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NO. COA09-1128

NORTH CAROLINA COURT OF APPEALS

Filed: 7 September 2010

ANDREY A. REKECHINSKY,

Plaintiff,

v.

Wake County  
08 CVS 5168

JANE HELEN GRIFFITHS,

Defendant.

Appeal by plaintiff from judgment entered 3 February 2009 and order entered 17 March 2009 by Judge Paul C. Ridgeway in Wake County Superior Court. Heard in the Court of Appeals 10 February 2010.

*E. Gregory Stott for plaintiff.*

*Teague Rotenstreich Stanaland Fox & Holt, PLLC, by Paul A. Daniels, for defendant.*

ELMORE, Judge.

On 25 August 2006, Andrey Rekechinsky (plaintiff) was driving his motorcycle on Gorman Street in Raleigh when he was struck by a vehicle driven by Jane Helen Griffiths (defendant). Plaintiff suffered injuries to his neck, back, body, limbs and torso as a result of the collision, as well as severe mental and physical pain which continued after the accident. Plaintiff claimed that defendant's negligence was the proximate cause of his injuries;

defendant admitted that her failure to keep a proper lookout was negligent, but denied that her negligence was the proximate cause of plaintiff's injuries.

On 16 June 2008, during the discovery phase, defendant requested the production of documents, including medical records and bills arising from the accident. On 15 August 2008, plaintiff filed objections to defendant's requests. On 9 October 2008, defendant filed a motion to compel; plaintiff also filed a motion to compel, along with a motion for a protective order asking the court to quash the request for production of documents and excuse plaintiff from providing the documents. On 16 October 2008, plaintiff argued his motion to compel; however, defendant did not argue her own motion. The trial court did not rule on the motions prior to trial.

The case came to trial on 5 January 2009, and defendant, pursuant to a motion *in limine*, asked the court to rule on the 9 October 2008 motion to compel and orally requested sanctions for plaintiff's failure to produce documents. The court granted defendant's motion to compel and sanctioned plaintiff by excluding two medical bills, which showed costs totaling \$3,455.00, from being admitted at trial. The trial court excluded these medical bills because plaintiff failed to produce medical bills and records during the discovery phase.

The jury found for plaintiff and awarded him \$12,000.00. Plaintiff filed motions for judgment notwithstanding the verdict and a new trial. The trial court denied both. Plaintiff now

appeals from the judgment and from the order denying judgment notwithstanding the verdict and new trial.

Plaintiff argues that the trial court committed reversible error by granting defendant's motion *in limine* and imposing sanctions that prevented plaintiff from introducing two medical bills. Plaintiff also argues that this error was "unduly prejudicial." We agree.

It is well established that sanctions may be imposed only after a party fails to comply with an order compelling discovery. *Stilley v. Automobile Enterprises*, 55 N.C. App. 33, 38, 284 S.E.2d 684, 687 (1981) (holding sanctions were not proper where no order existed to compel compliance with discovery); *Baker v. Speedway Motorsports, Inc.*, 173 N.C. App. 254, 267-68, 618 S.E.2d 796, 805 (2005) (holding sanctions were proper because plaintiff failed to comply with court order compelling discovery); *Badillo v. Cunningham*, 177 N.C. App. 732, 735, 629 S.E.2d 909, 911 (2006) (upholding dismissal of the plaintiff's case because of his failure to comply with discovery order). Rule 34 of the North Carolina Rules of Civil Procedure states that a party may request the production of documents without leave of the court, and that "[t]he party upon whom the request is served shall serve a written response within 30 days after the service of the request." N.C. Gen. Stat. § 1A-1, Rule 34(b) (2009). However, the party upon whom the request is served may make reasonable objections to the request. *Id.* Accordingly, "[t]he party submitting the request may move for an order under Rule 37(a) with respect to any objection to

or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested." *Id.* Under Rule 37(a), "the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request." N.C. Gen. Stat. § 1A-1, Rule 37(a)(2) (2009). Rule 37 also states that, if a party "fails to obey an order to provide or permit discovery, including an order made under section (a) of this rule[,] . . . a judge of the court in which the action is pending may make such order in regard to the failure as are just[.]" *Id.*

Sanctions are within the broad discretion of the trial judge and will not be overturned "absent a showing of abuse of that discretion." *Baker*, 173 N.C. App. at 264, 618 S.E.2d at 803 (quotations and citation omitted). "An abuse of discretion may arise if there is no record evidence which indicates that defendant acted improperly, or if the law will not support the conclusion that a discovery violation has occurred." *Id.* (citation omitted).

In this case, defendant requested production of documents, but plaintiff objected to these requests. These objections required defendant to pursue a motion to compel so that the court could order plaintiff to submit the documents pursuant to Rule 34(b). While defendant did file a motion to compel, she failed to argue it at the 16 October 2008 hearing. Defendant argues that Rule 7(b)(1) allows for oral motions, without notice, when "a cause is on the calendar for that session." Thus, defendant argues, her motion and the imposition of sanctions at trial on 5 January 2009 complied

with the rules. However, granting a motion to compel and *simultaneously* imposing sanctions for failure to comply with that order does not comply with those rules. See N.C. Gen. Stat. §1A-1, Rule 37(b) (2009) (stating sanctions are proper *after* failure to comply with order).

The case at hand is similar to *Stilley*, where the defendant also sought and was successful in achieving a Rule 37 sanction through a motion *in limine* at trial. 55 N.C. App. at 38, 284 S.E.2d at 687. This Court held that, "[b]ecause plaintiffs had not failed to comply with a discovery order, the court improperly granted defendant's motion *in limine*." *Id.* (citation omitted). Similarly, since plaintiff in the case at hand did not fail to comply with a discovery order, the court abused its discretion by granting defendant's motion *in limine*.

Plaintiff also argues that this error was "unduly prejudicial." In order to show prejudice, a party must show that "a different result would have likely ensued had the error not occurred." *Suarez v. Wotring*, 155 N.C. App. 20, 30, 573 S.E.2d 746, 752 (2002). Here, the jury awarded plaintiff \$12,000.00 in damages for personal injuries without taking into account the two medical bills totaling \$3,455.00, which were excluded. Defendant argues that the \$12,000.00 amount awarded was very similar to the total amount of medical bills of \$12,160.19 and, therefore, plaintiff cannot claim that he was prejudiced by the decision. However, this argument is unpersuasive, as the jury would have likely awarded more damages had they known of the \$3,455.00 in

additional medical bills. The jury was able to contemplate \$8,705.19 of medical bills in its overall award of \$12,000.00, which suggests that the jury intended to cover all medical bills stemming from the accident plus an additional amount for pain and suffering. It is likely, then, that the excluded \$3,455.00 would have been included in the overall award but for the error in sanctioning plaintiff. Therefore, a different result would have occurred but for this error, and the error was prejudicial.

We therefore reverse the judgment and the order denying judgment notwithstanding the verdict and new trial, and we remand for a new trial. Because we have granted a new trial, we need not consider plaintiff's remaining issues.

Reversed and remanded.

Judges BRYANT and STROUD concur.

Report per Rule 30(e).