NO. COA09-1271

NORTH CAROLINA COURT OF APPEALS

Filed: 7 December 2010

HOPE COLEMAN BROWN,
Plaintiff,

v. Lenoir County
No. 08 CVS 10

TELAS RAY STATEN, BAPTIST CHILDREN'S HOME OF NC, INC.,
Defendants.

Appeal by plaintiff from orders entered 14 July 2009 and 11 August 2009 by Judge Paul L. Jones in Lenoir County Superior Court. Heard in the Court of Appeals 23 February 2010.

Hope Coleman Brown, pro se, plaintiff-appellant.

Walker, Allen, Grice, Ammons & Foy, L.L.P., by Ron D. Medlin, Jr., for defendants-appellees.

GEER, Judge.

Plaintiff Hope Coleman Brown appeals from the dismissal of her negligence complaint filed against defendants Telas Ray Staten and Baptist Children's Home of N.C., Inc. for injuries arising out of a car accident. On appeal, plaintiff contends the trial court erred in granting defendants' motion to compel production of her medical records, asserting the records are protected by the physician-patient privilege. Plaintiff, however, by alleging that she was injured in the car accident, placed her medical condition at issue and consequently waived her physician-patient privilege.

The trial court, therefore, properly granted defendants' motion to compel. Plaintiff also argues the trial court erred in denying her motion to compel production of defendant Staten's medical records. Staten's medical condition was not, however, at issue, and the trial court, therefore, properly denied plaintiff's motion to compel.

Plaintiff also challenges the trial court's imposition of Rule 11 and Rule 37 discovery sanctions. Because the trial court failed to make the findings of fact necessary to support its decision to impose Rule 11 and Rule 37 sanctions, we must remand for further findings of fact.

Facts

On 3 January 2008, plaintiff filed a complaint alleging that on 7 September 2006, Staten, operating an automobile owned by Baptist, negligently rear-ended an automobile operated by plaintiff. After the trial court signed an order dated 16 September 2008 granting the motion of plaintiff's attorney "seeking an Order removing him as the attorney of record" for plaintiff, plaintiff proceeded *pro se*.

Defendants filed their answer on 16 January 2009. On the same date, defendants served plaintiff with their request for production of documents. Defendants sought, among other documents, plaintiff's medical records for injuries arising out of the accident, her medical records for the 10 years immediately preceding the accident, her employment history, and copies of her state and federal income tax records for the three years

immediately preceding the accident. Defendants also served a notice of deposition setting plaintiff's deposition for 20 February 2009.

On 13 February 2009, plaintiff hand-delivered her responses to defendants' request for production of documents. Plaintiff failed to provide defendants with the requested medical records for any injuries related to the accident or any other prior injuries or medical care, contending those records were protected by the physician-patient privilege. On 17 February 2009, defendants' counsel sent plaintiff a letter cancelling her deposition due to plaintiff's failure to provide complete discovery responses.

On 13 March 2009, defendants filed a motion to compel plaintiff to fully and completely answer defendants' requests for production of documents. On 2 April 2009, the trial court entered an order granting the motion to compel. The order specifically required that plaintiff sign releases so that defendants could obtain plaintiff's medical records and employment history.

In the meantime, plaintiff served defendants with her first request for admissions and first set of interrogatories in which she requested, among other things, information about Staten's medical records, tax records, and employment history. Plaintiff subsequently filed a motion to compel discovery of Staten's medical records, tax records, and employment history. In an order entered 12 March 2009, the trial court ordered that plaintiff's motion to compel be dismissed, explaining that "the Motion should be denied due to plaintiff's failure to prosecute the motion[.]"

On 17 March 2009, plaintiff served on defendants subpoenas duces tecum requesting the records that had been the subject of the trial court's 12 March 2009 order dismissing plaintiff's motion to compel for failure to prosecute. Defendants filed a motion for a protective order and motion to quash plaintiff's subpoenas on 30 March 2009. On 7 April 2009, plaintiff filed a second motion to compel, requesting that the trial court compel discovery of those records.

On 8 April 2009, defendants moved for Rule 11 sanctions, contending that the trial court had previously denied plaintiff's motion to compel discovery of the information plaintiff was requesting. Defendants also argued in the motion for sanctions that plaintiff had filed a motion to compel prior to the time discovery was due. On 14 April 2009, plaintiff filed a motion seeking discovery sanctions for defendants' alleged failure to comply with her discovery requests.

