

STATE OF MICHIGAN
COURT OF APPEALS

LINDA F. BILLINGS,

Plaintiff-Appellant,

V

MICHIGAN ABILITY PARTNERS,

Defendant-Appellee.

UNPUBLISHED

July 29, 2010

No. 291889

Washtenaw Circuit Court

LC No. 08-000626-CZ

Before: FORT HOOD, P.J., and BORRELLO and STEPHENS, JJ.

PER CURIAM.

In this disability discrimination cause of action, plaintiff appeals as of right from the trial court's grant of summary disposition in favor of defendant. Plaintiff contends that genuine issues of material fact exist regarding her discrimination claim and her allegation of failure to accommodate. Additionally, plaintiff challenges the trial court's grant of discovery sanctions in favor of defendant. We affirm in part, reverse in part, vacate in part and remand for further proceedings consistent with this opinion.

I. Facts

When she was 13 years old, plaintiff was diagnosed with retinitis pigmentosa, which is an eye disease. For which there is neither a cure nor treatment. The condition hinders plaintiff's ability to see at a distance, to see small print and to see in low-light. The condition also prevents her from driving and causes peripheral loss. Pursuant to a letter provided by her physician, plaintiff's condition has rendered her legally blind. Plaintiff received a bachelor's degree from Eastern Michigan University and received a master's degree in social work from the University of Michigan. During the course of her education, plaintiff utilized assistive devices that helped her to read by enlarging or magnifying font.

On October 19, 2005, plaintiff applied for the referral coordinator position with defendant. Defendant is a non-profit corporation in Ann Arbor. Among the programs offered by Defendant is the Washtenaw Intergenerational Housing Support (WISH) program, which provides housing assistance to individuals who are homeless or at risk of homelessness. Plaintiff was interviewed by Rebecca Lee and began working for defendant on October 31, 2005. Within a month of working with defendant, plaintiff's job title changed from intake worker/referral coordinator to intake worker/community integration coordinator. It appears that with the change in title came increased responsibilities. Plaintiff's position required her to interview potential

WISH participants to determine whether they were qualified for the program. Plaintiff would gather information about those clients, use the information to complete intake forms and then present her findings to defendant's clinical staff at their weekly meetings.

While the parties agree as to the plaintiff's job title and the nature of her responsibilities, they disagree on most other aspects of plaintiff's employment experience. Their first factual disagreement concerns the assistive devices plaintiff required to perform her job duties. Plaintiff contends the devices were provided by the Michigan Commission for the Blind and that defendant did not assist her other than by paying the shipping and handling costs of the devices. Defendant, however, contends that the program assisted plaintiff in securing the devices. The parties do agree that plaintiff made an oral request for a rolling cart so that she could transport the monitor that she used to magnify the font on written materials from her office to places where she was required to make presentations. They, also agree that the cart was never provided.

A major point of contention between the parties concerns the quality of plaintiff's job performance. Plaintiff has presented evidence through the affidavits and depositions of co-worker Julie Merriman and herself, to demonstrate that she was a productive employee who completed her work in a timely manner, maintained positive relationships with others and who effectively presented her findings to defendant's other employees. In contrast, the affidavit of Susan Hornfield, defendant's CEO, averred that plaintiff was not a productive employee and that other employees were assigned to her to help her complete her work. Ms. Hornfield stated that plaintiff was often aggressive towards others and that her presentations were deficient. Defendant also supported its allegations by producing extensive supervisory notes, which were written by Lee.

One particular job performance issue concerns the program's annual fundraiser, known as "Dreams by Design." According to Hornfield, the employees were notified months in advance of the event that was scheduled for April 21, 2006 and that attendance of the event was mandatory. Plaintiff testified that she was told neither the date nor the mandatory attendance requirement until shortly before the event. On April 18, 2006, plaintiff told Lee that she could not attend the event because she had purchased a plane ticket to fly to an event for her sorority. Plaintiff was told that she needed to provide defendant with a copy of her ticket to prove the date of purchase. Subsequently, plaintiff informed defendant that she would not be going on the trip and that she would attend Dreams by Design. However, on the day of the fundraiser, plaintiff called Lee and left a voicemail stating that she was ill and that she could not attend. In response, Hornfield called plaintiff and left a voicemail stating that plaintiff needed to produce a doctor's note verifying that she was ill in order to be excused from the event. However, plaintiff never produced any such note. Plaintiff told Hornfield that she went to the emergency room but left prior to seeing a physician because of the long wait time. She stated that she was not given any paperwork.

