

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA06-646

NORTH CAROLINA COURT OF APPEALS

Filed: 20 March 2007

LOUIS CARUSO,  
Plaintiff

v.

Onslow County  
No. 03-CVS-2592

MARK HENNESSY,  
Defendant.

Appeal by defendant from an order entered 7 November 2005 by Judge John E. Nobles in Onslow County Superior Court. Heard in the Court of Appeals 10 January 2007.

*Ward and Davis, LLP, by John A. J. Ward, for plaintiff-appellee.*

*Collins and Maready, P.A., by George L. Collins, for defendant-appellant.*

STROUD, Judge.

Defendant Mark Hennessy appeals from an order of the trial court awarding plaintiff Louis Caruso attorney's fees and costs incurred in prosecuting motions to compel and motions for sanctions pursuant to Rule 37 of the North Carolina Rules of Civil Procedure. We affirm.

---

I. Background

On 15 April 2003, plaintiff and defendant engaged in a brief physical confrontation. Defendant initiated a criminal assault proceeding against plaintiff after the confrontation. Plaintiff

filed a complaint against defendant on 19 August 2003, alleging abuse of process and malicious prosecution on account of the criminal assault proceeding. Defendant's answer to the complaint denied the material allegations of the complaint and included a counterclaim for assault and battery. The counterclaim requested compensatory and punitive damages for injuries allegedly inflicted by plaintiff during the confrontation. Plaintiff replied, denying all material allegations in defendant's counterclaim. Plaintiff asserted as part of his defense to defendant's counterclaim that any injuries allegedly suffered by defendant during the confrontation were pre-existing; he sought discovery of defendant's medical records for the purpose of supporting this defense.

On or about 16 June 2004, plaintiff served Plaintiff's First Set Of Interrogatories And Requests For Production Of Documents on defendant to obtain, among other things, defendant's medical records. On 23 September 2004, plaintiff's counsel received defendant's responses to the First Set Of Interrogatories And Requests For Production Of Documents.

Plaintiff filed a Motion to Compel And For Expenses pursuant to Rule 37(a) on 14 October 2004. In the motion, plaintiff alleged that the responses to twelve interrogatories and seven requests for production were missing or incomplete and that defendant's objections to five interrogatories and six requests for production were made for the purpose of causing "unnecessary delay and expense." On 3 November 2004, the trial court denied all of defendant's objections to the discovery and ordered full and

complete answers for all discovery requested in the motion. The trial court delayed ruling on plaintiff's motion for expenses pending receipt of an affidavit from plaintiff's counsel in support of the motion. On 29 November 2004, the parties entered into a Consent Order that all written discovery would comply with the 3 November 2004 order.

Plaintiff moved for discovery sanctions on or about 23 February 2005, alleging that defendant had failed to obey the order of 3 November 2004 and had failed to fully respond to Plaintiff's Second Set of Interrogatories and Requests for Production of Documents, served on defendant on or about 19 November 2004. Plaintiff's 23 February 2005 motion requested reasonable expenses, pursuant to Rule 37(b), incurred in connection with that motion, and renewed his request for reasonable expenses, pursuant to Rule 37(a), incurred in connection with his 14 October 2004 Motion to Compel. On 5 May 2005, the trial court granted plaintiff's motion in part, ordering defendant to serve on plaintiff's counsel, within 30 days of 5 April 2005, "full and complete supplemental answers to all written discovery" requests previously served on defendant or defendant's counsel. The trial court expressly permitted defendant's counsel to apply to the court for relief via telephone conference if he was "prohibited or . . . frustrated by any person or entity" from complying with the order. The trial court delayed a hearing on the requests for reasonable expenses, both those arising under Rule 37(a) and those arising under Rule 37(b).

Beginning 3 October 2005, and continuing on 18 October 2005, the trial court held a hearing on the requests for reasonable expenses made in the 23 February 2005 motion for sanctions. At the hearing, defendant primarily argued that provision of medical record release authorizations ("releases") amounted to full compliance with the discovery obligation to provide medical records, and in the alternative, that he was unable to comply with the discovery requests because of circumstances beyond his control. The trial court considered these arguments at the hearing. The trial court rejected defendant's first argument because its previous orders to compel discovery had placed an affirmative duty on defendant to provide the medical records, which could not be met by providing releases. The trial court rejected defendant's second argument because defendant had ample opportunity before the 3 October 2005 hearing on reasonable expenses to raise his inability to comply with the discovery requests due to circumstances beyond his control, but failed to do so.

On 7 November 2005, the trial court ordered defendant to pay plaintiff \$16,750.56 for attorney's fees and costs incurred by plaintiff in prosecuting his motion to compel pursuant to Rule 37(a)(4) and motion for sanctions pursuant to Rule 37(b)(2). Defendant appeals the trial court's order granting attorney's fees and costs to plaintiff.

