DA 22-0630

IN THE SUPREME COURT OF THE STATE OF MONTANA

2023 MT 152N

JOHN BUTLER,

Plaintiff, Counter-Defendant,
and Appellant,

v.

ELINOR SWANSON and DOES 1-20, inclusive,

Defendant, Counter-Plaintiff,
and Appellee.

ELINOR SWANSON,

Third-Party Plaintiff,

v.

JOSEPH FARZAM and JOSEPH FARZAM
LAW FIRM, a Professional Corporation,

Third-Party Defendants.

APPEAL FROM: District Court of the Thirteenth Judicial District,
In and For the County of Yellowstone, Cause No. DV-19-88
Honorable Rod Souza, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Gerry P. Fagan, Jordan W. FitzGerald, Moulton Bellingham PC, Billings, Montana

Joseph S. Farzam, Joseph Farzam Law Firm, Los Angeles, California

For Appellee:

Jon M. Moyers, Moyers Law P.C., Billings, Montana

Submitted on Briefs: May 10, 2023

Decided: August 8, 2023

Filed:

Clerk

Justice James Jeremiah Shea delivered the Opinion of the Court.

¶1 Pursuant to Section I, Paragraph 3(c), Montana Supreme Court Internal Operating Rules, this case is decided by memorandum opinion, shall not be cited and does not serve as precedent. Its case title, cause number, and disposition shall be included in this Court's quarterly list of noncitable cases published in the Pacific Reporter and Montana Reports.

¶2 John Butler (Butler) appeals from an order issued by the Thirteenth Judicial District Court, Yellowstone County, granting Elinor Swanson's (Swanson) motion to dismiss Butler's complaint against her, with prejudice, as a discovery sanction. We affirm.

¶3 In January 2020, Butler filed a complaint against Swanson, claiming that Swanson negligently injured him in a traffic accident. Swanson denied Butler's claim and asserted a counterclaim against him for abuse of process. In March, Swanson served written discovery requests upon Butler. After Swanson disputed the adequacy of some of Butler's responses, Swanson requested that the District Court schedule a show cause hearing to determine appropriate sanctions for Butler's discovery abuses. Alternatively, Swanson requested that Butler provide full and complete discovery responses.

¶4 The District Court held a show cause hearing in August and issued an order granting Swanson's motion in September. In its order, the District Court noted that "one cannot learn details of Butler's medical history by reading Butler's responses to discovery" and that "Butler's theory of the case and supporting facts and arguments cannot be gleaned from reviewing his responses."

¶5 The court determined that some of Butler's responses to Swanson's discovery requests appeared evasive. For example, the court pointed to Butler's response to

Swanson's request that he describe in detail every bodily ailment he had before the accident; Butler merely listed a left foot injury. Yet evidence obtained through other means revealed that Butler recently recovered from eye surgery due to a retinal separation. He also tested positive for hepatitis C approximately a year before the accident and suffered from a chronic heel wound impacting his Achilles tendon—which remained a severe source of infection despite more than a year of treatment. When Swanson requested that Butler "[a]dmit that after the accident at issue[,] serum testing at St. Vincent's Healthcare showed that [he] had amphetamine-methamphetamine, opiates, and cannabinoids in [his] system," the District Court noted Butler's evasive response that he could not admit or deny the request on the basis that "in your system" was vague and required expert opinion. Finally, the District Court noted that while Butler admitted to the court that he lacked the proper motorcycle insurance or endorsement when the accident occurred, he denied Swanson's request that he admit lacking the very same insurance or endorsement.

¶6 The District Court determined that Butler responded to Swanson's discovery questions with truncated, incomplete answers and required him to provide answers that comply with the rules of discovery. The court noted that before filing her motion in May, "Swanson's counsel sent Butler's counsel a letter that clearly and concisely explain[ed] how Butler [could] remedy the deficiencies in his responses." The court ordered Butler "to truthfully, fully, and completely respond to Swanson's [] [d]iscovery [r]equests by carrying out the requests in the letter." The court mandated that Butler provide these responses within 30 days of September 2, 2020—no later than October 2, 2020.

¶7 Butler neither provided Swanson any responses nor moved the court for more time before the October deadline. Swanson moved to dismiss Butler's complaint, with prejudice, as a discovery sanction for failing to obey the court's September order. In response, Butler asserted that, while untimely, he provided "full and complete responses" after the District Court's deadline. In reply, Swanson argued that Butler prevented her "from assessing the merits of the case or developing a defense to her substantial prejudice." As to Butler's assertion that he provided "full and complete responses" after the deadline, Swanson noted continuing deficiencies with Butler's untimely October responses, necessitating Butler to supplement his responses in November and December.

