

STATE OF MICHIGAN
COURT OF APPEALS

LAWTON & CATES, S.C.,

Plaintiff/Counter-Defendant-
Appellee,

v

INTERNATIONAL BROTHERHOOD OF
TEAMSTERS LOCAL UNION 299,

Defendant/Counter-Plaintiff-
Appellant.

UNPUBLISHED
September 21, 2010

No. 290479
Wayne Circuit Court
LC No. 06-633728-CK

Before: SHAPIRO, P.J., and SAAD and SERVITTO, JJ.

PER CURIAM.

In this action for breach of a contract to pay for legal services, a jury awarded plaintiff a judgment of \$45,632.42. Defendant appeals and, for the reasons set forth below, we affirm.

I. FACTS AND PROCEEDINGS

Defendant, a local Teamsters union, retained plaintiff, a Wisconsin law firm, to provide legal representation in connection with various federal labor law matters. From 1999 until 2004, the parties operated under an oral fee agreement that was negotiated between Kurt Kobelt, an attorney with plaintiff's firm, and Donald Smith, who was defendant's president at the time. According to both Kobelt and Smith, the fee agreement required defendant to pay plaintiff a flat fee of \$5,000 a month, which was based on the parties' estimate that plaintiff would provide approximately 50 hours of legal services each month, at a rate of \$100 an hour. Defendant's international union later conducted an investigation to determine whether defendant was paying too much for legal services. A dispute arose concerning the terms of the parties' oral fee agreement, including whether that agreement entitled defendant to a monthly fee adjustment or a monthly credit if plaintiff did not actually perform 50 hours of legal work in a given month.

After an audit, the international union concluded that defendant had overpaid plaintiff for legal services and instructed defendant to seek a credit or withhold future monthly payments until the amount of the alleged overpayment was satisfied. Plaintiff denied that it was overpaid and instead claimed that defendant actually owed an outstanding balance for legal services because it had allowed defendant to delay making the full monthly payment of \$5,000 during some months of financial distress. Plaintiff then filed this action for breach of the parties'

contract to pay for legal services, and defendant filed a counter-complaint in which it sought reimbursement for the amount of its alleged overpayment. The case proceeded to trial and the jury returned a verdict in favor of plaintiff.

II. ANALYSIS

Defendant claims that the trial court erred when it granted plaintiff's motion in limine to bar the testimony of defendant's expert witness, Donald Campbell, as a discovery sanction for defendant's failure to disclose Campbell's anticipated testimony before trial.

"This Court reviews for an abuse of discretion a trial court's decision with regard to whether to impose discovery sanctions." *Linsell v Applied Handling, Inc*, 266 Mich App 1, 21; 697 NW2d 913 (2005). As explained in *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006):

"[A]n abuse of discretion standard acknowledges that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome." . . . "[W]hen the trial court selects one of these principled outcomes, the trial court has not abused its discretion and, thus, it is proper for the reviewing court to defer to the trial court's judgment." [Citations omitted.]

MCR 2.302(B)(4)(a)(i) provides:

A party may through interrogatories require another party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter about which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

In addition, MCR 2.302(E)(1)(a)(ii) provides that a party has a duty to supplement a response to a discovery request regarding "the identity of each person expected to be called as an expert witness at trial, the subject matter on which the expert is expected to testify, and the substance of the expert's testimony."

Here, plaintiff served defendant with interrogatories that asked defendant to identify any expert witness it intended to call at trial, and to describe the substance of the expert's anticipated testimony, including the substance of any facts or opinions to which the expert was expected to testify. Defendant's responses identified Donald Campbell as an expert who would testify on the subject of "fee agreements, engagement versus retainer fees, etc." Defendant also stated that Campbell had "not finished" his review and analysis, but that he would testify regarding "all facts in Plaintiff's correspondence" and facts in the correspondence of local union officers, and that he would rely on "Rules of professional conduct governing attorneys" as the basis for his opinions. Defendant did not supplement its responses before trial.

The trial court ruled that the court rules permitted plaintiff to inquire about the identity of defendant's expert and the substance of any opinions or testimony its expert intended to offer at trial. The court further ruled that, although defendant identified Donald Campbell as an expert

witness on fee agreements, nothing in defendant's interrogatory answers provided plaintiff with notice of the substance of his testimony, including any facts or opinions to which he was expected to testify. The court ruled that Campbell could not testify because defendant never provided plaintiff with notice of Campbell's expected testimony, and plaintiff was therefore unable to prepare to address any testimony Campbell might give.