---

## II. Issues

Defendant contends that the trial court abused its discretion in awarding plaintiff attorney's fees and costs in the amount of

\$16,750.56. Specifically, defendant argues that his failure to provide medical records in response to the orders compelling discovery was justified (1) because provision of releases to plaintiff satisfied his obligations under the orders and (2) because he was unable to provide all the medical records ordered due to circumstances beyond his control. Defendant argues that the trial court abused its discretion when it did not find that his failure to provide the requested medical records was thereby justified. Defendant also argues that even if the award of attorney's fees and costs was a proper exercise of the trial court's discretion, the amount of the award is unreasonable.<sup>1</sup>

Plaintiff responds that this appeal should be dismissed under Rule 28(b)(4) of the North Carolina Rules of Appellate Procedure because it is an interlocutory appeal that has not been shown to affect a substantial right. Alternatively, plaintiff contends that if this Court considers the merits of the appeal, both the award of attorney's fees and costs and the amount of the award were an appropriate exercise of the trial court's discretion.

### III. Interlocutory appeal

"An order to pay attorney's fees as a sanction does not affect a substantial right," *Long v. Joyner*, 155 N.C. App. 129, 134, 574 S.E.2d 171, 175 (2002), *disc. review denied*, 356 N.C. 673, 577 S.E.2d 624 (2003), and any appeal therefrom should be dismissed as interlocutory, *id.* See also *Veazey v. City of Durham*, 231 N.C.

---

<sup>1</sup> Defendant also assigns error to a defect in service. However, he does not argue this assignment of error in his brief and we consider it abandoned. N.C.R. App. P. 28(b)(6).

357, 362, 57 S.E.2d 377, 381 (1950); N.C. Gen. Stat. § 1-277(a) (2005) (listing when an appeal may be taken from an order or determination of a trial court). Nevertheless, we have chosen to exercise our discretion to consider the merits of defendant's purported appeal by treating it as a petition for writ of certiorari. N.C.R. App. P. 21(a)(1); *Cochran v. Cochran*, 93 N.C. App. 574, 577, 378 S.E.2d 580, 582 (1989) (allowing an appeal from a discovery order even though it did not contain enforcement sanctions).

---

#### IV. Sanctions

When a motion to compel discovery is granted pursuant to Rule 37 of the North Carolina Rules of Civil Procedure,

the court *shall . . . require* the party . . . whose conduct necessitated the motion or the party advising such conduct or both of them to pay to the moving party the *reasonable expenses* incurred in obtaining the order, *including attorney's fees*, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

N.C. Gen. Stat. § 1A-1, Rule 37(a)(4) (2005) (emphasis added).

Similarly, if an order compelling discovery pursuant to Rule 37(a) is not complied with, the trial court is required to order the noncompliant party to "pay the reasonable expenses, including attorney's fees, caused by the failure [to comply], unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust." N.C. Gen. Stat. § 1A-1, Rule 37(b)(2) (2005). In short, when a trial court compels discovery in response to the motion of a party, or finds

that a party compelled to provide discovery failed to do so, an award of reasonable costs is *mandatory*, unless an exception listed in Rule 37 is found to apply. See *Kent v. Humphries*, 50 N.C. App. 580, 590, 275 S.E.2d 176, 183 (remanding order to compel discovery with instructions to award attorney's fees), *modified and aff'd*, 303 N.C. 675, 281 S.E.2d 43 (1981).

"The imposition of discovery sanctions is within the sound discretion of the trial judge and will not be reversed absent a showing of abuse of that discretion." *Smitheman v. National Presto Industries*, 109 N.C. App. 636, 640, 428 S.E.2d 465, 468 (internal citations omitted), *disc. review denied*, 334 N.C. 166, 432 S.E.2d 366 (1993). "The test for abuse of discretion is whether a decision is manifestly unsupported by reason, or so arbitrary that it could not have been the result of a reasoned decision." *Frost v. Mazda Motors of Am., Inc.*, 353 N.C. 188, 199, 540 S.E.2d 324, 331 (2000) (internal citations omitted).

