NO. COA14-715
NORTH CAROLINA COURT OF APPEALS

Filed: 31 December 2014

DONNIE E. ARNOLD,
Plaintiff,

v. Edgecombe County
No. 12-CVS-0996

THE INSURANCE COMPANY OF
THE STATE OF PENNSYLVANIA, and
WASTE INDUSTRIES USA, INC.
Defendants.

Appeal by defendant The Insurance Company of the State of Pennsylvania from order entered 29 May 2014 by Judge Quentin T. Sumner in Edgecombe County Superior Court. Heard in the Court of Appeals 3 November 2014.

White & Stradley, PLLC, by J. David Stradley and Robert P. Holmes, IV; and O'Malley Tunstall, PLLC, by Joseph P. Tunstall, for plaintiff-appellee.

Nelson Mullins Riley & Scarborough, LLP, by Christopher J. Blake; Steptoe & Johnson, LLP, by Roger E. Warin, pro hac vice, Charles G. Cole, pro hac vice, John F. O'Connor, pro hac vice; and Bennett Evan Cooper, pro hac vice, for defendant-appellant The Insurance Company of the State of Pennsylvania.

BELL, Judge.

The Insurance Company of the State of Pennsylvania ("Defendant") appeals from the trial court's order assessing sanctions requiring Defendant to pay $2.4 million to Donnie E. Arnold ("Plaintiff") for its belated compliance with a discovery order. On appeal, Defendant contends that (1) the trial court abused its discretion in imposing the $2.4 million sanction; (2) the trial court erroneously assessed a noncompensatory fine where the requirements of civil contempt were not met; and (3) the $75,000-per-day sanction was excessive. After careful review, we vacate the trial court's order assessing sanctions against Defendant.

Factual Background

On 8 June 2010, while driving a truck owned by his employer, Waste Industries USA, Inc. ("Waste Industries"), in the course of his employment, Plaintiff was injured in an automobile accident caused by an uninsured motorist. The truck driven by Plaintiff was insured by a policy underwritten by the Insurance Company of the State of Pennsylvania ("ICSOP"), with limits of uninsured motorist ("UM") coverage in the amount of $1 million. On 6 June 2011, Plaintiff notified Waste Industries and ICSOP of his claim for uninsured motorist insurance benefits ("Plaintiff's UM claim") arising out of the accident. ICSOP's

claims representative, AIG Claims, Inc. ("AIG Claims"), serves as ICSOP's claims-handling unit. AIG Claims handled Plaintiff's UM claim in its Divisional Claims Office in Alpharetta, Georgia.

Plaintiff and Defendant disputed the extent of Plaintiff's injuries arising out of the accident. On 7 February 2012, Plaintiff demanded arbitration of his claim. On 16 October 2012, the arbitration panel awarded Plaintiff $635,000, subject to a workers' compensation lien for benefits previously paid to Plaintiff.

On 2 November 2012[1], Plaintiff filed a complaint against ICSOP and Waste Industries, asserting claims for breach of contract, unfair and deceptive trade practices, and bad faith. Plaintiff alleged that ICSOP had "willful[ly] refus[ed] to promptly investigate, evaluate, arbitrate, and pay Plaintiff's first-party insurance claim for UM benefits" and that "AIG's employees failed to handle Plaintiff's UM claim properly." Plaintiff served his first set of combined discovery requests on ICSOP with the summons and complaint on 8 November 2012. Defendant submitted its first discovery responses and objections on 22 February 2013. On 5 March 2013, Plaintiff filed a motion

[1] Plaintiff alleged that, as of this date, Defendant refused to pay any insurance benefits despite the fact that the arbitration panel had awarded Plaintiff $635,000 on his UM claim.

to compel responses to discovery requests and production of documents.

Plaintiff's motion to compel was heard on 7 October 2013 in Edgecombe County Superior Court. Superior Court Judge Milton F. Fitch, Jr. entered a consent order ("the Discovery Order"), in which the parties agreed as follows:

> 1. Defendant Insurance Company of Pennsylvania's (ICSOP's) deemed admissions are withdrawn.
>
> 2. Defendant ICSOP shall provide full responses to Plaintiff's First Set of Discovery on or before October 18, 2013, save for assertion of attorney-client privilege.
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> 3. Defendant ICSOP shall deliver a complete privilege log to Plaintiff's counsel's office on or before October 11, 2013.
>
> 4. Plaintiff reserves the right to contest any privilege objections by further motion.