Following her absence from the Dreams by Design event, plaintiff had a meeting with Hornfield and Lee, at which she was presented with a remediation plan. The plan stated that plaintiff would attend all mandatory events, complete all intake forms and request any accommodations that would assist her in completing her tasks. The plan further provides that plaintiff must discuss any planned absences with Lee, must provide documentation for any

missed mandatory event and must meet with Lee on a weekly basis to discuss her performance and behavior. Plaintiff, Hornfield and Lee each signed the remediation plan.

According to Hornfield, plaintiff's performance did not improve after she signed the remediation plan. Hornfield asserts that plaintiff remained unproductive, began to have attendance problems and was searching for other employment during business hours. Lee asked plaintiff to complete a time study that would allow plaintiff to discover methods to increase her productivity. The parties disagree regarding whether plaintiff completed that study.

Thereafter, on August 24, 2006, plaintiff was terminated during a meeting with Lee and Hornfield. At the meeting, plaintiff was told that she was being terminated because of poor performance. Plaintiff has testified that when she disagreed regarding her performance, she was told that she was being terminated because the nature of her position was changing and would require driving. Merriman also testified that defendant's employees were told that plaintiff was terminated due to her inability to drive, which had become a job duty. Plaintiff was replaced a couple of months later by Jennifer Shaedig, who was working in a different department at MAP. The record demonstrates that Schaedig was not required to drive in order to complete her responsibilities.

Plaintiff filed her complaint on June 23, 2008 and sought redress pursuant to the Persons with Disabilities Civil Rights Act ("PWDCRA"), MCL 37.1101, et seq. Plaintiff alleged that she adequately performed the tasks required of her position and that her disability did not interfere with her performance. She further alleged that defendant failed to provide her with her requested accommodations and that defendant's termination of her constituted discrimination that was motivated by her disability. Plaintiff sought economic and non-economic damages.

A significant discovery problem in this case arose regarding the testimony of Dr. David N. Zacks. During the discovery period, defendant filed two sets of interrogatories. Plaintiff filed her responses to defendant's first set of interrogatories on September 22, 2008. In response to interrogatories concerning expert testimony, plaintiff responded that she had retained Dr. Zacks as an expert witness and that Zacks was of the opinion that plaintiff's condition qualified as a disability under the law and that he would further explain the way in which the condition limited her activities in the context of her employment at MAP. Upon receiving plaintiff's responses to its interrogatories, MAP deposed Dr. Zacks. At his deposition, Zacks stated that he had not been retained by plaintiff. He stated that he had not discussed the matter with plaintiff or her attorney. He testified that he did not have any plans to testify on plaintiff's behalf regarding her abilities to perform her tasks at MAP and denied forming any opinion regarding her ability to perform those tasks.

Defendant filed its motion for summary disposition pursuant to MCR 2.116(C)(10) on March 2, 2009. Defendant argued that summary disposition was proper for both the disability discrimination claim and the failure to accommodate claim. Regarding the disability discrimination claim, defendant asserted that plaintiff failed to establish a prima facie case because she could not show that she actually suffered from a disability pursuant to the PWDCRA and because she could not demonstrate that she was qualified for her position. Defendant further asserted that even if a prima facie case existed, plaintiff's cause of action failed because she could not demonstrate that her termination was the result of discriminatory animus. Regarding the failure to accommodate claim, defendant asserted that plaintiff was not entitled to relief

because such a claim could only succeed where the accommodation request in question was made in writing.

Defendant filed its motion for discovery sanctions on March 18, 2009. Defendant asserted that plaintiff provided false and misleading responses to defendant's interrogatories. As a result of those misleading responses, defendant incurred costs by needlessly deposing Dr. Zacks. Defendant requested sanctions amounting to \$2,000. Half of that sum was to go to Dr. Zacks, who charged \$1,000 to be deposed. The other half was to cover defendant's costs and attorney fees.