¶8 The District Court granted Swanson's motion to dismiss Butler's complaint, with prejudice, as a discovery sanction. The District Court determined that, after Butler provided evasive responses, he disregarded the District Court's directions by not providing true, full, and complete responses before the October deadline. The District Court noted that Butler did not sign an authorization form to release medical information until 12 days after the October deadline. The District Court noted that despite Butler's claim that his untimely authorizations provided Swanson "the full and complete responses" mandated by the court, Butler had to supplement his untimely releases two more times; the last of which occurred in December 2020.

¶9 The District Court held that "Butler's delay in signing and producing the authorizations reveal[ed] bad faith" and reiterated its earlier explanation that "[d]iscovery of Butler's medical history was a central issue in the case and properly sought by Swanson." After weighing the circumstances, the District Court concluded that the

sanction of dismissal was warranted. The District Court issued a final judgment certifying for appellate review its dismissal of Butler's complaint pursuant to M. R. Civ. P. 54(b).

¶10 We review a district court's imposition of discovery sanctions for an abuse of discretion. *City of Missoula v. Mountain Water Co.*, 2018 MT 139, ¶ 9, 391 Mont. 422, 419 P.3d 685 (internal citation omitted); *Mont. State Univ.-Bozeman v. Mont. First Jud. Dist. Court*, 2018 MT 220, ¶ 15, 392 Mont. 458, 426 P.3d 541 (hereinafter, *MSU*). A district court abuses its discretion when it acts arbitrarily, without employment of conscientious judgment, or in excess of the bounds of reason, resulting in substantial injustice." *Mountain Water Co.*, ¶ 9 (internal citation omitted).

¶11 Butler claims that the District Court abused its discretion by dismissing his complaint as a discovery sanction. He argues that the District Court did not "address and apply the appropriate standard for merits-based sanctions under Rule 37(b)." When we review a district court's discovery sanction, we first determine whether the sanction meets threshold compliance with the provision of M. R. Civ. P. 37 authorizing the sanction and whether a discovery violation occurred. *MSU*, ¶ 20 (internal citations omitted). Butler admits that he committed a discovery violation by failing to serve the appropriate discovery responses before the October deadline, and the District Court's decision to dismiss Butler's complaint as a discovery sanction is authorized by Rule 37(b)(2)(A)(v) (authorizing a district court to sanction a party for failing to obey an order to provide or permit discovery by dismissing the action).

¶12 When we review a district court's discovery sanction, we also assess the propriety of the sanction. *Culbertson-Froid-Bainville Health Care Corp. v. JP Stevens & Co. Inc.*,

2005 MT 254, ¶ 14, 329 Mont. 38, 122 P.3d 431 (hereinafter, *Culbertson*). We consider "the extent of prejudice caused by the violation or abuse[] and whether the sanction imposed proportionally relates to the nature and effect of the violation or abuse." *MSU*, ¶ 20 (internal citations omitted). The party requesting dismissal must show prejudice. *Stokes v. Ford Motor Co.*, 2013 MT 29, ¶ 18, 368 Mont. 365, 300 P.3d 648. "We also consider a party's disregard of the court's orders and authority." *Linn v. Whitaker*, 2007 MT 46, ¶ 20, 336 Mont. 131, 152 P.3d 1282 (internal citation omitted).[1]

¶13 Butler argues that the District Court did not "make any finding of prejudice" caused by his discovery abuses and violation of the District Court's September order. Butler argues that Swanson "was required to show prejudice in an amount that was so 'inexcusable' that it justified overriding the 'express preference' for adjudication on the merits" but "never bothered" to demonstrate prejudice whatsoever.

¶14 Butler's assertions that Swanson failed to demonstrate prejudice and the District Court did not find prejudice are incorrect. In the September order, the District Court explained that discovery of Butler's medical history was a central issue, and neither Butler's theory of the case and supporting facts and arguments nor the details of his medical history could be gleaned from reviewing his responses. The District Court then ordered Butler to provide true, full, and complete responses before an October deadline. He did

[1] A district court is not required "to expressly warn the abusing party of the sanctions it ultimately imposed." *Culbertson*, ¶ 15. But when a district court issues a warning, we consider whether the consequence inflicted via the sanction is consistent with the consequences expressly warned of by the court. *Linn*, ¶ 20 (internal quotation and citation omitted). Here, the District Court did not issue an express warning.

not. After Swanson moved to dismiss, Butler asserted that, while untimely, he provided "full and complete responses" after the October deadline. In reply, Swanson outlined the numerous ways in which Butler's untimely responses remained deficient in the face of the District Court's September order. She argued that Butler's refusal to respond to essential discovery "prevented [her] from assessing the merits of the case or developing a defense *to her substantial prejudice*." (Emphasis added). In its February order, the District Court dismissed Butler's complaint after determining that some of his responses to Swanson's proper discovery requests were evasive, Butler failed to comply with its September order, and "Butler's delay in signing and producing the authorizations reveal[ed] bad faith."

