ***."

¶ 30 Defendant Tur-Kaspa attached to his motion for sanctions plaintiffs' counsel's January 24, 2011 correspondence, which included an email between plaintiffs' counsel and the embassy in Saudi Arabia. In the letter, plaintiffs' counsel states "the plaintiffs have agreed to drop the number of plaintiffs to one ***."

¶ 31 The trial court granted plaintiffs until May 10, 2011 to respond to defendants' motions to dismiss pursuant to Rule 219(c) or in the alternative to compel plaintiffs' depositions to proceed in Cook County, and scheduled a deadline for defendants' reply. The court continued the matter until May 26, 2011 for status. On April 21, 2012, defendants both filed a motion to dismiss plaintiffs' third amended complaint. The court entered a briefing schedule on defendants' motions to dismiss plaintiffs' third amended complaint and continued that matter for status until May 13, 2011. On April 28, 2011, plaintiffs filed a motion to revise the April 25, 2011 order. The relief plaintiffs' motion sought was additional time to respond to defendants' motions and a single status date on all pending motions. In the course of the motion, plaintiffs' counsel alleged as follows:

> "Plaintiffs filed a motion for mediation of this dispute in light of their location, circumstance, and issues in the case. Plaintiffs' physical presence are not relevant to a fair resolution of this issue because the records of treatment or services outlining the dispute speak for themselves. Plaintiffs have nothing to add. There is no way that the defendants

> can be prejudiced by the absence of the plaintiffs physically at trial or arbitration."

¶ 32 On April 28, 2011, the trial court denied plaintiffs' motion to revise the April 25, 2011 order. On May 5, 2011, plaintiffs filed their responses to defendants' motions to dismiss plaintiffs' third amended complaint and defendants' motions to dismiss pursuant to Rule 219(c) or to compel deposition. The response to the motion to compel alleged, in part, as follows:

> "Prior to plaintiff's [sic] motion for mediation on January 24, 2011, the parties had discussed in open court the deposition of the defendants by telephone in light of their location in Riyadh, Saudi Arabia and had agreed to a telephone deposition of the plaintiffs. Plaintiffs' counsel had commenced arrangement for the depositions until plaintiffs' mediation motion was granted. Once the court *sua sponte* cancelled mediation without explanation, the defendants then unilaterally opted out of the deposition of the plaintiffs by telephone and are now demanding that the plaintiffs to [sic] travel from Riyadh Saudi Arabia to Chicago to present themselves for 3 hour depositions in Chicago."

¶ 33 Plaintiffs' response concedes "[t]here is no right to telephone deposition" and denies that plaintiffs refused to present themselves for deposition. Plaintiffs deny ever having ignored a court order. Plaintiffs argued that events negated the need for them to appear for a deposition, including the fact that the parties had agreed to and scheduled mediation and that the depositions were to occur by telephone. Plaintiffs alleged the parties had agreed to telephonic depositions prior to plaintiffs' motion for mediation and before plaintiffs moved for summary judgment on the issue of liability. Plaintiffs' responses request relief in the form of mediation and an order that plaintiffs do not have to come to Chicago but if they must be deposed, "the deposition can be

taken by telephone as originally agreed and planned."

¶ 34 Defendants replied to plaintiffs' response to the motions to compel or dismiss pursuant to Rule 219(c). Defendants replied they never agreed to depose plaintiffs via telephone. Defendant Tur-Kaspa alleged he requested plaintiffs to be produced for their depositions on October 28, 2010 and that on January 11, 2011, codefendant's attorney sent correspondence to plaintiffs' counsel requesting dates for plaintiffs' depositions. Defendant Tur-Kaspa's counsel again corresponded with plaintiffs' counsel on January 21, 2011 requesting deposition dates.

¶ 35 On May 13, 2011, the trial court continued defendants' motions to dismiss plaintiffs' third amended complaint to May 26, 2011. On May 26, 2011 the court set the cause for hearing on the motions to compel or dismiss pursuant to Rule 219(c) on June 29, 2011.

¶ 36 At hearing on defendants' motions to dismiss and motions to compel or dismiss pursuant to Rule 219(c), held on June 29, 2011, the trial court made an oral finding that the complaint states a claim for emotional distress. The court denied defendants' motions to dismiss allegations of emotional distress and denied defendants' motions to dismiss newly added allegations on the basis of the statute of limitations. The court granted defendants' motions to dismiss allegations of economic damages under negligence claims. The court also granted plaintiffs leave to file a fourth amended complaint.

¶ 37 The trial court turned to the motion to compel or dismiss pursuant to Rule 219(c). The court noted two dates on which it ordered plaintiffs to provide dates they were available for depositions (October 13 and January 5) and the January 25 order for depositions. The court ruled as follows: "[P]laintiffs are ordered to appear for deposition in Cook County within 45 days. If

they don't appear, the case is going to be dismissed."

¶ 38 Plaintiffs filed a fourth amended complaint on July 27, 2011. On June 29, 2011, and July 21, 2011, defendants RGI and Tur-Kaspa, respectively, corresponded with plaintiffs' counsel in an attempt to schedule plaintiffs' depositions before August 15, 2011. On July 22, 2011, plaintiff's counsel responded, in part, informing defense counsel he had informed plaintiffs of the court's order and that Ms. Ibrahim had informed counsel she had contacted the embassy to try to get a visa. On July 28, 2011, plaintiffs' counsel again wrote defense counsels stating, in part, that "Ms. Ibrahim has informed me she has contacted the Embassy in Riyadh, Saudi Arabia, and will try to get a visa. *** If I she [sic] has not been granted a visa, then certainly she cannot be in Chicago. I will update you and the court on the status date of August 15, 2011."

¶ 39 On August 12, 2011, defendant Tur-Kaspa filed a notice of motion to dismiss plaintiffs' fourth amended complaint with prejudice pursuant to Rule 219(c).

¶ 40 On August 15, 2011, plaintiffs' filed "Enas Ibrahim's email explaining her rationale for not being able to come to Chicago." The document, which appears to be a printout of an email, reads, in part, as follows:

> "You keep requesting me to come while I explained to you more than once that I cannot make it and I don't have the permission to leave the county. *** [T]he request of me coming to Chicago is not an option and you shall either find a way to proceed without my presence or I shall bear the consequences of losing the case. *** The visa is one issue but not the only issue that prevents me from coming. I cannot leave the county without my husband's consent and as we are separated and going through a divorce case, he refused to issue me

> a permission to leave the county. This is the law in Saudi and nothing can be done in this regard."