The trial court held a hearing on the motion for summary disposition and the motion for discovery sanction on April 2, 2009. At the hearing, the parties essentially restated the arguments from their briefs. Of note, plaintiff began by discussing the failure to accommodate claim. Plaintiff's counsel acknowledged that he had no authority in support of his argument that defendant should be estopped from demanding that the accommodation request come in writing. The parties also argued regarding the consequence of plaintiff previously collecting Social Security Disability Insurance (SSDI) benefits. However neither the trial court's opinion, nor ours, requires an analysis of that issue.

At the close of the parties arguments regarding the summary disposition motion, the trial court issued its ruling. The court stated that the record established that plaintiff was legally blind. Nonetheless, the court stated that the legal blindness did not constitute a disability under the statutory scheme because it did not substantially limit one or more major life activities. The court stated that it was "beyond the purview" of the court to address the significance of plaintiff's SSDI benefits. However, the court concluded that the second element of the disability discrimination claim had not been established, which indicates that the court believed plaintiff's legal blindness was related to her ability to perform her job duties. The court also found that plaintiff failed to provide any evidence of discriminatory animus or pretext. As a result, the trial court granted summary disposition regarding the disability discrimination claim. Likewise, the court denied the failure to accommodate claim due to the lack of a written request. Regarding the motion for discovery sanctions, the court stated that it would take the matter under advisement. The trial court ultimately granted the motion for discovery sanctions in an order filed on April 6, 2009. The court awarded defendant discovery sanctions in the amount of \$2,000. Half of that amount was to cover Dr. Zacks' deposition costs and the other half was to cover the attorney's fees incurred in the taking of the deposition and the filing of the motion for discovery sanctions. Plaintiff now appeals as of right.

II. Disability Discrimination

The trial court erred in granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). This Court reviews a trial court's decision regarding summary disposition pursuant to MCR 2.116(C)(10) de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). Summary disposition is proper when, upon examining the affidavits, depositions, pleadings, admissions and other documentary evidence, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Quinto v Cross and Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1997).

“To prove a discrimination claim under the [PWDCRA], the plaintiff must show (1) that [she] is [disabled] as defined in the act, (2) that the [disability] is unrelated to [her] ability to perform [her] job duties, and (3) that [she] has been discriminated against in one of the ways delineated in the statute.” Pursuant to MCL 37.1103(d)(i)(A), a disability is a physical or mental characteristic that “substantially limits 1 or more of the major life activities of that individual and is unrelated to the individual’s ability to perform the duties of a particular job or position.” A plaintiff initially has the burden of demonstrating that she has a disability that qualifies for protection under the PWDCRA. *Peden v City of Detroit*, 470 Mich 195, 205; 680 NW2d 857 (2004). Additionally, the plaintiff must show that she “has been discriminated against in one of the ways set forth in MCL 37.1202.” *Id.*¹ “If the plaintiff presents a prima facie case of purposeful discrimination, the burden then shifts to the defendant to rebut such evidence.” *Id.* If the defendant provides a non-discriminatory explanation for plaintiff’s termination, the burden shifts back to the plaintiff, who must present evidence to demonstrate that defendant’s alleged non-discriminatory purpose was mere pretext and that the decision was actually motivated by discriminatory animus. *Hazle v Ford Motor Co*, 464 Mich 456, 465-466; 628 NW2d 515 (2001). The trial court essentially found that plaintiff could not establish any of the elements of a disability discrimination cause of action. This Court will address each element in turn.

Regarding the first element of plaintiff’s discrimination claim, the trial court concluded that plaintiff failed to establish that she suffered from a disability. The evidence in the record supports the notion that plaintiff’s eye disease has rendered her legally blind, is untreatable and will continue to worsen. Defendant does not contest that plaintiff is legally blind and the trial court concluded that plaintiff was legally blind. However, the court agreed with defendant’s argument that plaintiff’s testimony established that driving was the only major life activity that was substantially affected by her sight status. Defendant failed to acknowledge that portion of her deposition where plaintiff testified that driving was the “main” major life activity that was affected by her condition. The record is replete with evidence that plaintiff needed assistive devices to read and otherwise function in educational, work and other life settings. The ability to read and communicate in writing are certainly major life activities in this society. Additionally, there is no binding precedent provide that driving is not a major life activity. Furthermore, defendant presents this Court with no authority for the proposition that a party’s perception of how her life has been affected controls the legal issue of whether she is disabled. Legal blindness substantially impacts many aspects of an individual’s life.

