

STATE OF MICHIGAN
COURT OF APPEALS

DENNIS CRAIG SULLIVAN,

Plaintiff-Appellee,

v

GEORGE E. MARSH,

Defendant-Appellant.

UNPUBLISHED

August 1, 2000

No. 210540

Genesee Circuit Court

LC No. 94-26347-CL

Before: Meter, P.J., and Gribbs and Griffin, JJ.

PER CURIAM.

Defendant appeals as of right a \$15,001 judgment entered on March 3, 1997, pursuant to a jury verdict in this defamation case. We affirm.

The present lawsuit, alleging defamation and intentional infliction of emotional distress, stems from workplace tension culminating in derogatory comments allegedly made by defendant, co-owner of a service station, about plaintiff, a manager at the station, in front of employees and customers. The case proceeded to trial before a jury. On the third day of trial, the trial court entered a default against defendant on the issue of liability based on its finding through testimony adduced at trial that defendant had wilfully failed to comply with plaintiff's pretrial discovery requests. The trial continued only with regard to proofs as to damages and, on February 4, 1997, the jury returned a verdict of \$15,000 on plaintiff's defamation count and \$1 on the intentional infliction of emotional distress count. The trial court thereafter denied defendant's motion for a new trial. Defendant now appeals as of right the judgment entered pursuant to the jury verdict.

I

Defendant first contends the trial court abused its discretion by entering a default against him with regard to the issue of liability as a discovery sanction during the midst of trial. We disagree.

After this suit was initiated in 1994, plaintiff's interrogatories were served on defendant's counsel. Defendant was asked in these interrogatories to provide a full and complete listing of any and all physical and/or tangible evidence, including but not limited to documents, recorded or written

statements, and information summaries or other reports which served as the basis for defendant's denial of the allegations set forth in plaintiff's complaint. In response to such discovery questions, no evidence was identified. Defendant's precise answer to these interrogatories was "George E. Marsh's memory, nothing more." When defendant's deposition was taken two years later, defendant answered "no" when again asked if he had any available testimony or documents to support the comments made to plaintiff in March 1993. A second set of interrogatories likewise yielded no further information from defendant. The case thus proceeded through mediation to trial on the basis of such disclosures (or lack thereof).

However, on the third day of trial, defendant for the first time disclosed that several months before the confrontation with plaintiff in March 1993, he had extensively reviewed, copied, and catalogued documents pertaining to the operation of the service station which he thought were germane to his defense. In fact, defendant testified he had reviewed such documents and copied them during a six-month period of time preceding the events which formed the basis for the complaint – more than one year before indicating in sworn discovery responses that he was not aware of any witnesses or records in support of his defense. At this juncture, the jury was excused and plaintiff moved to default defendant for failure to comply with discovery. Out of the presence of the jury, the trial court made a special record concerning plaintiff's motion for entry of a default. The court considered arguments from counsel and allowed the parties to question defendant. When questioned as to why he had not disclosed the evidence, defendant admitted that the information had been available to him when he filed his answer to the complaint in 1994, but stated he was "still holding my documents for private information." Defendant defended his failure to reveal the information on the grounds that "my reems [sic] of material was attorney/client confidential information." However, as plaintiff notes, defendant never registered an objection to discovery of this information on these grounds at either the time his deposition was taken or earlier, when the interrogatories were submitted to him.

The trial court ultimately determined that entry of default against defendant regarding the issue of liability was the appropriate remedy under the circumstances. In so concluding, the trial court noted that the case was in its third day of trial, it had been adjourned twice previously, defendant had intentionally withheld evidence for a period of nearly four years up to the time of trial, and plaintiff would be "severely prejudiced because he's three days into a trial, and all of a sudden he finds out that there actually are physical records which are part of the defense, and he still doesn't know what they are."

On appeal, defendant concedes the trial court properly recognized the appropriate factors it must evaluate to decide whether or not a discovery sanction should be imposed and acknowledged the sanction options available to it pursuant to the court rules. However, defendant argues a review of the record fails to demonstrate the wilfulness necessary to support entry of a default; although defendant admittedly told plaintiff's counsel at his deposition that he did not have any documents to support his statements to plaintiff in 1993, these statements were made under the mistaken impression that any items of evidence he still had were confidential and protected by the attorney/client privilege. Defendant maintains that even if discovery sanctions were warranted, entry of a default finds no justification in the record – other less drastic sanctions are provided by MCR 2.313(B)(2)(a-e).

