

STATE OF MICHIGAN
COURT OF APPEALS

CYNTHIA AUSTIN, a/k/a CYNTHIA
SHERWOOD,

Plaintiff-Appellee,

v

STATE FARM INSURANCE COMPANY,

Defendant-Appellant.

UNPUBLISHED
January 5, 2006

No. 255896
Bay Circuit Court
LC No. 03-003327-CK

Before: O’Connell, P.J., and Smolenski and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right from the trial court judgment entered on May 10, 2004, in favor of plaintiff pursuant to a jury verdict. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

The lawsuit arose from an injury plaintiff sustained in a car accident on January 9, 2001. Defendant initially paid plaintiff her first-party, no-fault benefits for approximately one month after the accident until she returned to work. Plaintiff continued to experience pain and was placed on complete disability in August, 2002, by the examining physician. Defendant then paid a second period of benefits from September 4, 2002, through April 7, 2003. However, defendant later terminated plaintiff’s benefits based in part on an independent medical evaluation by Dr. DeSantis. As a result, plaintiff filed the instant lawsuit against defendant.

During discovery, plaintiff sent expert interrogatories to defendant regarding Dr. DeSantis. The interrogatories, in part, requested information on (1) the number of times defendant had retained Dr. DeSantis to perform expert services in the last three years; (2) the number of times defendant had retained Physical Medicine Consult, P.C. to perform expert services in the last three years; (3) Dr. DeSantis’s fee for her professional services and for a deposition; (4) Dr. DeSantis’s income she had earned as an expert witness in the last three years, including fees for examinations, consultations, reports, and depositions; and (5) the percentage of Dr. DeSantis’s practice that was devoted to serving as an expert witness. Defendant failed to answer, so plaintiff filed a motion to compel defendant to answer. The trial court ordered defendant to provide full and complete answers within fourteen days of its September 8, 2003, order. On October 2, 2003, which was beyond the court-ordered time limit, defendant filed an answer to the interrogatories. Regarding questions 1, 2, and 4, defendant answered that it was “logistically impossible to produce [that] type of statistic.” Regarding question 5, defendant

objected on the ground that the information was unavailable to it. The rest of the interrogatories were substantively answered by defendant and are not in dispute.

On November 24, 2003, the trial court heard a motion by plaintiff to sanction defendant for failure to comply with the court's September 8, 2003, order and a motion by defendant to compel discovery. After reading defendant's answers to the interrogatories, the court stated that defendant blatantly disobeyed its initial order to compel. The court also noted that some of the information sought in the interrogatories could have been obtained from Dr. DeSantis. Following the hearing, the court ordered defendant to provide "full and complete answers" to plaintiff's interrogatories before January 15, 2004, or "[defendant's] medical experts [would] be stricken and [defendant] [would] not be allowed to produce medical evidence at trial."

On January 13, 2004, defendant filed supplemental answers to the interrogatories. Specifically, defendant provided substantive answers to each question except for that asking for the amount of Dr. DeSantis's income earned as an expert witness in the past three years. Defendant's answer read, "Dr. DeSantis is a salaried physician and she is not paid 'fee for service[.]' [Defendant] has no way of obtaining this information. Dr. DeSantis will not provide her salary information through this format." On January 20, 2004, plaintiff filed an objection to the answers, stating that Dr. DeSantis should be prohibited from testifying at trial. Two days prior, defendant filed a motion for a protective order claiming that plaintiff was not entitled to discover Dr. DeSantis's personal income. The motion was to be heard before the trial court on February 23, 2004. However, in a settlement conference on February 18, 2004, the trial court orally decided to enforce its December 17, 2003, order and struck Dr. DeSantis from testifying at the upcoming trial.

Defendant filed with this Court an emergency motion for stay of the trial and an application for leave to file an interlocutory appeal. On February 23, 2004, this Court ordered the dismissal of defendant's application for leave. This Court reasoned that it lacked jurisdiction because the trial court's ruling was oral and that defendant's claim that the trial court required it to disclose Dr. DeSantis's personal income was erroneous because plaintiff's interrogatory "d[id] not make such a broad request." Thereafter, the case went to trial and the jury returned a verdict in favor of plaintiff.

