

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA01-927

NORTH CAROLINA COURT OF APPEALS

Filed: 4 June 2002

STATE OF NORTH CAROLINA,
ex rel. GEORGE GRIFFIN,

Plaintiff,

v.

Craven County
No. 00 CVS 158

JAMES H. BEASLEY,

Defendant.

Appeal by defendant from orders entered 19 December 2000 and 26 January 2001 by Judge Benjamin Alford in Superior Court, Craven County. Heard in the Court of Appeals 24 April 2002.

Harris, Creech, Ward and Blackberry, P.A., by Thomas M. Ward and Charles E. Simpson, Jr., for plaintiff-appellee.

Stricklin Law Firm, P.A., by Bobby J. Stricklin, for defendant-appellant.

WYNN, Judge.

Under Rule 37(d) of the North Carolina Rules of Civil Procedure, a trial court may impose sanctions on a party for failing to comply with the rules of discovery. Because the evidence in this matter supports the trial court's determination that defendant failed to comply with an order compelling discovery, we affirm the trial court's sanction under Rule 37 ordering him to

pay attorney fees incurred by plaintiff.

Plaintiff George Griffin--Mayor of the City of Havelock, North Carolina--brought this *quo warranto* action on 24 January 2000 challenging defendant James H. Beasley's eligibility to serve on the Havelock Board of Commissioners following his election in November 1999. The complaint alleged that since "Beasley's primary residence and domicile are outside the Havelock city limits, he is not lawfully registered to vote in Havelock's elections, nor is he eligible to serve on the Havelock Board of Commissioners." Beasley answered essentially denying that his primary residence was located outside of the City of Havelock. Beasley also served upon plaintiff certain discovery which the plaintiff answered and returned to him.

Thereafter, plaintiff on 13 June 2000, served on Beasley discovery requests of Interrogatories, Requests for Admissions, and Request for Production of Documents. Beasley obtained an extension of time to answer the discovery until 14 August 2000; however, on that date, Beasley resigned as a City Commissioner.

Notwithstanding Beasley's resignation, on 29 August 2000 plaintiff filed a Notice of Admission of Facts by Defendant stating that the matters requested for admission are "deemed admitted by reason of Defendant Beasley's failure to answer in a timely fashion" under Rule 36. Beasley responded on 5 September 2000 with a motion to strike the notice, dismiss the action and award attorney fees to him. The next day, plaintiff moved for judgment on the pleadings under Rule 12(c) and for sanctions and attorney

fees. In his motion, plaintiff stated:

That although Defendant Beasley has now resigned from office, his wrongful actions have caused Plaintiff herein

to expend substantial funds for attorney's fees and costs by reason of Defendant Beasley's refusal to withdraw from office after having received notice of his disqualification by reason of his improper voting residence. That further, the Plaintiff herein is still entitled to a determination that Defendant's domicile is located outside of the City of Havelock and by reason thereof the Defendant should be excluded from serving or seeking a seat on the Board of Commissioners for the City of Havelock until such time as the Defendant meets the statutory requirements.

On 24 October 2000, the trial court entered an order providing:

1. That the Defendant's Motion to Dismiss and Motion for Attorney's Fees is DENIED.
2. That the Plaintiff's Motion for a judgment on the pleadings, for sanctions and for attorney's fees is DENIED.
3. That the Defendant's Motion to Strike Notice of Admission of Facts by Defendant is GRANTED. PROVIDED, HOWEVER, the Defendant is hereby ordered to answer the discovery propounded by Plaintiff to the Defendant, entitled "Interrogatories, Requests for Admissions and Requests for Production of Documents," filed and served on June 13, 2000. Said responses are to be filed and served on or before 5:00 p.m. on October 31, 2000.

This Court, however, granted Beasley a temporary stay of that order pending our decision on his petition to us to issue a *writ of certiorari* to review the 24 October 2000 trial court ruling. On denying that petition, we dissolved the temporary stay on 17 November 2000. Five days later, plaintiff moved for sanctions

against Beasley for failure to obey the trial court's order compelling discovery. On 30 November 2000, Beasley responded to the interrogatories and requests for production of documents but failed to serve answers to the remaining outstanding discovery.