¶15 This Court has held that "[l]itigants who are willful in halting the discovery process act in opposition to the authority of the court and cause impermissible prejudice to their opponents." *First Bank (N.A.)-Billings v. Heidema*, 219 Mont. 373, 376, 711 P.2d 1384, 1386 (1986) (internal quotation and citation omitted). Butler's assertions that Swanson failed to demonstrate prejudice and the District Court did not find any prejudice are incorrect. *See also Richard v. State*, 2006 MT 43, ¶ 57, 331 Mont. 231, 130 P.3d 634; *Bulen v. Navajo Ref. Co.*, 2000 MT 222, ¶ 19, 301 Mont. 195, 9 P.3d 607.

¶16 In an attempt to support his assertion that the party requesting dismissal must show prejudice in an amount that is so inexcusable that it justifies overriding the express preference for adjudication on the merits, Butler cites to a statement from this Court in *MSU*. The excerpt upon which Butler relies is taken out of context and misplaced. In *MSU*, we stated that "[e]xtreme sanctions precluding or truncating litigation on the merits . . . are *generally* proper only when the predicate discovery abuse is so inexcusable

and prejudicial that it outweighs the express preference in M. R. Civ. P. 1 for adjudication on the merits." *MSU*, ¶ 21 (emphasis added). In this case, the District Court concluded that "Butler's delay in signing and producing the authorizations reveal[ed] bad faith." "[W]e have stated, [] dismissal is appropriate where counsel or a party has acted willfully or in bad faith in failing to comply with the rules of discovery or with court orders enforcing the rules, or they have acted in flagrant disregard of those rules." *Kraft v. High Country Motors, Inc.*, 2012 MT 83, 37, 364 Mont. 465, 276 P.3d 908 (citing *Jerome v. Pardis*, 240 Mont. 187, 192, 783 P.2d 919, 922 (1989)); *Stokes*, ¶ 18.

¶17 Turning to whether the sanction imposed by the District Court proportionally relates to the nature and effect of Butler's discovery abuses, Butler argues that the District Court failed to consider "whether lesser sanctions were available that would more appropriately address whatever prejudice [] Swanson incurred." Butler provides a list of "lesser sanctions" the District Court might have imposed, but he admits that the District Court did address and consider lesser sanctions by rejecting his plea to merely require him to pay attorney fees at the second order to show cause hearing. Butler curiously relies on his own disregard of the District Court's September order by arguing that the court abused its discretion because Butler feels that he mitigated the effect of his discovery abuses by supplementing his incomplete responses three separate times after missing the October deadline. But when Butler presented this "no harm, no foul" argument to the District Court, it pointed to Butler's supplemental responses as evidence of his bad faith and reasoned that Butler could not cure his dilatory actions by presenting the requested information almost ten months after Swanson requested it and two months after the court-imposed deadline.

¶18 On appeal, Butler continues to miss the point. "Since 1981, we have consistently stated that discovery abuses will not be dealt with leniently." *Xu v. McLaughlin Research Inst. for Biomedical Sci., Inc.*, 2005 MT 209, ¶ 20, 238 Mont. 232, 119 P.3d 100. This Court recognizes that "when litigants use willful delay, respond evasively, or disregard court directions as part and parcel of their trial strategy, they must suffer the consequences." *Winslow v. Mont. Rail Link, Inc.*, 2005 MT 217, ¶47, 328 Mont. 260, 121 P.3d 506. The record supports the District Court's determination that Butler delayed his responses in bad faith, responded evasively, and disregarded its directions.

¶19 As the District Court explained, the "[d]iscovery of Butler's medical history was a central issue in the case and properly sought by Swanson." Without this information, Butler's actions frustrated Swanson's ability to secure the just, speedy, and inexpensive determination of the lawsuit Butler commenced against her. *See Culbertson*, ¶ 11 ("The Rules of Civil Procedure serve the purpose of 'securing the just, speedy, and inexpensive determination of every action.'" (Quoting M. R. Civ. P. 1)). Butler's discovery abuses are "the precise reason for the availability of court[-]imposed sanctions pursuant to [Rule] 37." *Linn*, ¶ 15 ("A refusal to provide discovery essentially prevents the case from progressing and is the precise reason for the availability of court[-]imposed sanctions pursuant to [Rule] 37." (Internal citation omitted)).

¶20 Butler fails to demonstrate that the District Court acted arbitrarily, without employment of conscientious judgment, or in excess of the bounds of reason, resulting in substantial injustice. The District Court did not abuse its discretion when it weighed the

circumstances and determined that Butler's discovery abuses warranted dismissal of his complaint as a sanction.

¶21 We have determined to decide this case pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules, which provides for memorandum opinions. This appeal presents no constitutional issues, no issues of first impression, and does not establish new precedent or modify existing precedent. Affirmed.

/S/ JAMES JEREMIAH SHEA

We Concur:

/S/ MIKE McGRATH
/S/ BETH BAKER
/S/ DIRK M. SANDEFUR
/S/ JIM RICE