On appeal, defendant argues that the court abused its discretion in striking its expert witness. We disagree.

A trial court has discretion whether to impose sanctions for violation of a discovery order. *Local Area Watch v Grand Rapids*, 262 Mich App 136, 147; 683 NW2d 745 (2004). An abuse of discretion has occurred only if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made, or the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias. *Dep't of Transportation v Randolph*, 461 Mich 757, 768; 610 NW2d 893 (2000).

Defendant claims that the trial court abused its discretion in excluding Dr. DeSantis from testifying and, as a result, the jury was not provided with all of the facts from each side regarding plaintiff's injury. The jury, therefore, found in favor of plaintiff and sanctions were levied against defendant for failing to properly pay benefits. However, a court may order sanctions for

failure to comply with a discovery order. MCR 2.313(B). Specifically, a court may preclude a party from introducing expert testimony at trial as a sanction for disobeying a discovery order. MCR 2.313(B)(2)(b); *LaCourse v Gupta*, 181 Mich App 293, 296; 448 NW2d 827 (1989).

Severe sanctions, such as ordering default judgment, are generally appropriate only when a party flagrantly and wantonly refuses to facilitate discovery, not when the failure to provide discovery is accidental or involuntary. *Traxler v Ford Motor Co*, 227 Mich App 276, 286; 576 NW2d 398 (1998). A trial court should consider the following factors in determining an appropriate discovery sanction:

(1) whether the violation was willful or accidental, (2) the party's history of refusing to comply with discovery requests (or refusal to disclose witnesses), (3) the prejudice to the defendant, (4) actual notice to the defendant of the witness and the length of time prior to trial that the defendant received such actual notice, (5) whether there exists a history of plaintiff engaging in deliberate delay, (6) the degree of compliance by the plaintiff with other provisions of the court's order, (7) an attempt by the plaintiff to timely cure the defect, and (8) whether a lesser sanction would better serve the interests of justice. [*Dean v Tucker*, 182 Mich App 27, 32-33; 451 NW2d 571 (1990).]

In the instant case, the sanction was appropriate because defendant impeded discovery by failing to provide complete answers to interrogatories. Initially, defendant failed to answer plaintiff's interrogatories, so plaintiff filed a motion to compel defendant to answer. The trial court ordered defendant to provide full and complete answers within fourteen days of its September 8, 2003, order. On October 2, 2003, which was beyond the court ordered time limit, defendant filed an answer to the interrogatories. Regarding three of the questions, defendant answered that it was "logistically impossible to produce [that] type of statistic." However, it was obviously not "logistically impossible to produce" the statistics because defendant did substantively answer those questions in its supplemental answers. Moreover, these answers were filed only after the trial court again ordered defendant to provide "full and complete answers" to plaintiff's interrogatories before January 15, 2004, under threat of precluding defendant's medical experts from testifying at trial.

Defendant argues that the interrogatory regarding Dr. DeSantis's earnings for testifying as an expert witness was overly broad, of questionable relevance, and not answerable. The interrogatory asked defendant to provide information regarding Dr. DeSantis's income she had earned as an expert witness in the last three years, including fees for examinations, consultations, reports, and depositions. Contrary to defendant's assertion that plaintiff's interrogatory required Dr. DeSantis to disclose all of her personal income, this Court noted in its dismissal of defendant's application for leave that plaintiff's interrogatory "d[id] not make such a broad request." Regarding relevancy, the Michigan Supreme Court has held that an expert witness's history of testifying for a particular class of parties is minimally suggestive of bias and therefore

relevant. *Wilson v Stilwill*, 411 Mich 587, 601; 309 NW2d 898 (1981). Most importantly, though, defendant was well aware of the potential sanction for failing to provide full and complete answers to the interrogatories and, therefore, should have challenged the form of the question before refusing to comply with the trial court order. As a result, the trial court's discovery sanction was proper and not an abuse of discretion.

Affirmed.

/s/ Peter D. O'Connell

/s/ Michael R. Smolenski

/s/ Michael J. Talbot