APPELLANT PRO SE:

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IN THE
COURT OF APPEALS OF INDIANA

LUIZ ALVES,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 71A03-0912-CV-605
	)	
DAMON R. LEICHTY, JAMES W. TUESLEY and BARNES & THORNBURG LLP,	)	
	)	
Appellees-Defendants.	)	
	)	

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable David C. Chapleau, Judge
Cause No. 71D06-0806-PL-127

July 1, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Luiz Alves, *pro se*, appeals the trial court's dismissal with prejudice of his complaint for legal malpractice against Barnes & Thornburg LLP and two of its attorneys as a sanction for failing to comply with discovery. Finding that Alves was given multiple chances and was warned by the trial court that his complaint would be dismissed if he did not fully respond, we find no abuse of discretion and therefore affirm.

Facts and Procedural History

On June 13, 2008, Alves filed a *pro se* complaint for legal malpractice against Barnes & Thornburg LLP ("B&T") and B&T attorneys Damon R. Leichty and James W. Tuesley (collectively, "the defendants") in St. Joseph Superior Court. Alves alleged in his complaint that he engaged B&T to represent him in connection with a dispute between him and his business partner, Paulo Teixeira, and that the defendants negligently rendered legal services to him, including representing him when they knew that a conflict of interest existed. B&T filed an answer, including a counterclaim for unpaid attorney fees totaling nearly $75,000.

On December 3, 2008, B&T served upon Alves its first set of interrogatories and first request for production of documents. After receiving an extension of time, Alves served his responses to the interrogatories and request for production of documents on B&T on January 5, 2009. Alves also filed them with the trial court. On April 1, however, B&T's attorney sent a letter to Alves describing the inadequacies of his responses and requesting a telephone conference to resolve the matter. The letter highlighted why B&T thought that Alves' responses were inadequate. For example,

Alves responded to several of the interrogatories with the responses, "calls for lengthy narrative response" and "seeks information protected by the attorney-client privilege." Appellee's App. p. 12, 13. Also, instead of answering some of the interrogatories, Alves simply directed B&T's attention to a document. As for the request for production of documents, B&T pointed out that, although Alves produced a few documents as attachments to his interrogatory responses, he did not respond separately to the request for production of documents.

On April 25, 2009, Alves sent a letter to B&T's attorney stating that he had recently come into possession of documents that were possibly relevant to his claim against the defendants and asked B&T if it wanted copies of these documents. Alves also asked for additional time to respond to discovery due to the "large amount of documents discovered recently." *Id.* at 41. B&T's attorney responded with a letter on April 30 advising Alves to "promptly" correct the deficiencies in his original discovery responses and to supplement his responses with the documents that he recently obtained. *Id.* at 42.

When Alves had not responded by July 7, 2009, B&T filed a motion to compel discovery responses in the trial court. In the motion B&T again detailed why it thought Alves' responses were inadequate. The trial court granted the motion that same day, ordering Alves to "complete responses to [B&T's] First Set of Interrogatories to Plaintiff and [B&T's] First Request for Production of Documents to Plaintiff within 20 days of the date of this Order." *Id.* at 44. Although B&T had asked the trial court to give Alves only fourteen days to respond, the court gave him twenty. On July 24, Alves filed a motion

for extension of time in which he sought ten additional days in which to complete his discovery responses. The court gave Alves until August 6, 2009, to comply.

On September 1, 2009, however, B&T still had not received a response from Alves. The defendants filed a motion to dismiss Alves' complaint and entry of default judgment on their counterclaim for unpaid attorney fees. The motion recited the history of the discovery problem, including that five months had elapsed since Alves had first been asked to correct the discovery deficiencies, B&T had made informal efforts to resolve the dispute, Alves received an extension of time from the trial court which he still did not meet, and in that same period of time, the defendants had responded to requests for admission, two sets of interrogatories, and two requests for production, all without complaint from Alves. The trial court set the motion for a hearing on October 5.

At the hearing, Alves conceded that he possessed documents relevant to his claim and that he had been in possession of them "[b]y August 4"; however, he gave no reason why his review of the documents was not complete two months later. Appellant's App. p. 13. He then explained that after his review was complete, one of his sons would have to translate his responses from Portuguese to English. The trial court explained to Alves:

> THE COURT: Well, I'll give you ten days to finish this and get this to them. Or, it shall be dismissed. Do you understand? You've got ten days to get whoever, your sons or anyone else who is fluent in both languages, to do whatever [they] need to do and get to the other party whatever was subject to the motion to compel order.
> MR. ALVES: Okay.
> THE COURT: Okay. If [you] don't submit it within ten days, then we'll dismiss your claim against Barnes and Thornburg. Fair enough?
> MR. ALVES: Okay, your Honor.
> * * * * *

> THE COURT: . . . But, I am going to give you one last chance to fully answer this discovery and comply with the order on motion to compel and then it's over. Do you understand?
> MR. ALVES: Okay, your Honor. (Indicating.)