On 22 April 2009, the trial court entered an order denying plaintiff's second motion to compel, denying plaintiff's motion for discovery sanctions, granting defendants' motion for Rule 11 sanctions, and granting defendants' motion to quash the subpoenas. Without making any findings of fact, the trial court ordered that plaintiff pay defendants $300.00 as a sanction.

On 28 April 2009, plaintiff filed notice of appeal from the trial court's order granting defendants' motion to compel entered 2 April 2009, stating that the order had been received by plaintiff on 20 April 2009, and from the trial court's order denying

plaintiff's motion to compel discovery and for costs. On 28 May 2009, plaintiff filed a motion for enlargement of time to serve the record on appeal. On 13 July 2009, the trial court denied plaintiff's motion for enlargement of time and dismissed plaintiff's appeal for failure to timely serve the proposed record on appeal.

On 14 July 2009, the trial court entered an order granting defendants' motion for discovery sanctions due to plaintiff's failure to provide discovery as ordered in the 2 April 2009 order. The trial court dismissed plaintiff's complaint with prejudice. On 21 July 2009, plaintiff filed a notice of appeal to this Court "from the final judgment Order of the [sic] Paul L. Jones, Judge Presiding, Superior Court of Lenoir entered by date on July 13th and 14th, 2009, Dismissing Plaintiff's Complaint granting Defendants' Motion for Sanctions, Order denying Plaintiff's Motion for Enlargement of Time and Dismissing Plaintiff's Appeal."

I

As an initial matter, we must address plaintiff's motion to strike defendants' brief. Under Rule 13(a)(1) of the North Carolina Rules of Appellate Procedure, "[w]ithin thirty days after appellant's brief has been served on an appellee, the appellee shall similarly file and serve copies of a brief." Pursuant to Rule 27(a), "[i]n computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not included." "The

last day of the period so computed is to be included, unless it is a Saturday, Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, Sunday, or a legal holiday." *Id.* Rule 27(b) provides that when service is by mail, the other party has three additional days to respond.

As plaintiff's brief was deposited in the mail on 21 November 2009, defendants had 33 days from 21 November 2009 to file their brief. Defendants deposited their brief in the mail on 23 December 2009, within the 33-day period. We, therefore, deny plaintiff's motion to strike defendants' brief as untimely.[1]

II

Turning to the merits, plaintiff first contends the trial court erred in granting defendants' motion to compel her to authorize the release of her medical records, asserting the records are protected by the physician-patient privilege. Under Rule 26(b)(1) of the Rules of Civil Procedure, "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party . . . ." If, however, "the matter of which discovery is sought is privileged, it is not discoverable, even if relevant, 'unless the interests of justice

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[1]Plaintiff also contends the trial court erred in dismissing her first notice of appeal for failure to timely file and serve the proposed record on appeal. That issue is, however, moot, because the record reveals that plaintiff served a second notice of appeal on 21 July 2009 and filed a proposed record on appeal on 11 August 2009.

outweigh the protected privilege.'" *Mims v. Wright*, 157 N.C. App. 339, 342, 578 S.E.2d 606, 609 (2003) (quoting *Shellhorn v. Brad Ragan, Inc.*, 38 N.C. App. 310, 314, 248 S.E.2d 103, 106, *disc. review denied*, 295 N.C. 735, 249 S.E.2d 804 (1978)).

It is well established that "a patient impliedly waives [the physician-patient] privilege when she opens the door to her medical history by bringing an action, counterclaim, or defense that places her medical condition at issue." *Spangler v. Olchowski*, 187 N.C. App. 684, 691, 654 S.E.2d 507, 513 (2007). Plaintiff alleges in her complaint that she "sustained severe, painful and permanent injuries" as a result of defendants' actions. She alleges she "suffered and is continuing to suffer physical pain, mental anguish, emotional distress and anxiety, all of which may continue in the future[.]" She also alleges that she "incurred medical and health care expenses for diagnosis and treatment" and that she "has been disabled from performing and enjoying usual and customary activities[.]" Under *Spangler*, by making these allegations, plaintiff waived the physician-patient privilege.