¶ 41 Plaintiffs' counsel filed his own affidavit in which he averred, in part, "I had informed her to arrange for a video deposition via Skype, I invested in the software and she invested in the software in anticipation of giving a video deposition, and she was devastated when she learnt [sic] that the judge will not allow a Skype deposition. It is my understanding that under Saudi law, she cannot leave the country at this time." Plaintiffs' counsel also filed an article titled "Saudi Arabian Women's Rights: Under Islam and Saudi Traditions."

¶ 42 In hearings on August 15, 2011, RGI's counsel informed the trial court depositions had not occurred. The court ruled that "[t]he case is dismissed with prejudice on the grounds that the plaintiffs have refused to appear for a deposition. This is based on my June 29, 2011 order." Plaintiffs' counsel attempted to have the court review the materials he filed on August 15, 2011. The following exchange occurred:

> "THE COURT: All right. Give me yours then, sir.
>
> MR. AMU: Yes. Thank you, Judge. That's all I'm saying.
>
> THE COURT: It's not going to make any difference. The issue–
>
> ***
>
> THE COURT: The issue is whether the depositions have been taken or not.
>
> ***
>
> THE COURT: It's a very simple issue.

***

THE COURT: This court cannot consider the law of Islam in regard to women in this case. There's a strict separation of church and state in this country and obviously in this state and in this jurisdiction."

¶ 43 On August 15, 2011, the trial court entered a written order granting defendant Tur-Kaspa's motion to dismiss plaintiffs' fourth amended complaint with prejudice "on the grounds that plaintiffs' refused to appear for their depositions as ordered by the court on 6/29/11." The order notes that RGI made an oral motion to dismiss plaintiffs' lawsuit with prejudice and granted their motion as well.

¶ 44 On September 12, 2011, plaintiffs filed a motion to vacate the dismissal with prejudice and seeking instead for the trial court to enter a dismissal for want of prosecution. The motion alleged that "Plaintiff's failure to comply with the order of this court to present for deposition in Chicago is not a wilful disregard of this court's dictate. The law in Saudi Arabia prevents plaintiff from leaving Saudi Arabia at this time." The motion argued that because plaintiff is unable to comply due to circumstances beyond her control the proper order is a dismissal for want of prosecution. Plaintiffs argued it would be unfairly prejudicial to enter a dismissal with prejudice under the circumstances. Attached to the motion is the affidavit of Enas Saleh Ibrahim. Ms. Ibrahim averred, in part, as follows:

> "My inability to comply with the court's order to come to Chicago for the deposition is not of my own doing. The law in Saudi Arabia prevents me from leaving the county at this time. Until the

> divorce proceedings between me and my husband is [sic] finalized in the court in Saudi Arabia, I am not able to leave Saudi Arabia and come to Chicago. That is simply the law in Saudi Arabia. There is nothing I can do about the situation of this law."

¶ 45 On October 12, 2011, defendants' each filed a response to plaintiffs' motion to vacate and for order of dismissal for want of prosecution. On October 27, 2011 plaintiffs filed a reply arguing, in part, "[u]nder the new rule of the Illinois Supreme Court, specifically SCR 241, the court can now grant plaintiffs' motion to conduct the deposition by video conference (Skype) and not dismiss the case at all." On October 27, 2011, plaintiffs filed a separate "motion to now allow plaintiffs' deposition to proceed by telephone or video conferencing consistent with the new Illinois Supreme Court Rule 241." That motion alleged Enas Ibrahim's failure to comply with the trial court's order was not a wilful disregard of the court's dictate but due to circumstances beyond her control. Plaintiffs argued Rule 241 "now allows for video or telephone testimony to be taken for all purposes including trial." The motion prays for an order reinstating the case and that plaintiffs' depositions occur by telephone or videoconferencing.

¶ 46 On November 18, 2011, defendants each filed responses in opposition to plaintiffs' motion to now allow remote depositions. On December 1, 2011, plaintiffs filed a reply. On December 7, 2011, the trial court entered an order on (1) plaintiffs' motion to vacate dismissal with prejudice on August 15, 2011 and instead enter a dismissal for want of prosecution and (2) plaintiffs' motion to now allow plaintiffs' deposition to proceed by telephone or video. The court denied both motions "for the reasons stated by the court on the record." At the hearing, the court ruled as follows:

"THE COURT: I issued at least four subsequent orders ordering the plaintiffs to be presented in Cook County, so this is over a period of 14 months.

* * *

I am denying the plaintiffs' motion. The Court dismisses the case with prejudice based on plaintiffs' refusal to–plaintiffs' attorney's refusal to present his clients in Cook County, and it was for over a year since the first court order.

Defendants just told me they also had requested the appearance for deposition of the plaintiffs earlier than my court orders.

Obviously, why would I have ordered it if I didn't need to order it, if it hadn't been done.

The plaintiff has shown throughout this that he does not believe that his client is required to appear.

***

[Rule 241 is] inapplicable because the rule applies to trial from the committee comments, and it's inapplicable for discovery depositions.

Furthermore, even if it were applicable to discovery depositions, I do not believe that adequate safeguards would be possible to ensure accurate identification of the witnesses and protect against influence by

> persons present with the witness.
>
> For those reasons and the reasons that the defendants presented to me here in court, as well as the case law, I am denying the motion.
>
> And this case is dismissed. This case is dismissed, as it was before, with prejudice. My order stands."

¶ 47 On January 6, 2011, plaintiffs timely filed a notice of appeal from the order entered on December 7, 2011.

¶ 48 ANALYSIS

¶ 49 Plaintiffs request this court reverse the trial court's December 7, 2011 order denying plaintiffs' motion to vacate the August 15, 2011 order dismissing plaintiffs' complaint with prejudice as a discovery sanction. "[A] trial court has the inherent authority to dismiss a cause of action with prejudice for failure to comply with court orders. However, dismissal of a complaint is a drastic sanction and is justified only when the party dismissed has shown a deliberate and contumacious disregard for the court's authority." (Internal quotation marks and citations omitted.) *Cutler v. Northwest Suburban Community Hospital, Inc.*, 405 Ill. App. 3d 1052, 1069 (2010). Plaintiffs' position is that they are unable to comply, not unwilling to comply, with the court's order. They request that the dismissal order be set aside if it will not cause a hardship to the parties to proceed to trial on the merits. Plaintiffs also argue that the trial court should have allowed a telephone or video deposition of the plaintiffs pursuant to Illinois Supreme Court Rule 241.

