FILED
United States Court of Appeals
Tenth Circuit

November 15, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

SEAN STETSON,

Plaintiff - Appellant,

v.

KEITH EDMONDS; CARGILL MEAT LOGISTICS SOLUTIONS, INC.,

Defendants - Appellees.

No. 22-1285 & 23-1020

Appeal from the United States District Court
for the District of Colorado
(D.C. No. 1:18-CV-01968-JLK-STV)

William F. Sulton, Sulton Law Firm, Milwaukee, Wisconsin (Anne T. Sulton, Sulton Law Offices, Milwaukee, Wisconsin, with him on the brief) for Plaintiff-Appellant

Christopher Casolaro, Faegre Drinker Biddle & Reath, Denver, Colorado (Isaac T. Smith, Faegre Drinker Biddle & Reath, Denver, Colorado, with him on the brief) for Defendants-Appellees.

Before **HOLMES**, Chief Judge, **MCHUGH**, and **CARSON**, Circuit Judges.

CARSON, Circuit Judge.

When a party to litigation seeks to intentionally deceive the court and its adversary, a district court may issue reasonable sanctions and require the deceitful party to pay attorney fees. Here, Plaintiff did just that, and the district court

sanctioned him with reasonable attorney fees and dismissal of non-economic claims.[1] Exercising jurisdiction under 28 U.S.C. § 1291, we affirm the district court.

I.

On August 1, 2016, Plaintiff and Defendant Edmonds were part of a low-speed, sideswipe vehicle accident. Although no one reported injuries on the scene, two weeks after the accident, Plaintiff sought medical treatment for injuries he claimed he sustained in the accident. With this visit, Plaintiff commenced his now plainly evident campaign to fabricate a claim for damages.

Over the next two years, Plaintiff lied to doctors, his attorneys, Defendants, and the district court to hide his history of constant back pain caused by years of heavy lifting and working with a jackhammer. At his first post-accident medical visit, Plaintiff lied: he reported that the accident had caused "constant back pain of the upper back, mid back, and lower back" and that he "had no similar problems in the past." During two different physical evaluations, Plaintiff lied again: when the examiner asked for all relevant medical history, Plaintiff answered twice that he had no relevant medical history. Plaintiff lied to at least one medical provider about the accident itself: both vehicles were moving about ten miles per hour (in the same direction) when the accident occurred, but Plaintiff said he was travelling more than thirty miles per hour at the point of collision. When Plaintiff's attorneys asked for

[1] We use "attorney fees" rather than "attorneys' fees" or "attorney's fees." When the usage in this opinion is inconsistent, it is based on the names of motions the parties filed.

any information relating to "prior medical treatment," Plaintiff again lied: Plaintiff told his attorneys that any treatment medical providers gave him before the accident was "unrelated to [his] recent neck and back issues." Plaintiff's attorneys also asked him for "a list of any medical providers [he] may have seen in the 8–10 years before the collision." Plaintiff again lied: he told them he could remember only a reproductive health examination during this time. Although Plaintiff's attorneys reminded Plaintiff of the "extreme[] importan[ce]" of disclosing his complete medical history, Plaintiff again lied and disclosed only two check-ups, an eye surgery, and a few dermatology appointments. In response to interrogatories, Plaintiff attested that he had not "seen ANY other providers" and had not "seen other doctors" aside from the reproductive health visit. When asked directly under oath if he had any issues with his back or neck before the accident, Plaintiff told Defendants "No." In a filing before the district court, Plaintiff attested that he "did not have prior medical issues involving his neck or back" adding that "[h]e naturally did not seek medical attention to his asymptomatic neck or back and, thus, has no medical records to produce or withhold."