As set forth in the Discovery Order, Defendant served its supplemental and amended discovery responses and documents on 18 October 2013.

On 31 January 2014, Plaintiff filed a motion for sanctions against Defendant for its alleged refusal to comply with the Discovery Order. Plaintiff asserted that Defendant had failed to provide full responses to 17 of the original 34 discovery

requests and asked the trial court to enter default judgment against Defendant. On 5 February 2014, Plaintiff's motion for sanctions came on for hearing. On 28 February 2014, the trial court entered an order ("the Sanctions Order"), making the following relevant conclusions of law:

> 1. Defendant ICSOP failed to comply with Judge Fitch's order of 7 October 2013 because Defendant ICSOP has failed to provide full responses to discovery request nos. 2-3, 6-8, 12, 25-27, and 33. The failure to comply was in bad faith and caused prejudice to Plaintiff. Defendant ICSOP's serious discovery misconduct, in the discretion of this Court, should be met with a significant sanction in order to deter Defendant ICSOP from continuing to disobey Judge Fitch's order.
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> 2. Defendant ICSOP acted in bad faith when it failed to comply with Judge Fitch's order by failing to provide full responses to discovery requests: 2-3, 6-8, 12, 25-27, and 33.
>
> 3. Defendant ICSOP's failure to comply with Judge Fitch's order . . . has prejudiced Plaintiff in the prosecution of this matter by depriving Plaintiff of relevant discovery responses, by causing needless delay in the discovery process, and by causing expenses associated with enforcing Judge Fitch's order.
>
> 4. There is a need to deter noncompliance of the parties, in this case Defendant ICSOP, with Orders of this Court.
>
> 5. After considering less severe sanctions than those described below, the Court finds

> that any lesser sanctions would not be appropriate given the seriousness of ICSOP's misconduct.

Based on these conclusions of law, the trial court ordered, in pertinent part, as follows:

> 1. On or before 3 March 2014, Defendant ICSOP must respond fully to discovery request nos. 2-3, 6-8, 12, 25-27, and 33 . . . .
>
> . . . .
>
> 3. In its further response to request nos. 6 and 7, Defendant ICSOP must identify and produce:
>
> > a. all documents containing or describing relevant best practices . . . and any of the "best practices" documents named in the produced AIG Performance Management Forms . . . .
>
> . . . .
>
> 11. The Court also orders that Defendant ICSOP shall pay to Plaintiff sanctions in the amount of $75,000 per day for each day following 3 March 2014 during which ICSOP has not fully complied with this order.
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> 12. Further, in its discretion, the Court finds that Defendant ICSOP must pay the reasonable expenses caused by Defendant ICSOP's failure to comply with the order compelling discovery including the cost of the transcript of the hearing 5 February 2014 and the reasonable attorneys' fees and expenses incurred by Plaintiff.

On 3 March 2014, Defendant served its second amended and supplemental responses to Plaintiff's first combined discovery request and produced more than 6,800 pages of additional documents. On 19 March 2014, Plaintiff filed a motion to assess sanctions against Defendant for its noncompliance with the Sanctions Order. Plaintiff alleged Defendant had failed to fully respond to request number 33, which sought documents "provided to supervisors of ICSOP's claims-handling unit outlining, describing or setting forth unit or employee performance goals/expectations for the time period of June 8, 2010, to present." Specifically, Plaintiff pointed to (1) Defendant's failure to "produce[] any performance goals/expectations associated with OFR [open-file review], CFR [closed-file review] or 'File Quality Leakage'" used in conducting performance evaluations; and (2) Defendant's failure "to produce personnel reviews for Alexander Vierheilig [("Mr. Vierheilig")], the person in ICSOP's chain of command who had authority to approve payment of Plaintiff's claim."