¶ 50 1. Plaintiffs' Brief

¶ 51 Defendant RGI made a preliminary request this court strike plaintiffs' brief and dismiss this appeal for failure to comply with several Supreme Court Rules governing appeals. Dr. Tur-Kaspa also stated that, based on plaintiffs' noncompliance with Supreme Court Rules regarding appeals, that this court "would be justified in disposing of the appeal on the basis of a finding of forfeiture, rather than deciding the merits ***." RGI argued plaintiffs' failure to comply with the rules governing appeals impermissibly shifted the burden to defendants to explain the proceedings below and respond to plaintiffs' erroneous arguments.

¶ 52 "Adherence to Supreme Court Rules *** is not an inconsequential matter. The purpose of the rules is to require parties to proceedings before a reviewing court to present clear and orderly arguments so that the court may properly ascertain and dispose of the issues involved. Where an appellant's brief fails to comply with the rules, this court has inherent authority to dismiss the appeal for noncompliance with its rules. However violation of the rules does not divest this court of jurisdiction, but rather is an admonishment to the parties. It is within our discretion to consider the merits of the appeal, which we do here, where the appellees' brief is sufficient to apprise us of [the appellants'] arguments, where the facts necessary to understand the issue are simple and in the interest of judicial economy." (Internal citations omitted.) *Zadrozny v. City Colleges of Chicago*, 220 Ill. App. 3d 290, 292-93 (1991).

¶ 53 We will not dismiss plaintiffs' appeal and decline the invitation to find all of the issues forfeited. RGI's argument that it should not be required to explain the proceedings below does not persuade us to sanction plaintiffs with dismissal of their appeal. First, we may rely on the

appellee's arguments to apprise us of the appellants' arguments. *In re Marriage of Debra N. and Michael S.*, 2013 IL App (1st) 122145, ¶ 44 (2013) ("We do not condone Debra's failure to comply with Rule 341; however, given that Michael has provided a summary of the relevant evidence in his response brief and the issues raised on appeal are simple, we will nonetheless consider Debra's challenge to the trial court's order"); *Zadrozny*, 220 Ill. App. 3d at 293. We also note that defendants would have had the burden to respond to plaintiffs' arguments, no matter how well-articulated, and were free to argue plaintiffs' arguments are not well grounded in fact or law. Second, we may ascertain the necessary information regarding the proceedings below from the record on appeal. The facts are sufficiently simple to permit resolution of the issue on appeal. Third, "[d]espite its deficiencies, [appellants'] brief is sufficient to enable us to discern [their] arguments and to pass on the merits of their appeal." *Young v. City of Centreville*, 169 Ill. App. 3d 166, 169 (1988).

¶ 54 2. Dismissal of Plaintiffs' Complaint

¶ 55 A. Standard of Review

¶ 56 "The imposition of sanctions against a party for noncompliance with discovery rules is a matter within the broad discretion of the trial court. It is a needed tool for the trial court for case management. We will not disturb the trial court's exercise of its discretion unless an abuse is apparent." (Internal citations omitted.) *Reyes v. Menard, Inc.*, 2012 IL App (1st) 112555, ¶ 22 (2012). Also, discovery orders, such as the order on plaintiffs' motion for telephonic or videoconferencing depositions, are also reviewed for an abuse of discretion. See generally *Ramos v. Kewanee Hospital*, 2013 IL App (3d) 120001, ¶ 76 (2013) ("Discovery rulings are

generally within the trial court's discretion and we will not disturb them absent an abuse of that discretion").

¶ 57 B. Timeliness of Plaintiffs' Claim Regarding Saudi Law

¶ 58 Dr. Tur-Kaspa argues that plaintiffs' contention that Saudi law prevented them from appearing for depositions in Cook County was untimely because plaintiffs did not argue this point until the last day for compliance with the trial court's order. RGI argues plaintiffs made a last-ditch effort to avoid compliance with the trial court's order to appear in Cook County for their deposition with their claim that the law of Saudi Arabia prohibited Ms. Ibrahim from leaving her country and appearing for her deposition.

¶ 59 "A trial court's determination of what sanction, if any, applies to a discovery violation is based on six factors set forth by the Illinois Supreme Court in *Shimanovsky v. General Motors Corp.*, 181 Ill. 2d 112, 124 (1998). No single factor is dispositive. The six factors are: (1) the surprise to the adverse party; (2) the prejudicial effect of the proffered testimony or evidence; (3) the nature of the testimony or evidence; (4) the diligence of the adverse party in seeking discovery; (5) *the timeliness of the adverse party's objection to the testimony or evidence*; and (6) the good faith of the party offering the testimony or evidence. In balancing these factors, the trial judge should weigh the parties' rights to maintain a lawsuit against the necessity to accomplish the objectives of discovery and promote the unimpeded flow of litigation." (Emphasis added.) (Internal quotation marks and citations omitted.) *Reyes*, 2012 IL App (1st) 112555, ¶ 27.

¶ 60 The parties must facilitate discovery between themselves and attempt to resolve disputes

without intervention from the trial court if possible. Illinois Supreme Court Rule 201(k) (Ill. S. Ct. R. 201(k) (eff. Jan. 1, 1967)) provides in pertinent part as follows:

> "The parties shall facilitate discovery under these rules and shall make reasonable attempts to resolve differences over discovery. Every motion with respect to discovery shall incorporate a statement that counsel responsible for trial of the case after personal consultation and reasonable attempts to resolve differences have been unable to reach an accord or that opposing counsel made himself or herself unavailable for personal consultation or was unreasonable in attempts to resolve differences." Ill. S. Ct. R. 201(k) (eff. July 1, 2002).