Plaintiff made intentionally false representations. Although the district court ordered Plaintiff to release all medical records to Defendants, Plaintiff continued to hide his extensive medical history and claimed he had nothing to disclose. Defendants discovered the true scope of Plaintiff's medical history when they identified unexplained medical treatment charges in Plaintiff's financial records. Plaintiff had suffered "low back pain" for twelve years before the car accident; in

Plaintiff's own words, "chronic," "severe," "debilitating," "daily," and "constant" pain. No medical provider had yet remedied Plaintiff's pain before the accident. Less than two months before the accident, Plaintiff reported to a doctor that he had "chronic [b]ack pain." Plaintiff also told medical professionals that he had "persistent muscle spasms" and that his pain was an "8" on a "scale of 1–10." Five weeks before the accident, Plaintiff again reported to medical professionals that he had a "Back Problem." Plaintiff had also suffered shoulder pain since 2005. Plaintiff regularly made payments for physical therapy and chiropractic services. In direct violation of the district court's order compelling Plaintiff to provide complete medical and financial records, Plaintiff disclosed none of this information.

As another part of his scheme, Plaintiff lied about his lost income to manufacture damages. Plaintiff told his attorneys and the district court that he made "10k a month." As evidence of his income, Plaintiff produced five checks, each for $2,500, purportedly issued as paychecks by A2Z Radon LLC—Plaintiff's business. Based on these checks, Plaintiff described his employment as "a secure job with guaranteed employment for the next twenty[-]seven years" and estimated his lost earnings to be $120,000 per year for twenty-seven years, totaling $3,240,000. After Defendants discovered Plaintiff had closed this bank account two years before the dates on the checks, Plaintiff admitted under oath that these paychecks "were a fraud." Plaintiff's tax returns confirmed his actual annual income ranged between $5,312 and $23,000 per year. Plaintiff's deceptive pattern prompted Plaintiff's counsel to withdraw from the case, citing their "repeated pleas for [Plaintiff] to

provide accurate and complete information" and Plaintiff's "fail[ure] to disclose banking and medical information."

On Defendants' motion, the district court sanctioned Plaintiff for his deception, dismissing Plaintiff's claims for non-economic damages and limiting his remaining damages to "those that can be verified or corroborated by other evidence." The district court designed this sanction to "preclude [Plaintiff] from pursuing damages claims that rest on his own representations and statements." Defendants also filed an Application for Attorneys' Fees and Expenses and the district court awarded Defendants $81,113.78 for reasonable expenses accrued in making and defending their motion for sanctions.

The district court reviewed, in limine, medical bills Plaintiff wished to introduce at trial. Plaintiff told the court that representatives from two of his medical providers would testify at trial to lay the necessary foundation to admit these bills. On this basis, the district court found some of these bills "likely admissible at trial." A few days before trial, however, Plaintiff admitted that, despite his prior representations, no one from the treatment providers would testify. The district court excluded the bills as inadmissible hearsay. The district court then granted Defendants' summary judgment motion, finding that, without any bills or testimony from a treating physician, and "while under a sanctions order that prohibits [Plaintiff] from presenting evidence that cannot 'be verified or corroborated by other evidence,' [Plaintiff could not] prove the existence of damages and therefore [could not] establish his negligence claim as a matter of law." Defendants filed a motion for a

second attorney fees award and the district court granted Defendants a $398,636.77 post-judgment award.

Plaintiff appeals both attorney fees awards, the sanctions, and the grant of summary judgment.

II.

A.

We review sanctions, including the sanction of dismissal, for abuse of discretion. Auto-Owners Ins. Co. v. Summit Park Townhome Ass'n, 886 F.3d 852, 857 (10th Cir. 2018). We review a district court's decision about the amount of attorney fees to award under Rule 37(a)(5)(A) for an abuse of discretion. Centennial Archaeology, Inc. v. AECOM, Inc., 688 F.3d 673, 678 (10th Cir. 2012).

We must decide whether the district court abused its discretion by granting Defendants $398,636.77 in post-judgment attorney fees. Fee shifting is the exception rather than the rule in American courts. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247 (1975). Even so, we hold that the district court did not abuse its discretion.