Plaintiff's second combined discovery, which was not at issue in the Sanctions Order, included a document request that directly requested production of open-file review ("OFR") and closed-file review ("CFR") documents. After an initial

objection by Defendant, counsel for both parties conferred regarding this request and Defendant voluntarily produced the OFR and CFR documents on 4 April 2014. On the same day, Defendant also produced Mr. Vierheilig's performance evaluations pursuant to an informal document request by Plaintiff's counsel.

Plaintiff's motion to assess sanctions came on for hearing on 7 May 2014 in Edgecombe County Superior Court. In open court, the trial court found that Defendant had not fully complied with the Sanctions Order and assessed sanctions against Defendant in the amount of $2.4 million to be paid directly to Plaintiff. On 29 May 2014, the trial court entered its order ("the Order Assessing Sanctions") requiring Defendant to pay sanctions to Plaintiff in the amount of $2.4 million "for its willful failure to comply with the Sanctions Order." In the Order Assessing Sanctions, the trial court found the following:

> [D]uring the 32-day period [following entry of the Sanctions Order], ICSOP willfully violated the Sanctions Order . . . by failing to produce:
>
> 1. Highly-relevant [sic] and potentially damaging (to ICSOP) "Best Practice" documents related to insurance claim handling . . . ;
>
> 2. Documents containing employee standards, goals, or expectations for ICSOP's claims-handling personnel (including such standards, goals, or expectations associated with Open File Reviews, Closed File Reviews, and Leakage/Lost Economic Opportunity assessments); and,

> 3. Personnel reviews for Mr. Alexander Vierheilig.
>
> Any of these failures, standing alone, justifies the assessment of sanctions contained in this Order.
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> Before assessing the sanction of $2.4 million, the Court again carefully considered the entire record, including ICSOP's non-compliance with the Sanctions Order and ICSOP's non-compliance with the underlying Consent Order. The Court further considered all of the available sanctions for such willful disobedience of court orders. In deciding the size of the sanction, the Court reviewed evidence of ICSOP's financial strength and the Court considered ICSOP's ability to pay a monetary sanction. . . . The court further found and considered that Plaintiff has been harmed by the delay and by the need to resort to multiple contentious court actions which would have been unnecessary but for ICSOP's willful disobedience of the Orders of the Court. After thorough consideration of these factors, the Court has determined that less severe sanctions would not be adequate given the seriousness of the misconduct and the willful disobedience. The Court finds that the sanction contained in this order is necessary to ensure compliance with the Court's Orders.

Defendant gave timely notice of appeal to this Court.

Analysis

I. Interlocutory Appeal

As an initial matter, we must address the interlocutory nature of Defendant's appeal. The Sanctions Order left unresolved the substantive allegations Plaintiff made in his lawsuit against Defendant ICSOP. Therefore, the order is interlocutory. *Carriker v. Carriker*, 350 N.C. 71, 73, 511

S.E.2d 2, 4 (1999) ("Interlocutory orders are those made during the pendency of an action which do not dispose of the case, but instead leave it for further action by the trial court in order to settle and determine the entire controversy.")(citation omitted).

Generally, no appeal may be taken from an interlocutory order. However, an interlocutory order may be appealed if the order implicates a substantial right of the appellant that would be lost if the order was not reviewed prior to the issuance of a final judgment. *Guilford Cty. ex rel. Gardner v. Davis*, 123 N.C. App. 527, 529, 473 S.E.2d 640, 641 (1996). This Court has previously held that "where a party is found in contempt for noncompliance with a discovery order or has been assessed with certain other sanctions, the order is immediately appealable since it affects a substantial right under [N.C. Gen. Stat. §] 1-277 and 7A-27(d)(1)." *Cochran v. Cochran*, 93 N.C. App. 574, 576, 378 S.E.2d 580, 581 (1989). As such, we have jurisdiction over Defendant's appeal.

II. The Sanctions Order

Defendant's primary argument on appeal is that the $75,000-per-day Sanctions Order was effectively a civil contempt order, and, as such, the trial court erred by imposing a

noncompensatory fine where the requirements for civil contempt proceedings were not adhered to. We agree.