¶ 61 The record before this court reveals that plaintiffs' counsel informed defense counsels of the possibility plaintiff Ibrahim might be unable to comply with the trial court's order due to circumstances beyond her control before the August 15 deadline. On July 28, 2011, plaintiffs' counsel wrote defense counsels stating, in part, that "Ms. Ibrahim has informed me she has contacted the Embassy in Riyadh, Saudi Arabia, and will try to get a visa. *** If I [sic] she has not been granted a visa, then certainly she cannot be in Chicago. I will update you and the court on the status date of August 15, 2011." We find that plaintiffs' counsel made a good faith effort to apprise defendants of circumstances preventing compliance with the court's order. Plaintiffs' counsel's letter did not mention Saudi law but he did inform defense counsels plaintiffs may not be able to comply with the court's deadline. Although plaintiffs' counsel's letter stated he would update defense counsel and the court *on* the deadline, we do not find that defendants were unfairly surprised or prejudiced. When the parties appeared in court on August 15, defendants were able to argue that plaintiffs' noncompliance should result in dismissal of their case. Nor did

defendants assert that they were surprised by plaintiffs' assertion of Saudi law. If the trial court had addressed the claim, a point which we will address below, defendants may have been justified in requesting additional time to respond. But on the record before us we can discern no prejudice to defendants from plaintiffs' failing to raise Saudi law specifically prior to the August 15 deadline. Compare *Big Three Food & Liquor, Inc. v. State Farm Fire & Casualty Co.*, 79 Ill. App. 3d 63, 68 (1979) (on motion to strike plaintiff's motion to vacate dismissal sanction plaintiff "waited until the day of the hearing, April 18th, before filing its response [to the motion to strike], again ignoring the court order and effectively denying State Farm its right to file a reply").

¶ 62 Nor was the assertion of Saudi law an "objection" to the trial court's discovery order. Rather, plaintiffs' counsel merely alerted the court to an inability to comply with the order. Whether those difficulties provide a sufficient excuse for noncompliance, and the veracity of that claim, were matters for the court to determine in deciding whether and how to sanction plaintiffs for a discovery violation. To the extent plaintiffs' assertion of their inability to comply with the court's order can be construed as an "objection" to that order, the court should have considered the "timeliness" of that objection along with its merits is fashioning an appropriate sanction. However, the record indicates that the court did not consider the timing or substance of plaintiffs' claim at the hearing on defendants' motions to compel or dismiss. Instead, the court viewed the situation as "a simple matter" of whether or not the deposition had occurred.

¶ 63 C. Plaintiffs' Noncompliance

¶ 64 Dr. Tur-Kaspa argues that plaintiffs' failure to comply with discovery orders was

deliberate as evidenced by their statement of their intention not to comply and efforts to justify their refusal. Given their failure to put forth a genuine effort to prove the Saudi law plaintiffs relied on, Dr. Tur-Kaspa argues the trial court had no viable option other than to dismiss plaintiffs' complaint with prejudice. RGI argues that on the August 15, 2011 deadline plaintiffs "signaled their continued unwillingness to appear for their depositions" because plaintiffs' counsel averred that " 'plaintiffs really have nothing to add to what is in [RGI's] records.' " RGI complains that after the court dismissed the complaint with prejudice, neither of plaintiffs' subsequent motions expressed a willingness or attempt to comply with the court's prior order. Instead of complying, plaintiffs requested that they appear for the deposition by telephone or videoconferencing. RGI argues that there is a lengthy history of failing to comply with repeated orders to appear for depositions which support the court's order.

¶ 65 Plaintiffs reply there was no fair or rational basis to dismiss plaintiffs' complaint with prejudice where plaintiffs were unable to appear in Cook County, not unwilling. Plaintiff's counsel also asserts, without citation to the record, that the trial court prevented him from presenting evidence of Saudi law. Specifically, plaintiffs' counsel asserts a witness was in court and prepared to testify as to Saudi law, and that Ms. Ibrahim was available to testify via telephone and videoconference why she was unable to come to Cook County. Plaintiffs argue that Ms. Ibrahim was simply unable to comply to due circumstances beyond her control, and fairness deems her case not be dismissed with prejudice.

¶ 66 Dr. Tur-Kaspa argues the dismissal was not an abuse of discretion because plaintiffs failed to prove their claims regarding the effect of Saudi law on their ability to comply with the

trial court's order and, therefore, there was no basis for the court to rule other than as it did. Dr. Tur-Kaspa argues that due to plaintiffs' failure of proof, the trial court had "no choice but to dismiss their action based upon their repeated refusals to comply with the court's orders." Dr. Tur-Kaspa also argues plaintiffs' claim Saudi law prevented their noncompliance, rather than their own deliberate disregard, is contrary to an earlier position plaintiffs took in this case. RGI argues plaintiffs failed to present the court with legal justification for the court to consider foreign law or competent proof of the law of a foreign jurisdiction, therefore the court did not abuse its discretion in rejecting plaintiffs' claims and dismissing their complaint.

¶ 67 The issue of whether plaintiffs have reversed positions on their appearance for depositions might be germane to a determination of whether their alleged reasons for noncompliance are genuine or merely an excuse. However, we do not believe that plaintiffs have taken any contrary position in these proceedings. In support of their motion for mediation, plaintiffs' counsel argued that if the case was not resolved by mediation, then plaintiffs would "have to come here from Saudi Arabia for the depositions." The statement by plaintiffs' counsel must be viewed in context. Our review of the record leads us to conclude that plaintiffs' counsel's position was that plaintiffs' depositions were not necessary at all, either because (1) their depositions were not required before mediation or (2) plaintiffs did not possess any relevant information that was not already known to the parties. Counsel's statement, in context, was that only after mediation was conducted or foreclosed would the issue of depositions even arise. It is misleading to assert that plaintiffs' counsel's current assertion that plaintiff Ibrahim cannot come to Chicago to be deposed–which, whether believed or not, is counsel's position–is contrary to his

earlier statement that plaintiffs might be required to return under certain circumstances.

¶ 68 Regardless, whether plaintiffs' reasons are sufficient to excuse noncompliance or in fact warrant sanctions is a matter left to the discretion of the trial court. Plaintiffs had the burden to establish "by affidavit *or otherwise* that its failure to comply with rules or court orders was warranted by extenuating circumstances." (Emphasis added.) *Big Three Food & Liquor, Inc.*, 79 Ill. App. 3d at 68. Defendants are correct that Plaintiffs did not provide expert testimony and did not submit a certified copy of the alleged Saudi law involved. Nonetheless we hold that counsel's failure in that regard does not warrant dismissal of plaintiffs' case at this stage of the proceedings. We find that the trial court did not give plaintiffs a sufficient opportunity to establish that their failure to comply was warranted by extenuating circumstances and, therefore, abused its discretion.