All federal courts have "inherent power[] . . . to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." Link v. Wabash R.R. Co., 370 U.S. 626, 630–31 (1962). This power includes the authority to "fashion an appropriate sanction for conduct which abuses the judicial process." Chambers v. NASCO, Inc., 501 U.S. 32, 44–45 (1991). Courts allow fee shifting when a party "acted in bad faith vexatiously, wantonly, or for oppressive reasons." Id. at 33

(citing Alyeska Pipeline Serv., 421 U.S. at 258–59, 260). Where "a court finds 'that fraud has been practiced upon it . . .' it may assess attorney[] fees against the responsible party." Id. at 46. (quoting Universal Oil Prods. Co. v. Root Refin. Co., 328 U.S. 575, 580 (1946)). A party invites fee shifting when it "delay[s] or disrupt[s] the litigation or . . . hamper[s] enforcement of a court order." Hutto v. Finney, 437 U.S. 678, 689 n.14 (1978) (citing Alyeska Pipeline Serv., 421 U.S. at 258–59).

"Bad faith" fails to capture the extent of Plaintiff's misconduct. First, Plaintiff lied and misled medical personnel about the severity of the accident. Despite his extensive history of back pain, Plaintiff sought out doctors he had never seen before to receive diagnosis and treatment. Providers Plaintiff had seen before would know he was lying if he said he had no back injuries or pain before the accident. And Plaintiff routinely misrepresented to doctors that his back pain began with the accident.

Second, Plaintiff acted in bad faith by lying to his attorneys. Although Plaintiff's attorneys asked him to provide all prior medical treatment details, Plaintiff repeatedly told his attorneys he had no injuries or pain before the accident. To hide the truth, Plaintiff represented that, since 1994, his medical history comprised a singular reproductive health appointment. Plaintiff also lied about his lost income, creating fraudulent checks to verify his claim that he made "10k a month."[2]

[2] At oral argument, Plaintiff argued that the manufacturing of fraudulent checks only defrauded his attorneys, not the court. But when Plaintiff's attorneys asked for additional income documentation, Plaintiff told his attorneys that his tax returns "won[']t be any good" and suggested: "How about we present it that I'm

Third, Plaintiff acted in bad faith by lying to Defendants. Plaintiff represented in sworn interrogatories that he had "no issues with pain" and that he "was in great physical condition before the incident." Even when Defendants directly asked Plaintiff whether he had any medical history concerning his back or neck before the accident, Plaintiff lied and told them he did not.

Fourth, and most egregiously, Plaintiff acted in bad faith by lying to the district court. He told the district court he "had no prior neck or back injuries" and swore that he had "disclosed all records, including pre-incident records related to [his] health." Until he faced proof of his fraud, Plaintiff continued to refer to his neck and back as "asymptomatic" and told the district court he had "no medical records to produce or withhold." Plaintiff lied to evade enforcement of the district court's order to provide complete medical and financial records. Plaintiff also falsified evidence to manufacture damages which were many times higher than his actual income. Plaintiff's concealment and deception constitute substantial bad faith, and manufacturing false evidence demands a severe response because it is detrimental to litigation. In sum, Plaintiff acted with wanton bad faith, disrupted the litigation, and hampered enforcement of the court's order. We thus hold that the

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behind on doing my taxes for [a] few years." This statement provides clear evidence that Plaintiff intended for his attorneys to present the fraudulent evidence to opposing counsel or the court. This conclusion also conforms with reason. What could Plaintiff reasonably believe his counsel would do with manufactured evidence except use it in litigation?

district court was well within its discretion to "assess attorney's fees against the responsible party." Chambers, 501 U.S. at 46 (citing Universal Oil, 328 U.S. at 580).

The district court also acted within its discretion in determining the amount of post-judgment fees. A complaining party "may recover 'only the portion of his fees that he would not have paid but for' the misconduct." Goodyear Tire & Rubber Co. v. Haeger, 581 U.S. 101, 109 (2017) (quoting Fox v. Vice, 563 U.S. 826, 836 (2011)). When a "plaintiff initiates a case in complete bad faith, so that every cost of defense is attributable only to the sanctioned behavior, the court may make a blanket award." Id. at 110–11. Similarly, if "a party was legally required to disclose evidence fatal to its position," a court "may grant all fees incurred from that moment on." Id. at 111.

