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NO. 08-401

NORTH CAROLINA COURT OF APPEALS

Filed: 7 October 2008

BILLY STEWART and  
CAROLYN R. STEWART,

Plaintiffs,

v.

Harnett County  
No. 06 CVS 710

ESTATE OF WILLIE MARTIN  
BREWINGTON, by and through  
Estate Administrator, DAVID  
HARTLEY,

Defendant.

# Court of Appeals

Appeal by plaintiffs from an order entered 10 September 2007 by Judge Paul C. Ridgeway and from orders entered 9 November 2007 and 10 January 2008 by Judge Franklin F. Lanier in Harnett County Superior Court. Heard in the Court of Appeals 23 September 2008.

## Slip Opinion

*The Law Office of James M. Johnson, by James M. Johnson, for plaintiff-appellants.*

*Hall, Rodgers, Gaylord, & Millikan, PLLC, by Kathleen M. Millikan, for defendant-appellee.*

BRYANT, Judge.

Billy and Carolyn Stewart (plaintiffs) appeal from an order entered 10 September 2007 granting defendant's motion to compel, an order entered 9 November 2007 dismissing plaintiffs' action with prejudice, and orders entered 10 January 2008 denying plaintiffs' motions for amendment of judgment and for relief from judgment.

*Facts and Procedural History*

On 6 April 2006, plaintiffs filed a complaint against defendant alleging injuries arising out of an automobile accident that occurred on 15 April 2003 involving plaintiffs and Willie Martin Brewington (decedent). On 10 May 2007, defendant served plaintiffs' counsel with defendant's first set of interrogatories and request for production of documents with plaintiffs' responses due on 12 June 2007. Defendant received no response from plaintiffs.

On 26 June 2007, defendant contacted plaintiffs' counsel and requested plaintiffs' discovery responses. Defendant consented to extend the date for responses to 27 July 2007; however, plaintiffs failed to respond. Defendant contacted plaintiffs' counsel again on 30 and 31 July 2007 to request plaintiffs' discovery responses. On 31 July 2007, defendant filed a motion to compel. Defendant's motion to compel was heard on 10 September 2007 and an order granting defendant's motion was entered that same day requiring plaintiffs to provide the documents requested within fifteen days of the order.

On 19 September 2007, plaintiffs' counsel filed a motion to withdraw on the basis of plaintiffs' failure to communicate with counsel. The motion was subsequently withdrawn on 10 October 2007. On 5 October 2007, defendant filed a motion to dismiss or to compel compliance and a motion for sanctions on the basis of plaintiffs'

failure to supply to defendant the requested documents. At the time defendant's motion was filed, plaintiffs had failed to submit any of the court-ordered documents. Defendant's motion was heard 29 October 2007. On 9 November 2007, an order was entered dismissing the action with prejudice and granting defendant's motion for sanctions. Plaintiffs appeal.

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On appeal, plaintiffs raise several issues which can be summarized by the following: (I) Whether the trial court abused its discretion by dismissing plaintiffs' action with prejudice; and (II) Whether the trial court erred by granting defendant's motion to compel.

*Standard of Review*

"[I]t is well established that orders regarding discovery matters are within the discretion of the trial court and will not be upset on appeal absent a showing of abuse of that discretion." *Evans v. United Servs. Auto. Ass'n*, 142 N.C. App. 18, 27, 541 S.E.2d 782, 788, *cert. denied*, 353 N.C. 371, 548 S.E.2d 810 (2001) (citations omitted). To demonstrate an abuse of discretion, the appellant must show that the trial court's ruling was manifestly unsupported by reason, *Clark v. Penland*, 146 N.C. App. 288, 291, 552 S.E.2d 243, 245 (2001), or could not be the product of a reasoned decision, *Chavis v. Thetford Prop. Mgmt., Inc.*, 155 N.C. App. 769, 771, 573 S.E.2d 920, 921 (2003). This Court is not allowed to substitute its own judgment for that of the trial court. *See Id.*

Plaintiffs argue the trial court abused its discretion by dismissing plaintiffs' action with prejudice pursuant to Rule 37(d) of the North Carolina Rules of Civil Procedure because the sanction was overly harsh. We disagree.