¶ 69 At the hearing on August 15, the trial court stated: "This court cannot consider the law of Islam in regard to women in this case. There's a strict separation of church and state in this country and obviously in this state and in this jurisdiction." Plaintiffs' counsel did not cite plaintiff Ibrahim's religion as the reason she could not comply with the court's order to appear in Cook County to be deposed. Ms. Ibrahim asserted that she could not obtain a visa and that the law of her home country forbade her travel. The court did not make any findings with regard to either of her claims. The court merely concluded that it could not consider religion in a court of law.

¶ 70 First, we agree the trial court could not enter a judgment construing the dictates of plaintiffs' religion. *Bivin v. Wright*, 275 Ill. App. 3d 899, 903 (1995) ("Illinois courts have

generally refused to decide cases that require a judicial interpretation of religious doctrine"). However, the court could consider the effect of plaintiffs' religious beliefs on them and, consequently, whether their failure to comply with the court's orders was deliberate and contumacious. *Jenkins v. Trinity Evangelical Lutheran Church*, 356 Ill. App. 3d 504, 509 (2005) ("By using the neutral principles approach, courts avoid the quagmire of trying to determine church doctrine, but can still determine disputes that are essentially civil in nature"). The neutral principles of law approach is not limited to disputes over church property. See *Bivin*, 275 Ill. App. 3d at 903 (applying neutral principles of law approach to negligence dispute). Rather, the court does not violate the First Amendment where it may resolve the dispute without a "searching inquiry into religious matters." *Id*. In this case, we believe the trial court could have resolved the issue in purely secular terms. The trial court should have made a determination as to whether plaintiffs genuinely felt they could not comply with the court's orders, even if their reasons were religious in nature. If plaintiffs sincerely held that belief, their actions could not be held to be contumacious. See *In re Marriage of Charous*, 368 Ill. App. 3d 99, 108 (2006) (for purposes of civil contempt contumacious conduct consists of conduct calculated to embarrass, hinder, or obstruct a court in its administration of justice or lessening the authority and dignity of the court). Regardless, plaintiffs did not assert their religion as the basis of their noncompliance, and the court may consider foreign law.

¶ 71 "While Illinois statutes provide that Illinois courts may take judicial notice of the laws of sister states and of the United States, an Illinois court cannot take judicial notice of the laws of foreign countries. Therefore, in Illinois, the laws of foreign countries must be pled and proven as

any other fact." (Internal citations omitted.) *Bianchi v. Savino Del Bene International Freight Forwarders, Inc.*, 329 Ill. App. 3d 908, 922 (2002). We hold the trial court should have permitted plaintiffs' counsel to provide evidence of the law of Saudi Arabia before it could properly make a determination that plaintiffs' conduct was in fact sanctionable and especially before it determined plaintiffs' conduct was deliberate and contumacious. It would be desirable, but not absolutely necessary, for counsel to provide expert testimony on the subject. In *Atwood Vacuum Machine Co. v. Continental Casualty Co. of Chicago,* 107 Ill. App. 2d 248, 263-64 (1969), the court turned to New York law as persuasive authority on the question of what evidence is required to prove foreign law "where any dispute arises concerning the foreign law" in the absence of judicial notice, as is the case in Illinois. *Id*. at 263. The court cited favorably the following passage from Sommerich & Busch, *The Expert Witness and The Proof of Foreign Law*, 38 Cornell L.Q. 125, 147-48:

> "In spite of the existence of foreign statutes, judgments, treatises and commentaries, or even of official declarations or certificates, irreconcilable conflict will frequently arise in bitterly contested proceedings. Such instances call for the opinions of experts in the foreign law involved. It would otherwise seem to be placing too much burden upon the court to expect it to determine the foreign law without other assistance when such situations arise.
> ***
>
> The use of the expert witness may frequently be essential; in all cases expert witnesses are desirable. All misunderstandings concerning facts, differences in translations, paths of reasoning and foundations for conclusions can be explored by direct and cross-examination in the presence of the parties, the

> court and the jury. The fullest compliance with every concept of fair play is possible in such events." (Internal quotation marks and citations omitted.) *Id*. at 263-64.

¶ 72 We cannot say that the assistance of an expert witness is essential in this case, because we cannot say that the parties have an irreconcilable conflict in the interpretation of the allegedly applicable Saudi law. The trial court never reached any question regarding Saudi law. While we recognize it was plaintiffs' burden to sustain the grounds of their motion, plaintiffs' counsel's failure should not result in the drastic sanction of dismissal of plaintiffs' complaint with prejudice. *Kubian v. Labinsky*, 178 Ill. App. 3d 191, 196 (1988) ("default judgment or dismissal of the action, being the most drastic sanctions, are ones which courts are reluctant to impose").

¶ 73 Dr. Tur-Kaspa also argues that the materials plaintiffs did submit do not prove that Saudi law absolutely prohibited either from appearing for their deposition. The materials suggest that Ms. Ibrahim could travel with her husband's permission, but plaintiffs submitted no evidence she ever asked his permission or that it was denied. Defendant Tur-Kaspa's arguments relate to factors the trial court could have considered in judging the sufficiency of plaintiffs' excuse and whether, and how, to sanction them. However, as we have noted, the trial court prematurely denied plaintiffs an opportunity to prove that their noncompliance was justified by extenuating circumstances. If plaintiffs are able to prove their claim, then clearly a sanction of dismissal would not be warranted.

> "An order of dismissal with prejudice is a drastic sanction to be entered only where the party's actions show a deliberate, contumacious or unwarranted disregard of the court's authority. Further,

> dismissal with prejudice is a sanction to be employed only as a last resort and after all the court's other enforcement powers have failed to advance the litigation. *** Notably, these concerns and requirements have been found to be applicable where dismissal is imposed as a sanction pursuant to either Rule 219 or the trial court's inherent authority." (Internal quotation marks and citations omitted.) *Cronin v. Kottke Associates, LLC*, 2012 IL App (1st) 111632, ¶ 45 (2012).