Plaintiff initiated and perpetuated his suit in complete bad faith. Plaintiff founded his suit on diagnoses he manufactured by giving doctors false and incomplete information. Plaintiff then used the diagnoses he knew were incorrect to justify a suit for damages he had concocted, lying to opposing counsel and the district court about the source of his injuries. Because "everything the [Plaintiff] did . . . was 'part of a sordid scheme' to [create] a valid claim," the district court did not abuse its discretion by making a "blanket award." Goodyear, 581 U.S. at 110 (quoting Chambers, 501 U.S. at 51, 57).

Plaintiff argues a blanket award was unwarranted for two reasons: (1) after the district court sanctioned him, he complied with all court-orders; and (2) the district court implied his suit had a basis not founded in bad faith when it denied Defendants'

motion for summary judgment after the discovery dispute. These arguments do not circumnavigate the discretion afforded to the district court. Because Plaintiff's fraud predated his suit and founded his claims for medical expenses and lost wages, the district court "could reasonably conclude that all legal expenses in the suit 'were caused . . . solely by [Plaintiff's] fraudulent and brazenly unethical efforts.'" Id. (quoting Chambers, 501 U.S. at 58). The district court exercised its discretion reasonably to curb Plaintiff's "abuse [of] the judicial process." Chambers, 501 U.S. at 45–46. We affirm the post-judgment award of $398,636.77.

B.

We also must decide whether the district court abused its discretion by dismissing Plaintiff's non-economic claims as a sanction for discovery violations, or for awarding $81,113.78 in attorney fees incurred in filing and defending the motion for sanctions. We review a district court's dismissal of claims as a sanction for abuse of discretion. Nat'l Hockey League v. Metro. Hockey Club, Inc., 427 U.S. 639, 642 (1976). "A district court abuses its discretion when it (1) fails to exercise meaningful discretion, such as acting arbitrarily or not at all, (2) commits an error of law, such as applying an incorrect legal standard or misapplying the correct legal standard, or (3) relies on clearly erroneous factual findings." Id.

Although dismissal of claims is a particularly harsh sanction, the Tenth Circuit has been clear "that a district judge may dismiss an action for discovery violations." Archibeque v. Atchison, Topeka and Santa Fe Ry. Co., 70 F.3d 1172, 1174 (10th Cir. 1995) (citing Ehrenhaus v. Reynolds, 965 F.2d 916, 920 (10th Cir. 1992)). A district

court may use dismissal as a sanction only when the discovery violation arises out of "willfulness, bad faith, or [some] fault of [the party]." Id. (citing Nat'l Hockey League, 427 U.S. at 640 (1976)). A district court should consider the following in determining whether dismissal is appropriate: "(1) the degree of actual prejudice to the defendant; (2) the amount of interference with the judicial process; (3) the culpability of the litigant; (4) whether the court warned the party in advance that dismissal of the action would be a likely sanction for noncompliance; and (5) the efficacy of lesser sanctions." Ehrenhaus, 965 F.2d at 920. "[I]f, after considering all the relevant factors, [the district court] concludes that dismissal alone would satisfy the interests of justice," the court has not abused its discretion. Id. at 918.

The district court completed a full analysis of the Ehrenhaus factors and found that dismissal alone satisfied the interests of justice. Plaintiff does not contest the district court's analysis of the Ehrenhaus factors. Instead, Plaintiff argues generally that dismissal represents a disproportionately severe sanction compared to his fraud. Because the Ehrenhaus factors (1) provide the only test for the propriety of dismissal, and (2) incorporate considerations of proportionality, we need not analyze Plaintiff's fraud under any other standard.

Considering Plaintiff's misrepresentation, deception, and fabrication, the Ehrenhaus factors favor dismissal. (1) Plaintiff forced Defendants to expend substantial effort and money uncovering records which Plaintiff ought to have produced voluntarily. (2) Plaintiff's tactics directly interfered with the district court's process, preventing meaningful discovery in violation of the district court's

order. (3) Plaintiff holds direct culpability for the fraud as he alone lied to medical professionals, wrote false checks, and sought to mislead his attorneys, Defendants, and the district court. (4) Although Plaintiff "was not specifically warned in advance about the possibility of dismissal," dismissal is appropriate; the Ehrenhaus factors are holistic and "the fact that [a party] was not warned of [an] imminent dismissal . . . does not undermine the court's consideration of the remaining factors." Archibeque, 70 F.3d at 1175. (5) A lesser sanction would have been ineffective.