Id. at 13-14, 15.

On October 15, 2009, Alves served upon B&T, and also filed with the trial court, his supplemental response to B&T's first set of interrogatories. He, however, did not respond to B&T's request for production of documents. The supplement is a twenty-six-page narrative that includes legal argument and citation to authority. Because it is in narrative form, the interrogatories are not answered separately. On October 23, the defendants filed a motion to impose discovery sanction for failure to comply with the trial court's discovery order. The motion details why the defendants believe that Alves' supplemental response is inadequate, that is, it is a "twenty-six page narrative that is often rambling, incoherent, argumentative, and repetitive. Much of it addresses his theory of a conspiracy between his former business associate and South Bend Capital Bank and is replete with conclusory inferences rather than factual assertions." *Id.* at 117. The defendants also explained that because Alves did not respond to each interrogatory separately, as required by Indiana Trial Rule 33(B) ("Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objections shall be stated in lieu of an answer."), they were left to guess which parts of the narrative were responsive to which interrogatory. The defendants also pointed out that, although Alves purported to reference documents by quoting them, he has "completely failed to respond to the B&T parties' request for production of documents." *Id.* at 118. The motion concluded:

> Eleven months, two extensions, one motion to compel, one motion for sanctions, and one reprieve later, and Luiz Alves still has not provided an even remotely adequate response to the B&T parties' discovery requests. Permitting this proceeding to continue would work a gross unfairness upon the B&T parties in that it would leave them open to a trial by ambush, which is contrary to what the Indiana Trial Rules contemplate. As one example, Alves has provided no information as to the damages he claims. The Court has wide discretion as to discovery sanctions, which it has exercised by extending Alves latitude. Alves has abused that latitude. This Court should now sanction that abuse.

Id. at 118-19.

That same day, the trial court entered an order granting the defendants' motion to impose discovery sanction. "[H]aving determined that Luiz Alves has had more than ample opportunity to respond to defendants' discovery requests [and] that Luiz Alves has failed to comply with this Court's discovery orders," the court dismissed Alves' complaint with prejudice. *Id.* at 120. The court did not grant the defendants' request to enter default judgment on their counterclaim but instead gave them forty-five days to file any dispositive motion.

On November 9, 2009, Alves filed a response to B&T's motion to impose discovery sanction and a motion to reconsider and set aside the order dismissing his complaint with prejudice. Then, on November 12, Alves filed a motion to modify order or correct error. The defendants filed a response to all three filings. The trial court held a hearing on December 2 and afforded Alves an opportunity to argue his position. Essentially, Alves argued that his October 15 response was "meticulous" and "appropriate." *Id.* at 21. The trial court denied the motion to correct error that same day:

> What I said in my order was, they had 45 days to file a dispositive motion. Which means a motion for summary judgment. I think you need to be prepared for that. And, you should consult an attorney. Because, they are

> asking for a large judgment against you for attorney fees they believe they've earned against you. I am not going to change my mind on the motion to dismiss. I am going to deny your motion to correct errors. It will be a final appealable order and you can appeal that, if you want to. But, you need to be prepared to deal with their motion for summary judgment. They have asked for an additional 45 days. . . . But, that's what you need to do to protect your interests at this point. Be prepared to deal with the request for attorney fees. And, you have to learn the . . . . Rules of Procedure. You are dangerously trying to handle your own case and you need to contact an attorney to represent you on the summary judgment issue. That's my advice to you. Okay?

Id. at 23-24. Alves, *pro se*, now appeals.