The second element of a discrimination claim requires the plaintiff to establish that her disability was unrelated to the duties required of her position. The trial court stated that plaintiff did not establish this element. A review of the motion hearing reveals little regarding the trial court’s reasoning in relation to this element.² However, all of the evidence indicates that, with

¹ Of relevance to the present case, MCL 37.1202(b) provides that an employer may not discharge an employee because of a disability that is unrelated to that employee’s ability to perform the duties of her position.

² On appeal, plaintiff implies that the trial court concluded that she could not establish the second element of her claim as a consequence of previously collecting Social Security Disability
(continued...)

the assistance of devices that she was provided, plaintiff had the physical ability to complete each of her tasks. We note that there is a material question of fact regarding whether driving was one of her job duties. As a result, we conclude that there was adequate evidence that plaintiff established the second element of a discrimination claim. Furthermore, we are not persuaded by defendant's argument that plaintiff was not qualified to perform her position. "An employee is qualified if [she] was performing [her] job at a level that met the employer's legitimate expectations." *Town v Michigan Bell Telephone Co*, 455 Mich 688, 699; 568 NW2d 64 (1997). Defendant argues that the evidence in the record establishes that plaintiff was not qualified for her position because she was not performing to defendant's expectations. As will be discussed in relation to discriminatory animus, the trial court appears to have agreed that plaintiff's performance was deficient. However, such a determination could only be made after making a credibility determination, which is a task reserved for a finder of fact. Defendant presented testimony and records that indicated that plaintiff's performance was unsatisfactory. In response, plaintiff presented her testimony and Merriman's testimony, which indicated that plaintiff performed reasonably well, was effective in her presentations and was not falling behind in completing her work. While a jury might ultimately determine that plaintiff's performance was deficient and that she was not qualified for the position, there certainly remains a genuine issue of material fact regarding that subject where the evidence is conflicting.

Because plaintiff established that she suffered from a disability, that her disability was unrelated to her ability to perform her job duties, and that she was terminated from her position, she has established a prima facie case for disability discrimination. As stated in *Peden*, the burden consequently shifted to defendant to rebut plaintiff's evidence by demonstrating that there was a non-discriminatory reason for her termination. To do so, defendant presented evidence to establish that plaintiff's performance was poor. Specifically, Hornfield's affidavit described plaintiff as an employee who was frequently absent and, when present, was unproductive and hostile towards co-workers. Plaintiff was presented with a remediation plan, which indicates that her performance was not satisfactory in defendant's view. Furthermore, defendant presented a significant number of pages of supervisory notes, which detail plaintiff's deficiencies as an employee.

Once defendant presented non-discriminatory reasons for plaintiff's termination, the burden shifted back to plaintiff to demonstrate that the stated reasons were pretext and that the motivation for the termination was discriminatory in nature. The trial court concluded that defendant successfully demonstrated that plaintiff failed to present evidence of discriminatory animus. We disagree.

Plaintiff attempted to create an inference of discrimination by asserting that similarly situated, non-disabled employees were treated differently than her. It is well established that such evidence can create an inference of discriminatory animus. *Wilcoxon v Minn Mining & Mfg Co*, 235 Mich App 347, 361; 597 NW2d 250 (1999). As discussed above, there is evidence that Hornfield told plaintiff and her co-workers that plaintiff was being terminated because her position would require driving in the future. Plaintiff was unable to drive due to her disability.

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Insurance. Upon reviewing the record, it is clear that the trial court made no such conclusion and that it properly concluded that any such question was outside of the purview of this litigation.

Shaedig, plaintiff's replacement, had no such disability. The record further demonstrates that Shaedig was not required to drive after she replaced plaintiff. We conclude that the evidence could create an inference that plaintiff's termination was motivated by discriminatory animus. Defendant falsely told plaintiff and her co-workers that plaintiff was essentially no longer capable of completing her job duties due to her disability. Then, defendant replaced plaintiff with a similarly situated, non-disabled employee. When viewing the evidence in the light most favorable to plaintiff, we must accept that plaintiff was adequately performing her duties. Consequently, it could be inferred that defendant utilized plaintiff's disability as an excuse to terminate her and replace her with another individual who was no more effective in the position. If a fact-finder reached such a conclusion, it would also be permitted to conclude that defendant's decision was motivated by a discriminatory animus. Consequently, summary disposition was improper.³

III. Failure to Accommodate

Plaintiff next asserts that the trial court improperly granted defendant's motion for summary disposition regarding plaintiff's claim for failure to accommodate. We disagree.