Although Defendants asked the district court to dismiss the entire action, the district court chose a lesser sanction and dismissed only the claims that relied on the veracity of Plaintiff's statements. Because the district court could not trust Plaintiff's testimony or evidence, the district court could not reach a reliable verdict on claims that it could not verify with external evidence.[3] Thus, the minimum effective sanction was dismissal of the claims to which Plaintiff's testimony would be central—*e.g.,* emotional distress, loss of enjoyment, inconvenience. The district court did not abuse its discretion in dismissing Plaintiff's non-economic claims.

Plaintiff also challenges the attorney fees the district court granted for expenses incurred by Defendants in making and defending their Motion to Compel and Motion for Attorney Fees and Sanctions. This grant was not an abuse of discretion. Federal Rule of Civil Procedure 37(a)(5)(A) states that if a district court grants a motion to compel, "the court must . . . require the party or deponent whose

[3] Plaintiff does not suggest any alternative sanctions, arguing only that district courts should generally prefer resolving cases on the merits.

conduct necessitated the motion . . . to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees." Because the district court granted Defendants' Motion to Compel, and because Plaintiff cannot "substantially justify" his failure to cooperate, the Rule requires the district court to award reasonable fees incurred in making and defending the motion.

Plaintiff challenges the amount of the award as unreasonable. The district court accepted the magistrate judge's supplemental recommendation. The district court calculated the award using the lodestar amount—the number of hours reasonably expended on the matter, multiplied by a reasonable hourly rate. Case v. Unified Sch. Dist. No. 233, 157 F.3d 1243, 1249 (10th Cir. 1998). The lodestar calculation "produces a presumptively reasonable fee." Anchondo v. Anderson, Crenshaw & Assocs., L.L.C., 616 F.3d 1098, 1102 (10th Cir. 2010) (citing Perdue v. Kenny A. ex rel. Winn, 559 U.S. 542, 553 (2010)). In addition, the district court's award represented a twenty percent reduction from the lodestar calculation. We find no error in the district court's calculation and—given the reduction—any departure from the lodestar amount benefited Plaintiff.

The district court also reviewed the six factors we have held determine the reasonableness of the number of hours expended in litigation:

> (1) whether the tasks being billed 'would normally be billed to a paying client,' (2) the number of hours spent on each task, (3) 'the complexity of the case,' (4) 'the number of reasonable strategies pursued,' (5) 'the responses necessitated by the maneuvering of the other side,' and (6) 'potential duplication of services' by multiple lawyers.

Robinson v. City of Edmond, 160 F.3d 1275, 1281 (10th Cir. 1998) (quoting Ramos v. Lamm, 713 F.2d 546, 554 (10th Cir. 1983)).

A simple automobile accident case would not traditionally require Defendants to bill so many hours. But Plaintiff's conduct, which ran afoul of ethical boundaries and the district court's orders, multiplied the number of hours Defendants billed. So, the district court acted within its discretion in awarding attorney fees for costs incurred in filing and defending Defendants' Motion to Compel and Motion for Attorney Fees and Sanctions.

C.

We must next decide whether the district court erred by granting Defendants' motion for summary judgment on Plaintiff's remaining claims. We review the district court's grant of summary judgment de novo. Timmons v. White, 314 F.3d 1229, 1232 (10th Cir. 2003). Federal Rule of Civil Procedure 56(c) provides that a court shall grant summary judgment if the pleadings, depositions, answers to interrogatories, admissions, or affidavits show there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. We review evidentiary rulings and rulings on motions in limine for abuse of discretion. Cavanaugh v. Woods Cross City, 718 F.3d 1244, 1249 (10th Cir. 2013) (citing United States v. Weller, 238 F.3d 1215, 1220 (10th Cir. 2001)).