Discussion and Decision

Alves contends that the trial court abused its discretion when it dismissed with prejudice his complaint for legal malpractice against the defendants as a discovery sanction. At the outset, we observe that a litigant who elects to proceed *pro se* "will be held to the same rules of procedure as trained legal counsel and must be prepared to accept the consequences of his action." *Shepherd v. Truex*, 819 N.E.2d 457, 463 (Ind. Ct. App. 2004). The trial court is vested with broad discretion in ruling on discovery issues, and this Court will interfere only when an abuse of discretion is apparent. *Hatfield v. Edward J. DeBartolo Corp.*, 676 N.E.2d 395, 299 (Ind. Ct. App. 1997), *reh'g denied*, *trans. denied*. We will find an abuse of discretion only when the result reached by the trial court is clearly against the logic and effect of the facts and circumstances before the court or the reasonable, probable and actual deductions flowing therefrom. *Id.*

"The rules of discovery are designed to allow a liberal discovery process, the purposes of which are to provide parties with information essential to litigation of the issues, to eliminate surprise, and to promote settlement." *Id.* "Discovery is designed to

be self-executing with little, if any, supervision or assistance by the trial court." *Id.* However, when the goals of this system break down, Indiana Trial Rule 37 provides the court with tools to enforce compliance. *Id.* Under Trial Rule 37(B)(2)(c), if a party disobeys a trial court's order regarding discovery, the trial court may issue "[a]n order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party."

Although an order dismissing an action or granting a default judgment is the ultimate sanction a trial court may issue, the court is not necessarily required to first issue a lesser sanction. *Prime Mortgage USA, Inc. v. Nichols*, 885 N.E.2d 628, 649 (Ind. Ct. App. 2008). "This is especially true when the disobedient party has demonstrated contumacious disregard for the court's orders, and the conduct of that party has or threatens to so delay or obstruct the rights of the opposing party that any other relief would be inadequate." *Id.* (quotation omitted). Although the opportunity to be heard in court is a litigant's most precious right and should be sparingly denied, we will not condone disregard for the trial court's orders. *Id.* "The only limitation on the trial court in determining an appropriate sanction is that the sanction must be just." *Id.* (quotation omitted). When deciding whether a sanction is just, we have routinely considered whether a trial court expressly warned a party that failure to comply could result in dismissal. *Id.*

Between the time discovery was served upon Alves in December 2008 and the time that the trial court dismissed his complaint in October 2009, B&T's attorney sent

Alves two letters attempting to informally resolve the dispute, Alves was granted twenty days to respond upon the court's grant of B&T's motion to compel, and Alves received an additional extension of ten days, which he did not meet. Then two months later at the hearing on the defendants' motion to dismiss Alves' complaint, the trial court granted Alves a reprieve by giving him yet another ten days along with a clear and repeated warning that failure to comply would result in the dismissal of his complaint. When Alves responded on October 15, he provided a lengthy response in narrative form that did not individually answer the interrogatories and completely failed to respond to the request for production of documents. As a result, the defendants were not able to obtain any discovery concerning Alves' alleged damages, had been able to obtain only partial discovery on several other issues, and had not been able to inspect the voluminous documents that Alves admitted to possessing or controlling.

On appeal, Alves still does not offer a justification for his failures. Rather, he has maintained all along that there is nothing insufficient or inadequate concerning his October 15 discovery response, which he describes as "meticulous." In addition, Alves does not cite one single decision from Indiana and instead cites federal cases from the Fifth, Sixth, Eighth, and Eleventh Circuits for the applicable law on discovery sanctions. In this case we would be hard pressed to say that the trial court abused its discretion given the clear warning that the court gave to Alves in the event he did not fully comply. We also highlight that the trial court gave Alves more time to respond than B&T actually sought in its motion to compel and that the court did not grant the default judgment that

B&T sought on its counterclaim. This is further evidence that the trial court carefully deliberated in exercising its discretion.

Although Alves essentially claims that he did the best he could in responding to B&T's discovery requests given his *pro se* status, this is no justification and more importantly does not explain his failure to produce documents. Alves is held to the same standard as trained legal counsel, and simply put his discovery responses have failed to meet that standard, despite clear warning from the trial court that his complaint would be dismissed if he did not fully comply. We therefore conclude that the trial court did not abuse its discretion in dismissing Alves' complaint against the defendants as a discovery sanction.

As for Alves' argument that the trial court erred in denying his motion to correct error, Alves made the very same arguments he has been making all along at the hearing on the motion to correct error and offered nothing new. For the same reasons as above, the trial court did not abuse its discretion in denying Alves' motion to correct error. We therefore affirm the trial court's dismissal with prejudice of Alves' complaint against the defendants as a discovery sanction.[1]

Affirmed.

NAJAM, J., and BROWN, J., concur.

[1] To the extent that Alves argues on appeal that the trial court did not give him an opportunity to defend his rights and respond to the defendants' motions, we find this claim to be without merit.