Pursuant to the PWDCRA:

[a] person with a disability may allege a violation against a person regarding a failure to accommodate under this article *only if the person with a disability notifies the person in writing* of the need for accommodation within 182 days after the date the person with a disability knew or reasonably should have known that an accommodation was needed. [MCL 37.1210(18) (emphasis added).]

Furthermore, MCL 37.1210(19) requires an employer to notify its employees of the requirement that an accommodation be requested in writing. In the present case, it is undisputed that defendant's employee handbook notified its employees of the requirements of MCL 37.1210(18) and that plaintiff signed a copy of that handbook. This Court has previously granted summary disposition to an employer in a suit arising out of a failure to accommodate on the basis that the accommodation in question was not requested in writing. See *Petzold v Borman's, Inc*, 241 Mich App 707, 716; 617 NW2d 394 (2000).

Plaintiff does not refute that, pursuant to the statutory scheme, an accommodation request must be made in writing. Rather, as she did before the trial court, plaintiff argues on appeal that promissory estoppel applies to the failure to accommodate claim and that defendant should be estopped from arguing that the request had to be in writing. As has been previously explained:

³ Because we conclude that summary disposition was improper, we need not determine whether the trial court was permitted to grant defendant's motion before the completion of the discovery process. However, we note that the evidence the discovery order pertained to is certainly relevant, as the content of the alleged forged letter could speak to plaintiff's credibility and mind-set relating to the Dreams by Design event.

The elements of promissory estoppel are (1) a promise, (2) that the promisor should reasonably have expected to induce action of a definite and substantial character on the part of the promisee, and (3) that in fact produced reliance or forbearance of that nature in circumstances such that the promise must be enforced if injustice is to be avoided. [Novak v Nationwide Mut Ins Co, 235 Mich App 675, 686-687; 599 NW2d 546 (1999).]

Plaintiff presents this Court with no authority for the proposition that promissory estoppel applies in this context. Rather, plaintiff offers the general proposition that because the PWDCRA is a remedial act, it should be liberally applied to the benefit of alleged victims of discrimination. We conclude that is unnecessary to determine whether promissory estoppel generally applies to claims for failure to accommodate because plaintiff has failed to demonstrate that the doctrine would be proper in the present case. As stated above, plaintiff signed an employee handbook that explicitly provided that any request for accommodation must be made in writing. As a result, plaintiff cannot establish that defendant reasonably expected plaintiff to believe that an oral request was satisfactory. Consequently, plaintiff is not entitled to relief.

IV. Discovery Sanctions

Finally, plaintiff argues that the trial court improperly granted defendant's motion for discovery sanctions. We conclude that the trial court's grant of the motion was proper. However, the trial court failed to properly determine the amount of appropriate attorney fees. As a result, the court must make such an inquiry on remand.

This Court reviews a trial court's decision to award discovery sanctions for an abuse of discretion. *Local Area Watch v Grand Rapids*, 262 Mich App 136, 147; 683 NW2d 745 (2004). "An abuse of discretion occurs when the decision results in an outcome falling outside the principled range of outcomes." *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006). Furthermore, the trial court's grant of discovery sanctions was premised on the conclusion that plaintiff violated the requirements of MCR 2.114(D) and MCR 2.302(G). This Court reviews a trial court's decision regarding a violation of those court rules for clear error. *Jackson Co Hog Producers v Consumers Power Co*, 234 Mich App 72, 91; 592 NW2d 112 (1999).

Pursuant to MCR 2.114(D), a party who signs a document is certifying that she has read the document, that the document is well-grounded in fact and that it is not meant for any improper purpose. If a party violates MCR 2.114(D), MCR 2.114(E) permits a court to impose sanctions, "which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the document, including reasonable attorney fees." Likewise, MCR 2.302(G) provides that a party that signs a discovery document, she attests that the document is consistent with the rules of discovery and that she is subject to sanctions for a violation of those rules.

