

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA01-1243

NORTH CAROLINA COURT OF APPEALS

Filed: 20 August 2002

LINDA AYERS,
Plaintiff-appellant,

v.

Guilford County
No. 00 CVS 7144

AMIE BETH PATZ,
JENNIFER DIANE HEATHCOCK, and
KATHY CAMPBELL HEATHCOCK,
Defendants-appellees.

Appeal by plaintiff from judgment entered 15 May 2001 by Judge Catherine C. Eagles in Guilford County Superior Court. Heard in the Court of Appeals 5 June 2002.

Douglas S. Harris, for plaintiff-appellant.

Adams, Kleemeier, Hagan, Hannah & Fouts, PLLC, by James W. Bryan and Thomas G. Hooper, for defendant-appellant Amie Beth Patz.

BRYANT, Judge.

Plaintiff appeals from an order imposing discovery sanctions against her for failure to appear at her deposition.

On 1 September 1998, plaintiff was injured when her car was involved in a two-car collision caused by the actions of the driver of a third car. The car that collided with plaintiff was driven by defendant Amie Patz. The car that caused the collision was allegedly owned by defendant Kathy Heathcock and operated by defendant Jennifer Heathcock. After the complaint and answer were

filed, plaintiff notified defendants Patz and Jennifer Heathcock that they would be deposed on 25 January 2001. Patz and Heathcock were deposed as scheduled. On 6 March 2001, plaintiff was notified that she would be deposed by defendant Patz on 19 March 2001. Three days before the deposition, plaintiff notified her attorney that she would not appear at the deposition and that her attorney was discharged. Plaintiff did not appear at her deposition, which was attended by plaintiff's discharged attorney, Patz's attorney and the court reporter. Plaintiff's discharged attorney made a motion to withdraw on 22 March 2001.

On 20 April 2001, Patz motioned for Rule 37 discovery sanctions. On 4 May 2001, plaintiff, representing herself, took a voluntary dismissal without prejudice. On 15 May 2001, the trial court awarded Patz sanctions in the amount of \$662.35. This award included attorney's fees resulting from plaintiff's failure to appear at her deposition. Plaintiff appealed.

Plaintiff argues that the trial court: 1) erred in granting Rule 37 discovery sanctions in favor of defendant after plaintiff took a voluntary dismissal; and 2) abused its discretion in granting sanctions. We disagree and affirm the order of the trial court awarding Rule 37 discovery sanctions.

I.

Plaintiff first argues that the trial court erred in imposing discovery sanctions because the court lost jurisdiction when plaintiff took a voluntary dismissal. We disagree. Patz motioned

for discovery sanctions on 20 April 2001 after plaintiff failed to appear at deposition. Plaintiff took a voluntary dismissal two weeks later. The trial court ruled on Patz's motion on 15 May 2001. Patz's motion for sanctions was properly before the trial court before plaintiff sought to dismiss her claim. Plaintiff cannot avoid sanctions by dismissing her claim after a motion for sanctions is before the court.

This Court has previously discussed the effect of a voluntary dismissal on the trial court's ability to rule on collateral matters such as sanctions. In *Renner v. Hawk*, 125 N.C. App. 483, 489, 481 S.E.2d 370, 373 (1997), this Court stated:

Under N.C. Gen. Stat. § 1A-1, Rule 41(a)(1) (1990) a plaintiff may take a voluntary dismissal of his case without prejudice by filing a notice of dismissal at any time before resting his case. The effect of such a voluntary dismissal is to terminate the action, and no suit is pending thereafter on which the court can enter a valid order. In *Bryson v. Sullivan*, 330 N.C. 644, 653, 412 S.E.2d 327, 331 (1992), the North Carolina Supreme Court clearly established, however, that a voluntary dismissal pursuant to Rule 41(a) "does not deprive the court of jurisdiction to consider collateral issues such as sanctions that require consideration after the action has been terminated."

(citations omitted). Plaintiff's voluntary dismissal notwithstanding, the trial court retained jurisdiction to rule on the issue of sanctions. Accordingly, this assignment of error is without merit.

II.

Plaintiff next argues that the trial court abused its discretion in granting Rule 37 sanctions on the facts of this case. We disagree.

Rule 28(a) of our Rules of Appellate Procedure states, "The function of all briefs required or permitted by these rules is to define clearly the questions presented to the reviewing court and to present the arguments and authorities upon which the parties rely in support of their respective positions thereon. Review is limited to questions so presented in the several briefs." N.C. R. App. P. 28(a). Plaintiff cites to only two authorities in support of her argument that the trial court abused its discretion. Both cases are offered in support of plaintiff's proposition that this Court reviews the trial court's order *de novo*. Our review, therefore, is limited solely to the issue of our standard of review.

Rule 37 of our North Carolina Rules of Civil Procedure states in pertinent part:

If a party . . . fails . . . to appear before the person who is to take his deposition, after being served with a proper notice . . . the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under subdivisions a, b, and c of subsection (b) (2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

N.C.G.S. § 1A-1, Rule 37(d) (2001). Our Supreme Court has held that "[t]he matter of the imposition of sanctions under Rule 37(d) is in the sound discretion of the trial judge and cannot be overturned absent a showing of abuse of that discretion." *Bumgarner v. Reneau*, 332 N.C. 624, 631, 422 S.E.2d 686, 690 (1992) (citing *Segrest v. Gillette*, 96 N.C. App. 435, 442, 386 S.E.2d 88, 92 (1989), *rev'd on other grounds*, 331 N.C. 97, 414 S.E.2d 334 (1992)). Furthermore, this Court has addressed the issue of the appropriate standards of review for Rule 37 and Rule 11 sanctions.

An award of sanctions for a discovery violation under Rule 37 "will not be overturned on appeal absent an abuse of discretion[.]" Rule 11 sanctions are slightly different in that imposition of sanctions is reviewable *de novo*, but the choice of sanction is reviewable under an abuse of discretion standard.

Crutchfield v. Crutchfield, 132 N.C. App. 193, 195, 511 S.E.2d 31, 33 (1999) (citations omitted). It is clear that the proper standard of review for the award of sanctions under Rule 37 is abuse of discretion, not *de novo*. Because plaintiff argued this assignment of error only to the extent of the proper standard of review, and failed to offer any other authority in support of her argument that the trial court erred in awarding sanctions, we overrule this assignment of error.

AFFIRMED.

Judges WALKER and McCULLOUGH concur.

Report per Rule 30(e).