¶ 74 Under the circumstances, dismissal of plaintiffs' complaint was not the last resort. Although the trial court had ordered plaintiffs to provide dates for depositions in the past, plaintiffs' counsel's response to those orders was to attempt to schedule mediation in lieu of plaintiffs' depositions. The record reflects counsel's efforts, albeit unsatisfactorily, to work with defense counsels to move this case forward in that way. Although the fact that the conduct leading to a discovery violation is attributable to the attorney is not a bar to sanctions, the fact that the initial failure to provide deposition dates was due solely to counsel's tactics is a factor the court should have considered. *Stevens v. International Farm Systems, Inc.*, 56 Ill. App. 3d 717, 720-21 (1978) (finding sanction barring defendant from defending one count in complaint "quite drastic considering that it was the conduct of the defendant's attorney which led to the imposition of the sanctions"). The trial court only issued one order to conduct a deposition by a date certain. When that did not occur, the trial court did not utilize any other enforcement tools before dismissing plaintiffs' complaint with prejudice. A sanction can be found too harsh and an abuse of discretion where the record does not indicate a lesser sanction was ineffective, that the dismissal was entered only as a last resort, and that a trial on the merits was no longer possible.

Gonzalez v. Nissan North America, Inc., 369 Ill. App. 3d 460, 469 (2006). On the record before us, the trial court's sanction was too harsh.

¶ 75 "Since the purpose of such sanctions is to effect discovery, not to punish the dilatory party a 'just order' under Rule 219(c) is one which, to the degree possible, insures both the accomplishment of discovery and a trial on the merits." (Internal citations omitted.) *Kubian*, 178 Ill. App. 3d at 196. Sanctions which the trial court may impose include a stay of the proceedings, the barring of testimony, the striking of claims or defenses, the awarding of fees and costs, or the institution of contempt proceedings. *Id*. In this case the trial court tried none of these to move the litigation forward before proceeding to "the most drastic sanction" of dismissal. In an appropriate case, the allowance of attorney fees incurred by reason of the noncompliance is an appropriate sanction to ensue both discovery and a trial on the merits. *Schwartz v. Moats*, 3 Ill. App. 3d 596, 599-600 (1971). In *Schwartz*, the discovery violation was a failure to respond to interrogatories until after the trial court granted the plaintiff's motion to dismiss and for judgment pursuant to Rule 219(c). *Id*. at 597-98. Although in *Schwartz* the court found that the imposition of attorney fees was an appropriate sanction rather than dismissal where, in that case, there eventually was compliance (*Id*. at 598-99), we find that dismissal of plaintiffs' complaint in this case, before the use of the court's other enforcement powers, including monetary sanctions, were found to be ineffective, was premature in light of the suggestion and some evidence to the effect that the failure of compliance was not deliberate or contumacious.

¶ 76 Further, we do not agree with RGI that the record reflects a lengthy history of failing to

comply with repeated orders to appear for depositions. The record does reflect plaintiffs' counsel's ongoing dispute with defense counsel as to the necessity of plaintiffs' depositions. Defense counsel complained to the trial court regarding numerous delays occasioned by multiple pleadings by plaintiffs engendering responses from defendants and motions to dismiss. The trial court also noted the delays in this case. However, delays not resulting from noncompliance with discovery orders are irrelevant to the issue of discovery sanctions and should not be considered.

¶ 77 Plaintiffs began these proceedings on October 28, 2009. Judge Brewer entered an order on October 13, 2010 granting plaintiffs 21 days to answer discovery and 14 days to propound discovery "at which time a schedule for party depositions should be presented to the court." The trial court entered another order concerning discovery in November 2010 requesting a schedule for party depositions. The court continued the case for status on discovery until January 25, 2011. The only failure of compliance at that stage of the proceedings was a failure to present a schedule for depositions during a period in which it is clear plaintiffs' counsel disputed the need to depose plaintiffs at all. Instead of complying with those orders, plaintiffs' counsel requested mediation. On January 25, the court directed plaintiffs to provide dates for depositions. Plaintiffs' counsel clearly believed mediation would obviate the need for his clients to be deposed. The court did not find that plaintiffs had failed to comply with its orders at this point in the litigation. The trial court merely continued the mater for "status on plaintiffs' depositions."

¶ 78 The trial court's March 29, 2011 order is in response to plaintiffs' counsel's position on the need for depositions at all. The court entered a briefing schedule on defense motions seeking plaintiffs' depositions. The court clearly rejected plaintiffs' view on the need for depositions

prior to mediation, but the proceedings to this point cannot fairly be construed as a deliberate and contumacious disregard of the court's orders. Plaintiffs' vigorously argued the matter should be resolved by mediation based on the documentary evidence. Then, in response to the court's order, defendants filed their first and only motion to compel. In its motion, RGI asserts it never agreed and the court did not order that plaintiffs' depositions were waived when the court ordered mediation on January 25, 2011. Defendant Tur-Kaspa's motion similarly alleged plaintiffs' counsel is mistaken in his understanding of prior court orders regarding mediation and that "depositions were never waived." Again, whether plaintiffs' counsel was correct or not, the motions to compel recognize that the delay in deposing plaintiffs up until this point was plaintiffs' counsel's view that mediation would precede their depositions.

¶ 79 On June 29, 2011 the trial court ordered plaintiffs to appear by August 15 in Cook County to be deposed. Thus, plaintiffs failed to comply with at most three orders to provide defense counsel with a date for depositions, after which the trial court simply continued the matter for status, and one order to appear for depositions. The record contains only one motion by each defendant to compel discovery and one ruling on a motion to compel discovery. On the date plaintiffs were ordered to appear, plaintiff Ibrahim presented a facially reasonable excuse for her failure to appear. The issue was not simply whether the depositions had been taken or not. Rather, the trial court should have given plaintiffs the opportunity to prove that their failure to comply with the court's order was warranted by extenuating circumstances. Therefore, we think the dismissal of plaintiffs' complaint for failing to comply with the order to appear in Cook County was an abuse of discretion. See *Santiago v. E.W. Bliss Co.*, 2012 IL 111792, ¶ 20 (2012)

(applying *Sander v. Dow Chemical Co.*, 166 Ill. 2d 48 (1995), to a certified question regarding sanctions for intentionally filing a complaint using a fictitious name without approval) ("Dismissal is justified only when (1) there is a clear record of willful conduct showing deliberate and continuing disregard for the court's authority; and (2) a finding that lesser sanctions are inadequate to remedy both the harm to the judiciary and the prejudice to the opposing party").