Plaintiff also argues that the trial court erred in denying her motion to compel the production of Staten's medical records and in quashing her subpoena seeking that information. In *Mims*, 157 N.C. App. at 343, 578 S.E.2d at 609, this Court addressed the ability of a plaintiff to obtain medical records from a defendant in a negligence case. The Court in *Mims* held that if a defendant does not, in his or her answer, place the defendant's medical condition in issue, there is no waiver of the physician-patient

privilege. *Id.* Because, in *Mims*, nothing in the defendant's answer or conduct during discovery opened the door to inquiry into the defendant's medical history, the Court concluded that the trial court erred in ruling that the defendant had waived her physician-patient privilege. *Id.*

The Court pointed out, however, that "[p]rivileged medical information may still be discoverable if 'disclosure is necessary to a proper administration of justice.'" *Id.* (quoting N.C. Gen. Stat. § 8-53 (2001)). The Court concluded, in *Mims*, that "the record [was] devoid of any allegations which might lead to a justifiable conclusion that the interests of justice outweighed the protected privilege." *Id.* at 344, 578 S.E.2d at 609. The Court pointed out that "there [was] nothing in the pleadings that would raise the issue of defendant's medical condition. Plaintiff did not allege that defendant's physical or medical condition contributed to the automobile accident. Defendant also did not counterclaim for any injuries she may have sustained during the accident." *Id.* The Court, therefore, concluded that "the trial court abused its discretion in compelling discovery of defendant's medical records." *Id.*

This case is indistinguishable from *Mims*. Staten did not waive his physician-patient privilege by asserting a counterclaim or any defense that would place his medical condition at issue. Nor does the record contain any allegation by plaintiff that Staten's medical condition in any way contributed to the accident.

The trial court, therefore, properly denied plaintiff's motion to compel and quashed her subpoena.

III

Plaintiff next argues that the trial court erred by granting defendants' motion for Rule 11 sanctions. "Rule 11 permits the court to impose appropriate sanctions, including an order to pay attorney's fees to the opposing party, if a pleading or motion has no basis in law or fact or is interposed for an improper purpose such as harassment or delay." *Overcash v. Blue Cross & Blue Shield of N.C.*, 94 N.C. App. 602, 617, 381 S.E.2d 330, 340 (1989).

In reviewing a trial court's decision to impose Rule 11 sanctions, "the appellate court will determine (1) whether the trial court's conclusions of law support its judgment or determination, (2) whether the trial court's conclusions of law are supported by its findings of fact, and (3) whether the findings of fact are supported by a sufficiency of the evidence." *Turner v. Duke Univ.*, 325 N.C. 152, 165, 381 S.E.2d 706, 714 (1989). The Court reviews the appropriateness of the particular sanction imposed for abuse of discretion. *Id.*

It is well established that "remand is necessary where a trial court fails to enter findings of fact and conclusions of law regarding a motion for sanctions pursuant to Rule 11." *Sholar Bus. Assocs. v. Davis*, 138 N.C. App. 298, 303, 531 S.E.2d 236, 240 (2000). In *Davis v. Wrenn*, 121 N.C. App. 156, 160, 464 S.E.2d 708, 711 (1995), *cert. denied*, 343 N.C. 305, 471 S.E.2d 69 (1996), *overruled on other grounds by Forbis v. Neal*, 361 N.C. 519, 649

S.E.2d 382 (2007), this Court reversed and remanded a Rule 11 sanctions order where the trial court made no findings explaining how the plaintiff's conduct violated Rule 11, why it had arrived at the particular sanction, and why that sanction was appropriate.

In this case, the Rule 11 order stated in its entirety:

