

[Cite as *Natl. Union Fire Ins. Co. of Pittsburgh v. Ohio State Univ. Bd. of Trustees*, 2006-Ohio-2541.]

IN THE COURT OF CLAIMS OF OHIO
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NATIONAL UNION FIRE INSURANCE	:	
COMPANY OF PITTSBURGH, PA	:	
Plaintiff	:	CASE NO. 2003-12379
	:	Judge Joseph T. Clark
v.	:	
	:	<u>DECISION</u>
OHIO STATE UNIVERSITY BOARD	:	
OF TRUSTEES, et al.	:	
Defendants	:	
:	:	
:	:	
:	:	
:	:	
:	:	
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:	:	
:	:	

{¶ 1} On March 7, 2006, this court conducted an evidentiary hearing on defendants' motion for sanctions. At issue was the discovery of claims files and other information pertaining to the settlement of insurance claims in 1999, 2000, and 2001 pursuant to a contract between the parties. Defendants allege that plaintiff settled various claims in bad faith and accordingly sought production of the claims files and other related information pursuant to a discovery request. On September 16, 2004, defendants filed a motion to compel discovery and for sanctions pursuant to Civ.R. 37 based upon plaintiff's failure to produce the claims files and related information. On October 26, 2004, plaintiff filed a response and a motion for a protective order, wherein plaintiff asserted that the claims files and related information were protected from discovery by the attorney-client privilege and the work-product exception. On November 16, 2004, the court found that the requested materials were not protected by either the attorney-client privilege or the work-product exception, granted

defendants' motion to compel and ordered plaintiff to produce the information and documents requested within 30 days. The court denied defendants' motion for sanctions at that time but reserved the right to further consider the motion should plaintiff fail to comply with the order. The court also denied plaintiff's motion for a protective order.

{¶ 2} Plaintiff appealed this court's ruling, and on August 4, 2005,¹ the Tenth District Court of Appeals affirmed this court's judgment and remanded the case back to this court. In overruling plaintiff's first assignment of error, the Court stated: "Accordingly, the attorney's advice and communications to National Union are discoverable, together with the remaining contents in the claims files." *National Union Fire Ins. Co. of Pittsburgh v. Ohio State Univ. Bd. of Trustees*, Franklin App. No. 04AP-1340, 2005-Ohio-3992, at ¶15. Furthermore, the Court stated, "*** the trial court properly held the claims files from previously settled cases, in their entirety, were discoverable." *Id.* at ¶19.

{¶ 3} On December 16, 2005, defendants filed a second motion for sanctions on the basis that plaintiff had not provided the claims files pursuant to this court's November 16, 2004, order. On December 21, 2005, plaintiff filed a second motion for a protective order wherein plaintiff argued that it could not release the claims files until the parties had entered into a confidentiality agreement that would protect against unlimited disclosure of the information in the claims files. On December 30, 2005, and January 3, 2006, respectively, the parties filed responses to the motions. On January 24 and 30, 2006, respectively, the parties

¹The judgment entry from the Court of Appeals' decision was filed on August 11, 2005.

filed replies. On January 30, 2006, plaintiff obtained new counsel. On February 9, 2006, the parties filed a stipulated confidentiality order. The court denied plaintiff's motion for a protective order and scheduled an evidentiary hearing on defendants' motion for sanctions.

{¶ 4} At the hearing, counsel for both parties informed the court that the documents in question had since been provided to defendants.

{¶ 5} Defendants argue that sanctions are warranted in this case pursuant to Civ.R. 37. Defendants provided the court with an itemized billing statement at the hearing. (Defendants' Exhibit A.)² Defendants argue that sanctions should be awarded for attorney fees and expenses incurred from August 27, 2004, to March 7, 2006, for plaintiff's failure to follow this court's order.

{¶ 6} Civ.R. 37 (B) states as follows: "(B) Failure to comply with order.

{¶ 7} ****

{¶ 8} "(2) If any party *** fails to obey an order to provide or permit discovery *** the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

{¶ 9} "(a) An order that the matters regarding which the order was made or any other designated facts shall be taken to be

²On March 13, 2006, defendants filed a "Supplemental Exhibit A" which includes attorney fees and costs related to the hearing date of March 7, 2006. Upon review, the court shall mark this document as Defendant's Exhibit A1 and it shall be ADMITTED.

established for the purposes of the action in accordance with the claim of the party obtaining the order;

{¶ 10} "(b) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

{¶ 11} "(c) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

{¶ 12} "****

{¶ 13} "In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court expressly finds that the failure was substantially justified or that other circumstances make an award of expenses unjust."

{¶ 14} In determining appropriate sanctions under Civ.R. 37(B)(2), the court should consider: "the history of the case; all the facts and circumstances surrounding the noncompliance, including the number of opportunities and the length of time within which the faulting party had to comply with the discovery or the order to comply; what efforts, if any, were made to comply; the ability or inability of the faulting party to comply; and such other factors as may be appropriate." *Russo v. Goodyear Tire & Rubber Co.* (1987), 36 Ohio App.3d 175, 178.

{¶ 15} Based upon the evidence presented at the hearing, the court finds that plaintiff's appeal of this court's November 16, 2004, order was not frivolous or made in bad faith. However, the

court further finds that plaintiff's failure to obey this court's November 16, 2004, order was not substantially justified after the time to appeal the decision of the Tenth District Court of Appeals had expired, 45 days after August 11, 2005. (See S. Ct. Prac. R. II, § 2.)

{¶ 16} Counsel for defendants presented evidence that they contacted plaintiff's counsel on five occasions from September 28, 2005, to November 1, 2005, to inquire about the production of the claims files. On November 2, 2005, this court conducted a status conference with the parties, at which time counsel for plaintiff stated that the claims files would be produced shortly. Counsel for both parties then exchanged a series of e-mails from November 15, 2005, to December 9, 2005, regarding the claims files and an agreement that the claims files would not be used outside the context of this litigation. Defendants filed their second motion for sanctions on December 16, 2005.

{¶ 17} The court notes that many legal arguments were presented by both parties in the lengthy briefs and memoranda that have been filed. However, upon review, the court finds that the crux of the issue is that plaintiff failed to comply with an order of this court even after the order was affirmed by the Tenth District Court of Appeals. The court further finds that the arguments in support of plaintiff's second motion for a protective order are not persuasive. Therefore, defendants' December 16, 2005, motion for sanctions is GRANTED, in part.

{¶ 18} Plaintiff filed an objection to Defendants' Supplemental Exhibit A on March 21, 2006. Plaintiff asserts that if sanctions are awarded, they should not be assessed for the period of time after plaintiff's new counsel entered an appearance

in this matter. Plaintiff contends that defendants should not be awarded sanctions and expenses for time spent in productive efforts to arrive at a resolution of the confidentiality agreement and ultimate production of the claims files. The court is not persuaded by plaintiff's argument.

{¶ 19} Furthermore, the court finds that no other circumstances make an award of expenses unjust. Accordingly, the court ORDERS that plaintiff shall pay defendants reasonable expenses caused by plaintiff's failure to obey this court's order, from September 28, 2005, through March 7, 2006, in the amount of \$24,995.20.

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: : : : : : : : : : : : : : : :	:	

The court held an evidentiary hearing on defendants' motion for sanctions pursuant to Civ.R. 37. Upon hearing all the evidence and for the reasons set forth in the decision filed concurrently herewith, the court ORDERS that plaintiff pay defendants sanctions in the amount of \$24,995.20. Said sum shall be paid to defendants by May 5, 2006.

JOSEPH T. CLARK
Judge

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HTS/cmd
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