¶ 80 Despite plaintiffs' counsel's conduct, even "dilatory and noncooperative conduct of plaintiffs' counsel-by whose actions plaintiffs are bound *** and which the sanctions provided for in Rule 219(c) *** were designed to address" (*Kubian*, 178 Ill. App. 3d at 200) does not obviate the "primary objective of Rule 219 to accomplish discovery and proceed to a trial on the merits" (*Kubian*, 178 Ill. App. 3d at 202)[2]. Under the standards articulated above, we find that the trial court should have made a determination as to whether plaintiffs' failure to comply was reasonable or justified by extenuating circumstances or events. *Kubian*, 178 Ill. App. 3d at 197; 202. If that were true, then "[t]hat is not to say that sanctions were not appropriate in this case. *** [But under those circumstances] the court had other means of enforcement under Rule 219(c) at its disposal; and, in our view, could have imposed progressively harsher sanctions

[2] On August 6, 2012, the Attorney Registration and Disciplinary Commission entered an interim suspension of plaintiffs' trial counsel, 'Lanre O. Amu, during the pendency of disciplinary proceedings. The record clearly reflects Mr. Amu's contentious exchanges with the trial court, including the trial court's scheduling of a hearing to determine whether it would find Mr. Amu in contempt of court. We have also outlined Mr. Amu's numerous pleadings containing several counts that the trial court dismissed and his repeated attempts to have mediation precede plaintiffs' depositions, apparently without plaintiffs' knowledge. Although not necessary to our disposition of this case, we note that plaintiffs should not suffer undue punishment for the behavior of an attorney who has been found unworthy to continue the practice of law.

proportionate to the gravity of the violations to compel discovery rather than exercising its discretion in such a way as to dispose of the litigation in the pretrial stage." *Kubian*, 178 Ill. App. 3d at 201-02.

¶ 81 Finally, plaintiffs have never provided any reason why Mr. Abdulmohsen cannot appear for his deposition in Cook County. As Dr. Tur-Kaspa noted, the materials plaintiffs submitted, even taken at face value, do not suggest that Saudi law restricts male's travel. Our review of the record reveals that plaintiffs' counsel has only argued that foreign law prohibited Ms. Ibrahim from leaving the country. However, we also note that one of counsel's correspondence suggests that, absent dismissal, this matter may proceed with only one plaintiff. Based on the record we presume that plaintiff would be Ms. Ibrahim. Nonetheless, in light of our order remanding this cause, if the trial court determines that either plaintiffs' failure to comply with the court's order was not willful or contumacious but, nonetheless, sanctionable, the court may consider an appropriate sanction against the plaintiffs individually for their personal failure to comply with the court's orders. *Department of Transportation v. Mainline Center, Inc.*, 38 Ill. App. 3d 538, 541 (1976) ("The severity of a sanction should be circumscribed by the conduct of the offending party"). If Mr. Abdulmohsen is unwilling or unable to establish that his own noncompliance was reasonable or justified, the court may impose an appropriate sanction. Such sanctions may include barring his testimony or dismissal of his claims rather than the entire case.

¶ 82 3. Motion for Remote Depositions

¶ 83 We next turn to plaintiffs' motion asking the trial court to allow plaintiffs' depositions to proceed by telephone or videoconferencing. Dr. Tur-Kaspa argues that the court properly denied

plaintiffs' motion for remote depositions because (1) the motion was untimely and (2) remote depositions would violate Supreme Court Rules 203 (Ill. S. Ct. R. 203 (eff. Jan. 1, 1967)) and 206 (Ill. S. Ct. R. 206 (eff. Jan. 1, 1967)). On the timeliness issue, Dr. Tur-Kaspa asserts that not only did plaintiffs wait over two months after the court dismissed their complaint, and one month after plaintiffs moved to vacate that order, it is also contrary to a position plaintiffs took earlier in the proceedings. The trial court raised the issue of remote depositions at the April 7, 2011 hearing on plaintiffs' motion to reconsider the March 29, 2011 order, but, Dr. Tur-Kaspa argues, plaintiffs rejected the suggestion their depositions could be taken by telephone or videoconference. Thus, he argues, the propriety of the trial court's ruling is clear. Plaintiffs' counsel denies refusing depositions by videoconference or that defendants ever raised the possibility of taking plaintiffs' depositions by videoconference.

¶ 84 We are not convinced that plaintiffs' counsel is taking a contrary position than he stated at the hearing on April 7, 2011. At the hearing, plaintiffs' counsel stated: "If mediation doesn't resolve this case, we continue litigation. They have to come here from Saudi Arabia and, Judge, if we mediate this case and the plaintiffs don't show up physically, how are the defendants worse off? No reason–there is nothing the plaintiffs are going to say when they come here."

¶ 85 First, plaintiffs are not asserting contradictory positions. Earlier in the proceedings, plaintiffs' counsel persisted in attempting to have mediation precede plaintiffs' depositions. This is not a clear rejection of conducting remote depositions. Nor was plaintiffs' position at the April 7, 2011 hearing the same as at the time of filing the motion. The court did not order plaintiffs' to appear until June 29, 2011. The record suggests that prior to that time, plaintiffs' counsel lead

plaintiffs to believe they would not have to return to Cook County until after mediation. Plaintiff Ibrahim's email (taken at face value) is dated the same day as the court's order and clearly states "It was initially agreed when you have accepted this case that I will not come to the US unless it was the trial ***." Thus the record reflects that neither plaintiffs nor plaintiffs' counsel rejected the possibility of conducting the depositions remotely; rather, neither believed there would be a necessity to do so before the court's June 29 ruling. After that point it became clear to counsel that plaintiffs would be unable to comply. Thus, the October 27 motion is not contrary to any earlier position in the case because it is based on the court's June 29 ruling and states that plaintiff Ibrahim's "failure to comply with the order *** is not a wilful disregard of this court's dictate. The law in Saudi Arabia prevents plaintiff from leaving Saudi Arabia at this time."

¶ 86 Second, the trial court had jurisdiction over both of plaintiffs' postjudgment motions. The court entered its order dismissing plaintiffs' complaint with prejudice on August 15, 2011. Plaintiffs filed their first postjudgment motion within 30 days of that order on September 12, 2011. "A trial court has jurisdiction for a period of 30 days after the entry of a final judgment to modify or vacate the final judgment on the timely motion of a party or *sua sponte*." *Darling v. Reinert*, 132 Ill. App. 2d 192, 194-95 (1971). Thus, plaintiffs' September 12, 2011 motion was timely. Although filed more than 30 days after the court's August 15 order, we also find that due to the proper filing of a postjudgment motion, the court had jurisdiction to hear plaintiffs' October 27, 2011 motion. *In re Marriage of Ehgartner-Shachter and Shachter*, 366 Ill. App. 3d 278, 286 (2006) ("[T]he circuit court retains jurisdiction over a judgment beyond the 30–day period if other claims in that action remain pending. Other exceptions to the 30–day rule include

instances where a new claim or a post-trial motion directed at the judgment is filed within 30 days of its entry"). When plaintiffs' filed their October 27 motion, the initial postjudgment motion remained pending. Therefore, the court still had jurisdiction over this matter. *Id*.