> THIS CAUSE being heard by the undersigned judge on motion of [sic] the plaintiff's Second Motion to Compel, and Motion for Sanction and Defendants' Motion to Quash Subpoena and Defendants' Motion for Sanctions;
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> AND IT APPEARING TO THE COURT that plaintiff's Motion to Compel should be denied;
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> AND IT APPEARING TO THE COURT that the plaintiff's Motion for Sanctions should be denied;
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> AND IT APPEARING TO THE COURT that the defendants' Motion to Quash Subpoena should be granted;
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> AND IT APPEARING TO THE COURT that the defendants' Motion for Sanctions should be granted;
>
> IT IS THEREFORE ORDERED, ADJUDGED AND DECREED THAT the plaintiff's Second Motion to Compel Discovery is hereby denied; the plaintiff's Motion for Sanctions is hereby denied; the defendants' Motion to Quash Subpoena is granted; and the defendants' Motion for Sanctions is granted.
>
> THEREFORE, the plaintiff shall pay to the Clerk of Superior Court, within thirty (30) days of the filing of this Order, sanctions in the form of $300.00 made payable to the Clerk of Superior Court for Lenoir County. Thereafter, the Clerk of Superior Court of Lenoir County shall pay to counsel for defendants, the $300.00 payment for sanctions.

Thus, as in *Davis*, the trial court failed to make findings to explain its decision to sanction plaintiff. We must, therefore,

remand to the trial court for further findings of fact regarding (1) how plaintiff's conduct violated Rule 11, (2) how the court arrived at the $300.00 sanction, and (3) why $300.00 is an appropriate sanction.

IV

Plaintiff also argues that the trial court erred in dismissing her complaint for failure to comply with its order compelling her response to defendants' discovery requests. Under Rule 37(b)(2) of the Rules of Civil Procedure, "[i]f a party . . . fails to obey an order to provide or permit discovery . . . a judge of the court in which the action is pending may make such orders in regard to the failure as are just . . . ." Rule 37 authorizes dismissal of a plaintiff's complaint as a sanction for failure to comply with a discovery order.

"Generally, a trial judge has discretion to determine the propriety and select the method of sanctions." *Crutchfield v. Crutchfield*, 132 N.C. App. 193, 195, 511 S.E.2d 31, 33 (1999). "An award of sanctions for a discovery violation under Rule 37 'will not be overturned on appeal absent an abuse of discretion.'" *Id.* (quoting *Graham v. Rogers*, 121 N.C. App. 460, 465, 466 S.E.2d 290, 294 (1996)).

This Court has held, however, that "'[b]efore dismissing a party's claim with prejudice pursuant to Rule 37, the trial court must consider less severe sanctions.'" *In re Pedestrian Walkway Failure*, 173 N.C. App. 237, 251, 618 S.E.2d 819, 828 (2005) (quoting *Global Furn., Inc. v. Proctor*, 165 N.C. App. 229, 233, 598

S.E.2d 232, 235 (2004)), *disc. review denied*, 360 N.C. 290, 628 S.E.2d 382 (2006). "'The trial court is not required to *impose* lesser sanctions, but only to *consider* lesser sanctions.'" *Id.* (quoting *Global Furn., Inc.*, 165 N.C. App. at 233, 598 S.E.2d at 235).

In *Goss v. Battle*, 111 N.C. App. 173, 177, 432 S.E.2d 156, 159 (1993), this Court vacated and remanded an order imposing Rule 37 sanctions for further proceedings because nothing in the hearing transcript or the trial court's order indicated the trial court considered less severe sanctions before dismissing the complaint. This holding, however, did not "affect the trial court's discretionary authority, on remand, to impose the sanction of dismissal with prejudice after properly considering less severe sanctions." *Id.*

As in *Goss*, the trial court's order in this case granting defendants' motion for sanctions does not indicate that it considered lesser sanctions, and we find nothing else in the record to indicate that the trial court did so. The order merely states:

> THIS CAUSE being heard by the undersigned judge on motion of the Defendants' [sic] for an order dismissing the Plaintiff's claims for relief in the above-captioned case as a sanction for the Plaintiff's failure to comply with this Court's previous orders granting the Defendants' Motion to Compel and Motion for Sanctions; and it appearing to the Court that the Plaintiff has failed to comply with the Court's aforementioned orders and that the Defendants' motion should be allowed;
>
> IT IS THEREFORE ORDERED that the Plaintiff's Complaint is hereby dismissed with prejudice.