Several court rules bear on the present circumstances. A party is under a duty seasonably to amend a prior response to a discovery request if the party obtains information on the basis of which the party knows that the response was incorrect when made. MCR 2.302(E)(1)(b)(i). “If a court finds, by way of motion or otherwise, that a party has not seasonably supplemented responses as required by this subrule the court may enter an order as is just, including an order providing the sanctions stated in MCR 2.313(B) and, in particular, MCR 2.313(B)(2)(b).” MCR 2.302(E)(2).

MCR 2.313(B)(2) provides in pertinent part:

If a party . . . fails to obey an order to provide or permit discovery . . . the court in which the action is pending may order such sanctions as are just, including, but not limited to the following:

* * *

(b) an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting the party from introducing designated matters into evidence;

(c) an order striking pleadings or parts of pleadings, staying further proceedings until the order is obeyed, dismissing the action or proceeding or a part of it, or rendering a judgment by default against the disobedient party; . . .

A trial court’s decision to sanction a party for discovery abuses is a matter of discretion vested in the trial court. *Middleton v Margulis*, 162 Mich App 218, 222; 412 NW2d 268 (1987). In determining on appeal whether an abuse of discretion has occurred, this Court in the recent case of *Bass v Combs*, 238 Mich App 16, 26-27; 604 NW2d 727 (1999), has explained:

The Michigan Court Rules at MCR 2.313(B)(2)(c) explicitly authorize a trial court to enter an order dismissing a proceeding or rendering a judgment by default against a party who fails to obey an order to provide discovery. *Thorne v Bell*, 206 Mich App 625, 632; 522 NW2d 711 (1994). The trial court should carefully consider the circumstances of the case to determine whether a drastic sanction such as dismissing a claim is appropriate. *Richardson v Ryder Truck Rental, Inc.*, 213 Mich App 447, 451; 540 NW2d 696 (1995). Severe sanctions are generally appropriate only when a party flagrantly and wantonly refuses to facilitate discovery, not when the failure to comply with a discovery request is accidental or involuntary. *Traxler [v Ford Motor Co]*, 227 Mich App 276, 286; 576 NW2d 398 (1998)], *supra* The factors that should be considered in determining the appropriate sanction include the following:

“(1) [W]hether 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 [other party]; (4) actual notice to the [other party] of the witness and the length of time prior to trial that the [other party] received such actual notice; (5) whether there exists a history of [the party’s] engaging in deliberate delay; (6) the

degree of compliance by the [party] with other provisions of the court's order; (7) an attempt by the [party] 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) *Id.* 32-33 (451 NW2d 571 (1990)).]

See also *Chrysler Corp v Home Ins Co*, 213 Mich App 610, 612; 540 NW2d 485 (1995); *Frankenmuth Mutual Ins Co v ACO, Inc.*, 193 Mich App 389, 396-397; 484 NW2d 718 (1992); *LaCourse v Gupta*, 181 Mich App 293, 296-297; 448 NW2d 827 (1989); and *Equico Lessor, Inc v Original Buscemi's Inc*, 140 Mich App 532; 364 NW2d 373 (1985).

Under the standard set forth in *Bass, supra*, we conclude the trial court's decision to enter a default against defendant did not constitute an abuse of discretion. Defendant flagrantly and wilfully withheld information from plaintiff despite discovery requests which should have revealed the documents and evidence. Defendant admitted at trial that in his answers to interrogatories and during his deposition he failed to disclose the documents in question, but claimed he did not do so because they were either irrelevant or, in his view, protected by the attorney/client privilege. However, rather than register a timely objection at the time of discovery, see MCR 2.309(B)(1); MCR 2.306(D)(4), defendant, when asked at trial if he had been dishonest answering the interrogatories, replied, “I guess you'd have to say – my private information wasn't revealed to you.” The record indicates defendant was artfully deceitful in defending his failure to reveal the documents, claiming all of the information in these documents was committed to his memory and, therefore, his answers to interrogatories were not inaccurate. Under these circumstances, we conclude the trial court did not abuse its discretion in entering the default against defendant. The trial court carefully weighed the appropriate factors, see *Bass, supra*, before rendering its decision to sanction defendant in this manner, and we find no error in the imposition of such severe sanctions on the basis of the record before us.