The trial court's Sanctions Order referred to Rule 37 of the North Carolina Rules of Civil Procedure when it addressed the imposition of sanctions. Rule 37 authorizes a trial court to impose sanctions against a party who fails to comply with a discovery order. N.C.R. Civ. P. 37(b)(2) ("If a party . . . fails to obey an order to provide or permit discovery, . . . a judge of the court in which the action is pending may make such orders in regard to the failure as are just . . . ."). Among the sanctions enumerated in Rule 37 is "an order treating as a contempt of court the failure to obey any orders." N.C.R. Civ. P. 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 Roane-Barker v. Southeastern Hosp. Supply Corp.*, 99 N.C. App. 30, 37, 392 S.E.2d 663, 667 (1990) (holding that sanctions order striking defendant's answer and counterclaims, assessing defendant plaintiff's attorney's fees, and entering default judgment for plaintiff, although severe, was expressly authorized by Rule 37 and not an abuse of discretion absent

specific evidence of injustice).

While Rule 37 allows the trial court to require the party in noncompliance with a discovery order to pay reasonable expenses, including attorney's fees, "Rule 37(a)(4) requires the award of expenses to be reasonable, [and] the record must contain findings of fact to support the award of any expenses, including attorney's fees. 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) (citations omitted)(vacating and remanding attorney's fees award where sanctions order contained no findings of fact to support conclusion that fees were reasonable).

In the case *sub judice*, Defendant argues that the monetary sanctions imposed against it in the Sanctions Order under the guise of Rule 37 were not for reasonable expenses or attorney's fees — the only two monetary awards permitted under Rule 37. Rather, Defendant contends, and we agree, that because Rule 37 does not authorize noncompensatory monetary awards, the $75,000-per-day monetary sanctions effectively constitute a civil contempt sanction for failure to comply with the trial court's

prior orders and the trial court erred by not complying with the requirements for entering a civil contempt order.

N.C. Gen. Stat. § 5A-21 defines civil contempt as the "[f]ailure to comply with an order of the court." N.C. Gen. Stat. § 5A-21(a) (2013). This Court has previously stated that "[w]here the purpose [for which the trial court exercises its contempt power] is to provide a remedy for an injured suitor and coerce compliance with an order, the contempt is civil." *Thompson v. Thompson*, __ N.C. App. __, __, 735 S.E.2d 214, 216 (2012) (citation and quotation marks omitted)(finding trial court had exercised its contempt power even though order did not explicitly mention the word "contempt").

Here, the trial court stated in its Sanctions Order that it was imposing the $75,000-per-day sanctions award against Defendant to "deter noncompliance . . . with Orders of this Court" and it further "order[ed] that Defendant ICSOP *shall pay to Plaintiff* sanctions in the amount of $75,000 per day for each day following 3 March 2014 during which ICSOP has not fully complied with this Order." (emphasis added). Thus, it is apparent that the trial court intended the noncompensatory monetary sanctions awarded directly to Plaintiff to be sanctions arising from finding Defendant to be in civil contempt.

Having determined that the purported Rule 37 sanctions were, in reality, civil contempt sanctions, we turn now to whether the requirements for entering an order of civil contempt have been met.

> Review in civil contempt proceedings is limited to whether there is competent evidence to support the findings of fact and whether the findings support the conclusions of law. Findings of fact made by the judge in contempt proceedings are conclusive on appeal when supported by any competent evidence and are reviewable only for the purpose of passing upon their sufficiency to warrant judgment. . . . The trial court's conclusions of law drawn from the findings of fact are reviewable *de novo*.

Tucker v. Tucker, 197 N.C. App. 592, 594, 679 S.E.2d 141, 142-43 (2009) (citations, quotation marks, and brackets omitted).

In order to hold a party in civil contempt,

> the trial court must find the following: (1) the order remains in force, (2) the purpose of the order may still be served by compliance, (3) the non-compliance was willful, and (4) the non-complying party is able to comply with the order or is able to take reasonable measures to comply.

Shippen v. Shippen, 204 N.C. App. 188, 190, 693 S.E.2d 240, 243 (2010) (citation omitted). *See* N.C. Gen. Stat. § 5A-21(a) (2013). N.C. Gen. Stat. § 5A-23(e) further provides that "[i]f civil contempt is found, the judicial official must enter an order finding the facts constituting contempt and specifying the

action which the contemnor must take to purge himself or herself of the contempt." N.C. Gen. Stat. § 5A-23(e) (2013).