As described above, the trial court's grant of discovery sanctions was a consequence of the court determining that plaintiff's responses to defendant's interrogatories were false and misleading. Defendant's interrogatory no. 2 asked whether plaintiff she "intend[ed] to retain the service of any expert witness." Plaintiff responded that she "has obtained" the services of Dr. Zacks. Then, in interrogatory no. 3, defendant asked what any retained expert witnesses were "expected to testify." Plaintiff responded that Dr. Zacks was of the opinion that plaintiff suffers

from a legal disability and that he would explain what plaintiff could and could not do in the work setting. When defendant subsequently deposed Dr. Zacks, he revealed that he had not been retained as an expert and that he had not formed an opinion regarding the case.

This Court agrees with the trial court's conclusion that plaintiff's responses to the interrogatories constitute a violation of the requirements of MCR 2.114(D) and 2.302(G). As plaintiff argues on appeal, defendant's interrogatories asked whether plaintiff had a future intention of retaining a particular expert and, if so, what the testimony of that expert was expected to be. Plaintiff's response, however, indicated that Dr. Zacks "had" been retained (as opposed to "will be retained"). Furthermore, rather than state that Dr. Zacks was expected to testify in a certain manner, plaintiff's response implied that the content of Dr. Zacks's testimony was certain. As a result, defendant needlessly deposed Dr. Zacks at a time when he had yet to form any opinion regarding the case.

The trial court's conclusion regarding the violation of the court rules was not clearly erroneous. Rather, the court's ruling was consistent with binding precedent. In *Jackson Co Hog Producers*, 234 Mich App at 92, the law firm of Fieger, Fieger, & Schwartz signed interrogatories that misleadingly implied that a particular expert had been retained and that the content of his testimony was known. This Court held that the responses violated MCR 2.114(D) and 2.302(G) because "the answers would lead a reasonable person to wrongly conclude that the experts had already formed the opinions referenced in the answers and that the experts would definitively give trial testimony that conformed to the interrogatory answers." *Id.* The Court reasoned that "there is a difference between the answers given in this case and an answer that candidly acknowledges that the experts have not yet been retained, consulted, or questioned, but, if all goes as expected, will testify in a certain manner." *Id.* at 93. Based on the same reasoning, we affirm the lower court's conclusion.

Although we conclude that it was proper to award defendant discovery sanctions, we further conclude that the trial court did not sufficiently explain the basis for the amount of the sanctions. It is undisputed that Dr. Zacks charged defendant \$1,000 for his services. Consequently, that portion of the trial court's order is affirmed. However, the trial court also granted defendant \$1,000 in costs and attorney fees. Pursuant to MCR 2.114(E), defendant was entitled to reasonable attorney fees. This Court has previously explained, in the context of MCR 2.114, that a number of factors are relevant in determining whether an attorney's fee is reasonable. *BJ's & Sons Constr Co v Van Sickle*, 266 Mich App 400, 410; 700 NW2d 432 (2005). Among the facts to be considered are the skill and labor involved and the professional standing and experience of the attorney. *Id.* In the present case, this Court cannot find any evidence that the trial court conducted a meaningful analysis before awarding \$1,000 in attorney's fees. Rather, the trial court merely approved the full amount requested in the motion for discovery sanctions. That motion did not provide any explanation for the request. Consequently, the trial court's order is vacated and we remand this matter and instruct the trial court to conduct a thorough consideration of the relevant factors before issuing its award of attorney's fees.

V. Conclusion

The trial court erred in granting defendant's motion for summary disposition regarding plaintiff's claim for disability discrimination where plaintiff presented evidence to demonstrate

that defendant's stated reason for terminating plaintiff was mere pretext. However, the trial court properly granted the motion for summary disposition regarding the failure to accommodate claim because the request for accommodation was not made in writing and the doctrine of promissory estoppel is inapplicable in this instance. Finally, the trial court properly granted defendant's motion for discovery sanctions. However, the portion of the award relating to attorney's fees is vacated and the trial court is instructed to fully consider the relevant factors in crafting its award.

Affirmed in part, reversed in part, vacated in part and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Karen M. Fort Hood

/s/ Stephen L. Borrello

/s/ Cynthia Diane Stephens