We first consider defendant's contention that providing medical record release authorizations satisfies, as a matter of law, an obligation to provide medical records arising from a discovery order under Rule 34 of the North Carolina Rules of Civil Procedure. We agree with the trial court that, under the circumstances of this case, provision of releases did not satisfy defendant's discovery obligation to provide medical records. The trial court found that defendant, because of his "dilatatory actions," had been placed under "an affirmative duty [by the first

discovery order] . . . to produce the requested documents.”<sup>2</sup> The trial court further found that defendant had failed to comply with both the first discovery order and a subsequent discovery order. There is more than adequate evidence in the record to support these findings by the trial court, and we hold that the trial court’s determination that provision of releases was insufficient to comply with defendant’s affirmative duty to provide medical records is supported by reason, was not arbitrary, and was therefore not an abuse of the trial court’s discretion.<sup>3</sup>

We next consider defendant’s contention that his failure to provide the medical records required by the discovery order was justified because circumstances beyond his control prevented him from so doing. If a party is unable to answer discovery requests because of circumstances beyond its control, an answer cannot be compelled. *Atlantic Veneer Corp. v. Robbins*, 133 N.C. App. 594, 598, 516 S.E.2d 169, 172 (1999) (upholding sanctions when party failed to show that compelled discovery could not be reasonably produced); *Laing v. Liberty Loan Co.*, 46 N.C. App. 67, 71, 264 S.E.2d 381, 384 (upholding sanctions when insufficient excuses were offered for failure to comply with a discovery order), *disc. review*

---

<sup>2</sup> Defendant did not appeal from the underlying discovery orders themselves but only from the sanctions order entered on 7 November 2005. Thus, we consider defendant’s contentions as to his provision of releases only in the context of his appeal of the sanctions order.

<sup>3</sup> In so holding, we do not imply that provision of releases will always be insufficient to comply with a discovery request under Rule 34. We hold only that the trial court did not abuse its discretion under the particular facts of this case.



*denied and appeal dismissed*, 300 N.C. 557, 270 S.E.2d 109 (1980); accord *Societe Internationale v. Rogers*, 357 U.S. 197, 2 L. Ed. 2d 1255 (1958) (holding that sanctions violated the Fifth Amendment when party was unable to comply with discovery order despite good faith efforts).

The record indicates that defendant had more than a year to produce the medical records, during which time the trial court granted two motions to compel and entered one consent order. The record does not show that defendant presented any evidence of circumstances beyond his control which made him unable to answer the discovery requests during this period. Although the trial court specifically gave defendant the option to apply for relief via telephone conference if he was "frustrated" in trying to comply with the second order, there is no record evidence to indicate that defendant did so. For these reasons, the trial court did not abuse its discretion when it rejected defendant's claim that he was unable to answer due to circumstances beyond his control.

In sum, defendant did not show that his failure to produce the medical records ordered by the trial court was substantially justified, and he does not aver that an award of expenses would be otherwise unjust. Therefore, the trial court was bound to award attorney's fees and costs to plaintiff as part of the order compelling discovery, see N.C. Gen. Stat. § 1A-1, Rule 37(a)(4) (2005) and *Kent*, 50 N.C. App. at 590, 275 S.E.2d at 183, and as a result of its finding that defendant unjustifiably failed to comply

with that order, see N.C. Gen. Stat. § 1A-1, Rule 37(b)(2) (2005). The trial court did not abuse its discretion in so doing.

The only remaining question in defendant's appeal is whether the \$16,750.56 awarded to plaintiff for attorney's fees and costs was an abuse of discretion because it was unreasonable in amount. We hold that the amount was not unreasonable.

Determining a reasonable amount for an award of attorney's fees lies within the discretion of the trial court. *Morris v. Bailey*, 86 N.C. App. 378, 387, 358 S.E.2d 120, 125 (1987). Findings of fact to support the reasonableness of the amount are required in order to show that the trial court properly exercised its discretion. *Benfield v. Benfield*, 89 N.C. App. 415, 422, 366 S.E.2d 500, 504 (1988). These findings may include "the time and labor expended, the skill required to perform the legal services rendered, the customary fee for like work, or the experience and ability of the attorney." *Morris*, 86 N.C. App. at 387, 358 S.E.2d at 126.

In the instant case, the trial court found that the fees and costs for plaintiff's attorney were "reasonable and proper." The trial court specifically based this finding on several documents which were included as attachments to plaintiff's motion requesting attorney's fees and costs. These documents contained extensive information regarding the time and labor expended, including detailed time records of the work by plaintiff's counsel for each hearing on the motions to compel and motion for sanctions. The record also contains affidavits in support of the customary fee for

like work and the experience and ability of the plaintiff's attorney. For these reasons, we conclude that the amount of the award was supported by reason, was not arbitrary, and therefore was not an abuse of discretion.

---

V. Conclusion

The trial court did not abuse its discretion by awarding the amount of \$16,750.56 to plaintiff for attorney's fees and costs incurred in prosecuting motions to compel and motions for sanctions. The trial court order is affirmed.

AFFIRMED.

Judges TYSON and STEPHENS concur.

Report per Rule 30(e).