This Court has stated that "[w]illfulness constitutes: (1) an ability to comply with the court order; and (2) a deliberate and intentional failure to do so." *Eakes v. Eakes*, 194 N.C. App. 303, 310, 669 S.E.2d 891, 896 (2008) (citation and quotation marks omitted). Here, the trial court failed to make any findings regarding Defendant's "willful noncompliance" as required by subsection (3) of N.C. Gen. Stat. § 5A-21(a) in both its 28 February 2014 Sanctions Order and its 29 May 2014 Order Assessing Sanctions. Although in the Sanctions Order, the trial court concluded as a matter of law that "Defendant ICSOP acted in bad faith when it failed to comply with [the Discovery Order]," the Sanctions Order does not provide any explanation as to how the trial court reached this conclusion, nor is this conclusion supported by the findings of fact. The trial court made the following relevant findings of fact in the Sanctions Order:

> 8. Following the hearing on Plaintiff's motion to compel on 7 October 2013, Judge Fitch signed a Consent Order which ordered Defendant ICSOP to "provide full responses to Plaintiff's First Set of Discovery on or before 18 October 2013, save for assertion of attorney-client privilege."

> 9. On 18 October 2013 Defendant ICSOP served Defendant's Supplemental and Amended Responses to Plaintiff's First Combined Discovery, which document was attached to Plaintiff's Motion for Sanctions; those requests and responses are attached as Exhibit A.
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> 10. Defendant's Supplemental and Amended Responses to Plaintiff's First Combined Discovery (Exhibit A) accurately shows Plaintiff's discovery requests and Defendant ICSOP's responses (without the documents produced by ICSOP) as of 5 February 2014 (the date of the hearing on Plaintiff's amended motion for sanctions). Said requests and responses as shown on Exhibit A are hereby incorporated into these findings of fact.
>
> 11. Defendant ICSOP's responses do not constitute full responses to the following discovery requests: 2-3, 6-8, 12, 25-27, and 33.

The trial court's finding of fact that Defendant's responses "do not constitute full responses," without more, is insufficient to support a finding that Defendant's noncompliance was willful.

Similarly, in the Order Assessing Sanctions, the trial court stated that it "found and considered that Plaintiff has been harmed by the delay and by the need to resort to multiple contentious court actions which would have been unnecessary but for ICSOP's willful disobedience of the Orders of the Court." However, the trial court failed to provide any findings of fact to support its finding and ultimate holding that Defendant's

noncompliance was willful. As such, we conclude that the trial court did not comply with the requirements for finding civil contempt when it imposed its civil contempt sanctions on Defendant. Therefore, we vacate the trial court's Order Assessing Sanctions.

III. Payment of Contempt Sanctions to Plaintiff

Defendant also argues that the trial court erred in ordering the $2.4 million sanctions award to be paid to Plaintiff. We agree.

In North Carolina, "[c]ontempt is a wrong against the state, and moneys collected for contempt go to the state alone." *Blevins v. Welch*, 137 N.C. App. 98, 103, 527 S.E.2d 667, 671 (2000) (citation and quotation marks omitted). Here, in the Order Assessing Sanctions, the trial court directed Defendant to pay the sum of $2.4 million *to Plaintiff*. We have determined that the sanctions award was not for "reasonable expenses" authorized by Rule 37. Rather, the noncompensatory monetary sanctions constituted a civil contempt sanction. Thus, that portion of the trial court's Sanctions Order that ordered a noncompensatory fine to be paid to a private party was legally impermissible. *Id.*

IV. Excessive Sanctions Award

In its brief, Defendant also argued that the trial court's award of $75,000 for each day Defendant remained in noncompliance with the Sanctions Order was excessive. In light of our holding in this case that the Order Assessing Sanctions did not comply with the requirements for civil contempt proceedings — and, therefore, must be vacated — we do not find it necessary to reach the merits of this argument.

Conclusion

For the reasons stated above, we vacate the Order Assessing Sanctions entered 29 May 2014.

VACATED.

Chief Judge McGEE and Judge CALABRIA concur.

Report per Rule 30(e).