Rule 37 of the North Carolina Rules of Civil Procedure authorizes a trial judge to impose sanctions, including dismissal, upon a party for discovery violations. See N.C. Gen. Stat. § 1A-1, Rule 37(b)(2) and (d) (2007). Whether a sanction should be imposed under Rule 37 lies within the sound discretion of the trial court. *Goss v. Battle*, 111 N.C. App. 173, 177, 432 S.E.2d 156, 159 (1993). A decision of the trial court to impose sanctions may be reversed only for abuse of discretion. *Hursey v. Homes by Design*, 121 N.C. App. 175, 177, 464 S.E.2d 504, 505 (1995). A trial court has abused its discretion when "its ruling was so arbitrary that it could not have been the result of a reasoned decision." *Id.*

Prior to dismissing an action for failure to respond to discovery requests, a trial court must consider lesser sanctions. *Goss*, 111 N.C. App. at 177, 432 S.E.2d at 158-59; *Badillo v. Cunningham*, 177 N.C. App. 732, 734, 629 S.E.2d 909, 911 (2006). "[W]here the record on appeal permits the inference that the trial court considered less severe sanctions, this Court may not overturn the decision of the trial court unless it appears so arbitrary that it could not be the result of a reasoned decision." *Badillo*, 177 N.C. App. at 734, 629 S.E.2d at 911.

In this case, the record implies that the trial court considered lesser sanctions before dismissing plaintiffs' action with prejudice. During the hearing on defendant's motion to dismiss, plaintiffs' counsel conceded that some form of sanctions, such as being taxed for the cost of obtaining discovery information, was appropriate because of plaintiffs' non-compliance with the order to compel. Additionally, the trial court stated in the order of dismissal that it had "considered certain lesser discovery sanctions before dismissing Plaintiffs' case with prejudice . . . ." The language of the order along with requests by plaintiffs' counsel for the court to consider sanctions other than dismissal, permit the inference that the trial court considered lesser sanctions before ordering plaintiffs' case to be dismissed with prejudice. See *Id.*

Plaintiffs argue *Badillo* is distinguishable because the plaintiff in *Badillo* produced no documents or discovery, whereas here, plaintiffs furnished over 900 pages of medical records to defendants before the hearing on the motion to dismiss. Plaintiffs argue the trial court's statement regarding consideration of lesser sanctions is "boilerplate" because the trial court gave no weight to plaintiffs' evidence regarding their good faith efforts to comply with the order to compel.

We reject plaintiffs' argument that good faith efforts were made to provide discovery. Defendant contacted plaintiffs after the expiration of 30 days from service of the discovery request and agreed to extend the time for response. However, plaintiffs again

failed to provide defendant with any documents in a timely manner. Only after defendant's motion to compel was granted did plaintiffs begin to attempt to fulfill defendant's requests. However, plaintiffs again failed to submit any documents within the time period specified by the trial court's order to compel. Plaintiffs only submitted documents after defendant filed a motion to dismiss or compel discovery. Plaintiffs' actions do not demonstrate a good faith attempt to comply with the order to compel discovery. We hold, the trial court did not abuse its discretion by dismissing plaintiffs' action with prejudice. This assignment of error is overruled.

II

Plaintiffs argue the trial court erred by granting defendant's motion to compel. We disagree.

Pursuant to Rule 34 of the North Carolina Rules of Civil Procedure, a party may request documents from another party for the purpose of discovery. N.C. Gen. Stat. § 1A-1, Rule 34 (a) (2007). The party upon whom the request is served must respond or object to the request within 30 days after service of the request. N.C. Gen. Stat. § 1A-1, Rule 34 (b). If the served party has not responded within the time period, the party submitting the request may move for a motion to compel discovery under Rule 37(a). *Id.* "Whether or not the party's motion to compel discovery should be granted or denied is within the trial court's sound discretion and will not be reversed absent an abuse of discretion." *Wagoner v. Elkin City*

*Sch.' Bd. of Education*, 113 N.C. App. 579, 585, 440 S.E.2d 119, 123 (1994).

Here, defendant served plaintiffs with defendant's first set of interrogatories and request for documents on 10 May 2007. Plaintiffs failed to respond or object to defendant's request within 30 days. Although plaintiffs attempt to argue defendant's request was vague or overly broad, plaintiffs failed to object to defendant's discovery request on this or any other basis within the designated time period. Furthermore, plaintiffs failed to object to the discovery request at the hearing on defendant's motion to compel. Plaintiffs can not now argue the order granting defendant's motion to compel was defective because defendant's requests were vague or overly broad.

Additionally, plaintiffs' remaining arguments that the order to compel discovery failed to find that plaintiffs had possession or control over the documents, failed to require defendant to pay for the cost of production of the documents, and required plaintiffs to pay the cost of production, are without merit. The trial court did not abuse its discretion by granting defendant's motion to compel discovery. This assignment of error is overruled.

Plaintiffs also argue the trial court erred by failing to hear the pending motion of plaintiffs' counsel to withdraw from the case and by failing to rule on plaintiffs' pending motion for a protective order before hearing defendant's motion to dismiss. Plaintiffs have failed to cite any authority in support of their

argument. Therefore, pursuant to N.C. R. App. P. 28(b)(6) (2007), this assignment of error is dismissed.

For the forgoing reasons, the orders of the trial court are affirmed.

AFFIRMED.

Judge WYNN concurs.

Judge ARROWOOD concurs in the result only.

Report per Rule 30(e).