¶ 87 On the merits of plaintiffs' motion, defendant Tur-Kaspa argues that the election of the place of deposition and whether the deposition will be in person are left to the party noticing the deposition. Ill. S. Ct. R. 206 (eff. Jan. 1, 1967). Therefore, in the absence of an agreement between the parties, the trial court "had no discretion under the plain language of Rule 203 to require defendants to take plaintiffs' depositions outside of Cook County" or by telephone or by videoconference. Whether required or not, he argues, in light of the rules the trial court exercised its discretion properly. RGI argues, correctly, that defendants were entitled to take plaintiffs' discovery deposition despite the trial court's order granting mediation. It also argues that defendants were entitled to take those depositions in the county in which plaintiffs' complaint was pending (Ill. S. Ct. R. 203 (eff. Jan. 1, 1967)) and, therefore, the court did not abuse its discretion in ordering plaintiffs to appear in Cook County, because defendants did not agree to proceed with the depositions outside the county.

¶ 88 Rule 203 states, in part, as follows: "However, the court, in its discretion, may order a party *** to appear at a designated place in this State or elsewhere for the purpose of having the deposition taken." Ill. S. Ct. R. 203 (eff. Jan. 1, 1967). RGI cites *In re Estate of Atwood*, 97 Ill. App. 2d 311, 322-23 (1968), in support of its argument that an agreement between the parties is required for a deposition to occur outside the jurisdiction where the complaint is pending. In *Estate of Atwood*, a respondent argued that as a non-resident the trial judge did not possess the

jurisdictional authority to order him to give his deposition in Illinois under Supreme Court Rule 203. *Id*. at 322. The court held that "as a party seeking relief in a court of this state by bringing an action, [he] was subject to the court's authority to order him to appear in Illinois for a deposition." *In re Estate of Atwood*, 97 Ill. App. 2d at 323. "It is apparent to us that the purpose of [Rule 203] is to provide jurisdictional authority for the purpose of discovery over parties who establish the requisite contacts with Illinois by bringing an action in this state." *Id*. at 322.

¶ 89 In *In re Estate of Atwood*, the court held that "[i]f [the deponent] objected to the time or place set for the deposition, or if he had suggestions of his own to make in that regard, he should have availed himself of the procedure set forth in Rule 201(c)(1)." *Id*. at 323-24. Rule 201(c) states that "[t]he court may at any time on its own initiative, or on motion of any party or witness, make a protective order as justice requires, denying, limiting, conditioning, or regulating discovery to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or oppression." Ill. S. Ct. R. 201(c)(1) (eff. Jan. 1, 1967). However, *In re Estate of Atwood* is distinguishable because in that case two depositions had actually been scheduled (*In re Estate of Atwood*, 97 Ill. App. 2d at 315; 317), and the deponent failed to attend without any explanation. Here, no depositions were scheduled and plaintiff has provided some explanation for the inability to provide dates to be deposed in Cook County. Regardless, we find nothing in the language of the court's opinion in *In re Estate of Atwood* or in the language of Rule 203 that requires the deposing party's agreement before the court may exercise its discretion to order a party deponent to appear "elsewhere for the purpose of having the deposition taken."

¶ 90 Dr. Tur-Kaspa also argues that Supreme Court Rule 241, on which plaintiffs relied, does

not apply. RGI also notes that Rule 241 applies to trial testimony, not to depositions. Plaintiffs reply there is no rational basis to permit videoconferencing testimony at trial but not for a deposition. There is no reason to apply a more stringent rule to depositions, according to plaintiffs.

¶ 91 In their October 27 motion, plaintiffs cited Illinois Supreme Court Rule 241 in support of their request for an order that plaintiffs may appear by telephone or videoconferencing for their depositions. We do not construe plaintiffs' argument to be, as RGI suggests, that Rule 241 required the trial court to permit plaintiffs' depositions to proceed by telephone or videoconference. We construe plaintiffs' motion as arguing that Rule 241 embodies the view that testimony received by videoconferencing is reliable.

¶ 92 RGI argues it "cannot begin to assess plaintiffs' dubious liability position or their claims of emotional distress other than by beginning with the plaintiffs' discovery depositions, conducted face-to-face, not by telephone or videoconference." But RGI never explains why a face-to-face deposition is necessary or how their deposition would be impeded by conducting it by videoconferencing. Dr. Tur-Kaspa argues that remote depositions would not provide circumstances in which the fairness of the deposition could be overseen and confirmed. Dr. Tur-Kaspa relies on the trial court's finding that "I do not believe that adequate safeguards would be possible to ensure accurate identification of the witnesses and protect against influence by persons present with the witness."

¶ 93 The trial court, in its discretion, may order the place for a deposition to occur. The trial court did not rely on the inapplicability of Rule 241 to deny plaintiffs' motion. The court found

that it did not believe that adequate safeguards were possible. Again, the trial court made this determination without the benefit of evidence from plaintiffs on that question. Absent agreement of the parties, plaintiffs would have the burden to prove that such adequate safeguards would be in place, and they clearly failed to do so. However, earlier in the litigation, the court noted that defendants raised the possibility of a video deposition, and the court also suggested it as an option, prior to the court's erroneous ruling on defendants' motions to dismiss pursuant to Rule 219(c). In light of our reversal of the order dismissing plaintiffs' complaint, it is also appropriate to remand for reconsideration of the issue of how depositions might occur in this case.

¶ 94 CONCLUSION

¶ 95 The trial court abused its discretion when it failed to give adequate consideration to plaintiffs' claim that their failure to comply with the trial court's order was reasonable or justified by extenuating circumstances or events. *Kubian*, 178 Ill. App. 3d at 197. The trial court's judgment denying plaintiffs' motions to vacate the order of dismissal and to now allow depositions to proceed by telephone or videoconference are reversed and the cause remanded for an evidentiary hearing on plaintiffs' proffered reasons for failing to comply with discovery rules and the court's orders, and to reconsider plaintiffs' motion for telephonic or videoconference depositions in light of the court's findings.

¶ 96 Reversed and remanded.