By order dated 19 December 2000, the trial court held Beasley in contempt of its initial order compelling discovery and concluded that "Plaintiff is entitled to reimbursement of attorney's fees and expenses arising from Defendant's failure to obey the Order of the Court." Thereafter, by supplemental order dated 26 January 2001, the trial court ordered Beasley to pay \$5,045.34 to plaintiff for reimbursement of attorney fees. From the 19 December order, Beasley appeals to this Court.

The issues on appeal are whether the trial court: (I) properly imposed sanctions on Beasley for failing to comply with the trial court's order compelling discovery; and (II) abused its discretion in awarding attorney fees.

Under Rule 37(d) of the North Carolina Rules of Civil Procedure, sanctions may be imposed if a party fails "to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories or . . . to serve a written response to a request for inspection [of documents] submitted under Rule 34." N.C. Gen. Stat. § 1A-1, Rule 37(d) (2001). If a party, ordered to provide discovery fails to do so, "a judge of the court in which the action is pending may make such orders in regard to the failure as are just," including paying "the

reasonable expenses, including attorney's fees caused by the failure." N.C. Gen. Stat. § 1A-1, Rule 37(b)(2). "The choice of sanctions under Rule 37 lies within the court's discretion and will not be overturned on appeal absent a showing of abuse of that discretion." *Routh v. Weaver*, 67 N.C. App. 426, 429, 313 S.E.2d 793, 795 (1984); *see also Hursey v. Homes By Design, Inc.*, 121 N.C. App. 175, 177, 464 S.E.2d 504, 505 (1995); *Cheek v. Poole*, 121 N.C. App. 370, 374, 465 S.E.2d 561, 564, *cert. denied*, 343 N.C. 305, 971 S.E.2d 68 (1996); *American Telephone and Telegraph Co. v. Griffin*, 39 N.C. App. 721, 727, 251 S.E.2d 885, 888, *disc. rev. denied*, 297 N.C. 304, 254 S.E.2d 921 (1979). "A party wishing to avoid sanctions for non-compliance with discovery requests has the burden of proving the non-compliance was justified." *Graham v. Rogers*, 121 N.C. App. 460, 465, 466 S.E.2d 290, 294 (1996).

In the case *sub judice*, plaintiff served the "Interrogatories, Requests for Admissions, and Requests for Production of Documents" on 13 June 2000. Following no response by Beasley, plaintiff filed a "Notice of Admission of Facts by Defendant" on 29 August 2000. Ultimately, the trial court ordered Beasley to respond to the discovery requests by 5:00 p.m. on 31 October 2000. Instead of responding to the discovery requests, on that date Beasley served plaintiff a copy of his petition for *writ of certiorari* and motion for temporary stay which was filed with the Court of Appeals on 2 November 2000. On 3 November 2000, another panel of this Court granted the motion for temporary stay pending its decision on the petition for certiorari; on 17 November 2000, this Court denied the

petition and dissolved the temporary stay. On 22 November plaintiff filed a motion for sanctions; Beasley responded to the discovery on 30 November 2000.

On 19 December 2000, in its order allowing motion for sanctions, the trial court found that at the initial hearing for the motion to compel held on 8 October 2000, counsel for Beasley had represented that the discovery motions were completed but simply not signed because Beasley had resigned his position and decided the case was moot. The trial court also found that it had "disagreed with the defendant's contention that the lawsuit was moot and denied defendant's motion to dismiss and motion for attorney's fees." In sum, the record shows that Beasley did not respond to the discovery served upon him in June 2000 until 30 November 2000, over thirty days after the trial court ordered him to provide the responses; and that the trial court made findings of fact to support its order granting sanctions against Beasley under Rule 37.

Beasley next contends that the trial court abused its discretion in awarding attorney fees. We disagree.