II

In a related argument, defendant next contends the trial court, in conjunction with the entry of default on the issue of liability, erred in limiting the presentation of defendant's evidence to that which had been properly disclosed, thereby unfairly preventing him from presenting witnesses and exhibits in his defense. However, pursuant to MCR 2.313(B)(2)(b), *supra*, a trial court is authorized to prohibit the introduction of evidence of designated matters as a discovery sanction. Such a decision by the trial court is reviewed for an abuse of discretion. *Bass, supra*; *Middleton, supra*.

The practical effect of the court's ruling was to exclude a litany of defendant's exhibits and witnesses. However, for the reasons set forth above, such a sanction was warranted under the circumstances. Moreover, once defendant was defaulted, the sole remaining issue to be tried before the jury was the amount of damages. See *Dollar Rent-A-Car Systems v Nodel Const Co, Inc.*, 172 Mich App 738, 743; 432 NW2d 423 (1988); *Midwest Mental Health Clinic, PC v Blue Cross & Blue Shield of Michigan*, 119 Mich App 671, 675; 326 NW2d 599 (1982). Because this evidence related to the issue of liability, not damages, the court's ruling did not unfairly prevent defendant from proceeding with the damages portion of the trial. Therefore, the trial court did not abuse its discretion in disallowing defendant's presentation of these proofs as part of the sanctions for discovery abuse.

III

Defendant's next two issues challenge certain evidentiary rulings of the trial court. Defendant complains the trial court abused its discretion in finding evidence going to the issue of plaintiff's credibility and character to be inadmissible pursuant to MRE 404(b). Defendant claims "he should have been allowed to attack plaintiff's so-called good character by offering proofs that he was not such a wonderful employee" while working at the service station. Specifically, defendant maintains that the excluded testimony of a mechanic at the service station would have supported his theory that plaintiff was stealing from him, engaging in illegal activities, working for a competitor, and would have established plaintiff had an unsavory reputation among fellow co-workers. Additionally, defendant argues the trial court improperly foreclosed his attempt to impeach plaintiff by asking him about inconsistencies between statements made in his complaint and his testimony at trial and, finally, that the trial court erroneously denied defendant the opportunity to question a witness about the March 1993 incident using transcripts of plaintiff's deposition testimony.

However, in light of and consistent with our conclusion that the trial court properly sanctioned defendant by entering a default on the issue of liability, to which the proffered evidence of character and credibility set forth above pertained, we conclude the trial court did not abuse its discretion in excluding such evidence. *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 188; 600 NW2d 129 (1999).

IV

Defendant lastly argues the jury instructions given by the trial court unfairly prejudiced him because such instructions ignored applicable law and had the effect of improperly directing a verdict as to one count. Without any specific citation to the trial transcript, defendant maintains that although the trial court accurately instructed the jury that damages are presumed with regard to plaintiff's defamation per se claim, see, generally, *Burden v Elias Bros Big Boy Restaurants*, __Mich App __; __ NW2d __ (Docket No. 204788, issued 5/5/00), the court erroneously omitted the fact that there must be some proof of actual damages presented by plaintiff.

Claims of instructional error in a civil trial are reviewed by this Court for an abuse of discretion. *Joerger v Gordon Food Service, Inc*, 224 Mich App 167, 173; 568 NW2d 365 (1997). Jury instructions should be reviewed in their entirety, rather than extracted piecemeal to establish error in certain portions. *Id.* Error requiring reversal will not be found if, on balance, the theories of the parties and the applicable laws were adequately and fairly presented to the jury. *Id.* See also *McPeak v McPeak (On Remand)*, 233 Mich App 483, 494; 593 NW2d 180 (1999).

Our review of the jury instructions, as a whole, clearly belies defendant's claims of instructional error. The trial court properly instructed the jury concerning the requisite burden of proof as to damages and likewise advised jurors that it was their duty to ascertain damages taking into account the nature and extent of plaintiff's injury on the basis of the presented proofs. We therefore find defendant's claim of instructional error to be unmeritorious.

Affirmed.

/s/ Patrick M. Meter

/s/ Roman S. Gibbs

/s/ Richard Allen Griffin