We must, therefore, vacate the order dismissing plaintiff's complaint with prejudice and remand for findings of fact addressing why less severe sanctions than dismissal are not appropriate. As in *Goss*, however, nothing in this opinion limits the trial court's discretionary authority, on remand, to impose the sanction of dismissal with prejudice after properly considering less severe sanctions.[2]

V

Plaintiff also contends that the trial judge was biased against her and improperly ruled in favor of defendants. "'[A] party has a right to be tried before a judge whose impartiality cannot reasonably be questioned.'" *In re Pedestrian Walkway Failure*, 173 N.C. App. at 252, 618 S.E.2d at 829 (quoting *State v. Fie*, 320 N.C. 626, 627, 359 S.E.2d 774, 775 (1987)). "Therefore, '[o]n motion of any party, a judge should [be] disqualif[ied] . . . in a proceeding in which his impartiality may reasonably be questioned, including but not limited to instances where . . . he has a personal bias or prejudice concerning a party . . . .'" *Id.* (quoting Code of Judicial Conduct, Canon 3(C)(1)(a) (2005)).

The burden is on the party moving for disqualification to "'demonstrate objectively that grounds for disqualification

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[2]Plaintiff also argues that defendants filed a "fraudulent" set of interrogatories and fraudulently cancelled and failed to appear at her deposition. There is, however, no evidence that defendants' discovery requests were fraudulent. With respect to the cancelled deposition, the record shows that defendants informed plaintiff they were cancelling the deposition due to her incomplete responses to their interrogatories and their need to review the withheld medical records before conducting the deposition.

actually exist.'" *Lange v. Lange*, 357 N.C. 645, 649, 588 S.E.2d 877, 880 (2003) (quoting *State v. Scott*, 343 N.C. 313, 325, 471 S.E.2d 605, 612 (1996)). "'Such a showing must consist of substantial evidence that there exists such a personal bias, prejudice or interest on the part of the judge that he would be unable to rule impartially.'" *Id.* (quoting *Scott*, 343 N.C. at 325, 471 S.E.2d at 612).

Because the record does not indicate that plaintiff moved to have the trial judge recused, she has waived appellate review of this issue. *See In re Key*, 182 N.C. App. 714, 719, 643 S.E.2d 452, 456 (holding that when party in civil proceeding failed to move in trial court to recuse judge for bias and prejudice, Rule 10(b)(1) precluded appellate review of issue whether judge was biased), *disc. review denied*, 361 N.C. 428, 648 S.E.2d 506 (2007).

Even if plaintiff had properly preserved this argument, it would be without merit. Although plaintiff points out that the trial judge dismissed every motion she made, "'[t]he fact that a trial judge has repeatedly ruled against a party is not grounds for disqualification of that judge absent substantial evidence to support allegations of interest or prejudice.'" *In re Faircloth*, 153 N.C. App. 565, 579-80, 571 S.E.2d 65, 74 (2002) (quoting *Love v. Pressley*, 34 N.C. App. 503, 506, 239 S.E.2d 574, 577 (1977), *disc. review denied*, 294 N.C. 441, 241 S.E.2d 843 (1978)).

Plaintiff's only other allegations of prejudice are (1) the general allegations that the trial judge "displayed an abuse of the adversary process" and denied plaintiff's right to a fair trial,

and (2) the more specific allegations that the trial judge was rude to plaintiff when plaintiff was late to arrive at the courtroom where the hearing was being held and that the judge personally knew plaintiff was "economically deprived." Plaintiff also claims that the trial judge had been involved in previous cases involving plaintiff's children.

There is no evidence in the record to support any of plaintiff's allegations. As plaintiff did not choose to file a transcript of the proceedings with this Court, there is no way for this Court to find any support for plaintiff's claims that the trial judge was rude, embarrassing, or treated plaintiff differently than defendants. Further, the record contains no indication that the trial judge in any way abused the adversary process. And, plaintiff included no evidence to support her contentions regarding the trial judge's hearing her children's cases. Thus, even if plaintiff had moved for recusal, she has not shown substantial evidence of the judge's bias.

Finally, we note that plaintiff appears to be arguing that the trial judge erred in not ruling on her motion to be declared indigent because it prevented her from proceeding as an indigent in this appeal. Although plaintiff has included in the record on appeal a petition to sue or appeal as an indigent, filed on 29 June 2009, in which she incorporates by reference an affidavit of indigency allegedly filed on 17 March 2009, she does not include the actual affidavit of indigency in the record. Without that

affidavit, we are unable to address whether the trial court's failure to declare plaintiff indigent was error.

Affirmed in part; vacated and remanded in part.

Judges McGEE and ERVIN concur.

Report per Rule 30(e).