In *Lincoln v. Grinstead*, 94 N.C. App. 122, 379 S.E.2d 671 (1989), this Court affirmed the trial court's decision to award attorney fees in response to the defendant's failure to comply with the trial court order compelling discovery. In that case, we held that the trial court properly imposed sanctions, when the defendant's responses to interrogatories were almost three weeks beyond the 30 days allowed by Rule 33. See also *Hammer v. Allison*,

20 N.C. App. 623, 202 S.E.2d 307, *cert. denied*, 285 N.C. 233, 204 S.E.2d 23 (1974).

In the present case, Beasley did not respond until five months after service of the discovery on him; more than thirty days after the trial court ordered him to respond; and eight days after the motions for sanctions for failure to comply with the order compelling discovery. The trial court holds broad discretion in determining what sanctions to enter in response to a party's failure to comply with an order compelling discovery. We hold that the trial court did not abuse its discretion by awarding plaintiff attorney fees. See *Cheek v. Poole, supra*; *Lincoln v. Grinstead, supra*. Thus, this assignment of error is rejected.

Finally, Beasley argues that there is no authority for the trial court to order that fees regarding his attempt to obtain a writ for certiorari. We disagree.

Rule 37(a)(4) requires the award of expenses to be reasonable, the record must contain findings of fact to support the award of any expenses, including attorney's fees. See *Morris v. Bailey*, 86 N.C. App. 378, 387, 358 S.E.2d 120, 125 (1987). The findings should be consistent with the purpose of the subsection which is not to punish the noncomplying party, but to reimburse the successful movant for his expenses.

Benfield v. Benfield, 89 N.C. App. 415, 422, 366 S.E.2d 500, 504 (1988).

In the present case, the trial court determined that Beasley's appeal was procedurally inadequate and that Beasley did not file his temporary stay motion in this Court until 2 November 2000 although the trial court had ordered him to respond by 31

October 2000. In effect, since Beasley was already in contempt of the trial court's order when he applied for a temporary stay from this Court, the granted temporary stay did not stay his compliance; rather, it stayed only the entry of contempt by the trial court until the denial of the petition for certiorari. Specifically, the trial court found that "[t]he plaintiff failed to (a) apply for a stay of execution from the trial court, (b) present extraordinary circumstances showing it impracticable to obtain a stay in the trial court, (c) file a bond to support a motion for writ of supersedeas, (d) file a motion for writ of supersedeas."

Moreover, the record shows that the attorney fees ordered were reasonable and necessary. In the initial order for sanctions, the trial court required plaintiff to provide and file with the trial court an affidavit in support of the fees incurred by plaintiff from the time of Beasley's contempt through the time of obtaining an order for sanctions. Plaintiff provided supporting documentation, showing billing and charges related to the case. In his affidavit, plaintiff's counsel stated that he normally and customarily charges

\$170.00 for his services as an attorney, which is within or below normal range of fees customarily charged by other attorneys in this area with the same level of experience. That by previous agreement with the plaintiff herein, I am still charging \$155.00 per hour which is less than my current hourly rate. . . . That of this Affidavit, I have expended, or will expend, at least 18.30 hours in my representation of Plaintiff, and my associates have expended no less than 13.00 hours, and my legal assistants have expended 4.10 hours. . . . The hourly rate charged by an associate in my firm who assists in appeals is \$125.00 per

hour . . . The hourly rate charged by legal assistants in my firm . . . is \$75.00. . . That at the date of this Affidavit, expenses incurred as described on "Exhibit A" in the amount of \$276.34. Fees and expenses shown on "Exhibit A" total \$5,045.34.

In a supplemental order, the trial court ordered that Beasley pay plaintiff \$5,045.34 for "reimbursement of attorney's fees and related expenses incurred on account of and by reason of those matters more particularly set forth in the Court's previous order awarding sanctions to plaintiff." The award of expenses was reasonable and the record contained findings of fact to support the award of attorney fees. Thus, we find that the trial court acted within its discretion in ordering the amount of attorney fees awarded for Beasley's failure to comply with the court order compelling discovery. *Roane-Barker v. Southeastern Hosp. Supply Corp.*, 99 N.C. App. 30, 37, 392 S.E.2d 663, 667 (1990) ("Absent specific evidence of injustice, we cannot hold [the amount of attorney fees] constitute an abuse of discretion."), *review denied*, 328 N.C. 93, 402 S.E.2d 418 (1991).

For the foregoing reasons, we affirm the trial court's sanction of attorneys fees.

Affirmed.

Judges McCULLOUGH and BIGGS concur.

Report per Rule 30(e).