Once the district court limited Plaintiff's damages to medical expenses, Plaintiff wished to enter medical bills into evidence that would purportedly substantiate the amount of his damages. But this evidence required appropriate

foundation. The district court reasonably found that foundation lacking. The general rule against hearsay excludes out of court statements offered to prove the truth of the matter asserted. Fed. R. Evid. 801(c). Plaintiff, as "the proponent of the evidence," bore the "obligation of establishing the applicability of a hearsay exception" to enter his financial statements into evidence. United States v. Samaniego, 187 F.3d 1222, 1224 (10th Cir. 1999).

Plaintiff did not lay the appropriate foundation for his bills' admissibility under a hearsay exception.[4] To admit the hearsay as a Record of a Regularly Conducted Activity, the proponent of the evidence must establish the necessary foundation by either "the testimony of the custodian or another qualified witness, or by a certification." Fed. R. Evid. 803(6)(D). Once Plaintiff admitted, just days before trial, that the "billing office" representatives on their witness list would "not be testifying or attending trial," Plaintiff could not lay the foundation required to enter these bills into evidence without appropriate certification.

But Plaintiff contends his evidence was admissible because of his "declaration that he received these bills and others" and because of "an affidavit from Lake Worth Surgical Center about its medical bills."[5] We disagree. Even assuming that the

[4] Nor could Plaintiff testify about what the bills said because that information is also hearsay. Fed. R. Evid. 801(c).

[5] Plaintiff presents two arguments we need not address. First, Plaintiff argues that the amount he paid for services is some evidence of the services' reasonable value. We need not decide this issue because Plaintiff had no admissible evidence of the amount he paid for services. Second, Plaintiff argues the district court erred in concluding "[Plaintiff] concedes he cannot lay proper foundation for the admission of

affidavit from Lake Worth Surgical Center qualifies as a certification, that does not end the inquiry. Plaintiff must not only provide a certification but must also make the "certification available for inspection" so the Defendants have "a fair opportunity to challenge [it]." Fed. R. Evid. 902(11).[6] By providing the certification just prior to trial, Plaintiff deprived Defendants of their opportunity to meaningfully inspect and challenge it.[7] And, where the proponent of evidence does not provide an opportunity to inspect the certification, the district court may exclude the records. Id. Thus, the district court did not abuse its discretion by excluding the bills from evidence.

Having appropriately excluded Plaintiff's remaining evidence, the district court lastly considered whether Plaintiff's claims, supported by no evidence of damages, failed as a matter of law. A federal court sitting in diversity applies the substantive law of the state in which it sits. Erie Railroad Co. v. Tompkins, 304 U.S. 64, 78 (1938). The substantive state law of Colorado therefore governs Plaintiff's negligence claims. Colorado law establishes four elements of a negligence claim: (1) defendant owed a duty to plaintiff; (2) the defendant breached that duty; (3) plaintiff

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any actual bills into evidence." We need not decide whether Plaintiff conceded this point because he cannot lay the proper foundation for the admission of any actual bills into evidence.

[6] Federal Rule of Evidence 902(11) concerns the authentication of evidence and prevents litigants from entering evidence using the business records hearsay exception unless a qualified party verifies it is appropriate. Plaintiff's extensive fraud and deception exemplify the importance of this rule: this evidence could not qualify for admission based on Plaintiff's testimony alone.

[7] The district court set the trial to begin on Monday, September 12, 2022, and the court did not enter the affidavit until Friday, September 9, 2022.

suffered damages; and (4) a proximate cause relationship exists between the defendant's breach and plaintiff's damages. Casebolt v. Cowan, 829 P.2d 352, 356 (Colo. 1992). Plaintiff bore the burden to prove each element of his claim by a preponderance of the evidence, including the existence of "harm resulting in damages." Keller v. Koca, 111 P.3d 445, 447 (Colo. 2005) (citing Ryder v. Mitchell, 54 P.3d 885, 889 (Colo. 2002)).

As discussed above, once the district court determined Plaintiff's bills were not admissible, Plaintiff had no verifying evidence of economic damages. Plaintiff, therefore, could not establish an essential element of his case—damages. Without any evidence of an essential element, no genuine issue of material fact existed, and the district court correctly concluded Defendants were entitled to judgment as a matter of law.[8]

AFFIRMED.

[8] We deny Appellees' motion to file a sur-reply.