We reject defendant's argument that it had no duty to supplement because Campbell failed to render an opinion before trial, orally or in writing. Regardless of whether Campbell previously offered any opinion or provided a report, MCR 2.302(B)(4)(a)(i) permitted plaintiff to inquire about the substance of any facts or opinions to which Campbell was "*expected to testify.*" If, as defendant contends, Campbell had not previously identified any facts or opinions to defendant, defendant nonetheless had an obligation to identify for plaintiff any facts or opinions to which defendant *expected* Campbell to testify. Defendant cannot properly identify a person as an expert witness and then profess ignorance of that expert's expected testimony.

Further, defendant's vague and generalized responses to plaintiff's inquiries did nothing to state any actual facts or to assist plaintiff in understanding the substance of any facts to which Campbell was expected to testify. When defendant was asked to state the substance of any facts to which Campbell was expected to testify, it responded, "[A]ll facts in Plaintiff's correspondence and correspondence of Local Union's Officer's." In addition, when plaintiff asked defendant to state the grounds for each opinion by Campbell, it responded, "Rules of professional conduct governing attorneys." Defendant did not identify any particular correspondence, or any particular facts in any correspondence to which Campbell was expected to testify. Defendant also did not identify any particular rule in the Rules of Professional Conduct to which Campbell was expected to offer testimony. This was plainly insufficient.

Defendant maintains that plaintiff could have taken Campbell's deposition to discover his anticipated testimony. The availability of that discovery option does not excuse defendant from complying with its obligation to provide appropriate responses to plaintiff's interrogatories under MCR 2.302(B)(4)(a)(i), or with its duty to supplement responses under MCR 2.302(E).

Defendant contends that Campbell's testimony was admissible under MRE 705, which provides:

The expert may testify in terms of opinion or inference and give reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

This rule addresses the admissibility of evidence underlying an expert's opinion. See *People v Pickens*, 446 Mich 298, 334-335; 521 NW2d 797 (1994). Here, the trial court did not rule that Campbell's testimony was inadmissible under MRE 705, but rather excluded the testimony as a discovery sanction. Thus, defendant's reliance on MRE 705 is misplaced.

We also disagree with defendant's argument that the court's sanction of precluding Campbell's testimony was improper. The failure to supplement answers to interrogatories regarding expert testimony may result in sanctions even if the trial court did not order a party to respond to the interrogatories. *LaCourse v Gupta*, 181 Mich App 293, 296; 448 NW2d 827

(1989). The preclusion of expert testimony is a permissible sanction. *Id.* at 297; MCR 2.313(B)(2)(b). In *Colovos v Dep't of Transp*, 205 Mich App 524, 528; 517 NW2d 803 (1994), *aff'd* 450 Mich 861 (1995), this Court stated:

Before imposing a sanction, such as barring a witness, several factors should be considered, including whether the violation was wilful or accidental; the party's history of refusing to comply with discovery requests or disclosure of witnesses; the prejudice to the party; the actual notice to the opposite party of the witness; and the attempt to make a timely cure.

Here, defendant's discovery violation cannot be considered accidental. Although the record does not disclose a history of other discovery violations, plaintiff was prejudiced because defendant's vague and generalized responses did little to reveal the subject matter of Campbell's expected testimony, its responses did nothing to provide notice of the substance of any facts and opinions to which Campbell was expected to testify, and defendant never cured its inadequate responses.¹ Thus, plaintiff was unable to prepare to address any testimony Campbell might offer. See *Bass v Combs*, 238 Mich App 16, 34; 604 NW2d 727 (1999), overruled in part on other grounds in *Dimmitt & Owens Fin, Inc v Deloitte & Touche (ISC), LLC*, 481 Mich 618, 627-628; 752 NW2d 37 (2008), and *Beach v State Farm Mut Auto Ins Co*, 216 Mich App 612, 618-620; 550 NW2d 580 (1996). Further, the trial court's sanction was limited to the witness whose testimony was affected by the discovery violation. Under the circumstances, the trial court did not abuse its discretion by precluding defendant from calling Campbell as an expert witness at trial.

Affirmed.

/s/ Henry William Saad
/s/ Deborah A. Servitto

¹ Moreover, at oral argument on appeal, counsel for defendant acknowledged that he knew plaintiff wanted defendant to supplement the answers and he acknowledged that he knew that plaintiff intended to file a motion in limine and he failed to file supplemental answers in response to plaintiff's motion in limine.