NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37

KEVIN FUREY,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellant	:	
	:	
v.	:	No. 2758 EDA 2011
	:	
TEMPLE POLICE OFFICERS CARL BINDER, CHAD HARVEY, AND DOUGLAS SEGARS	:	

Appeal from the Judgment Entered September 22, 2011,
in the Court of Common Pleas of Philadelphia County
Civil Division at No. 04184 April Term 2009

BEFORE: STEVENS, P.J., FORD ELLIOTT, P.J.E., AND ALLEN, J.

MEMORANDUM BY FORD ELLIOTT, P.J.E.: **FILED MAY 09, 2013**

Appellant appeals the dismissal of his lawsuit for repeatedly failing to provide discovery to defendants. Finding no error, we affirm.

The genesis of appellant's lawsuit was an incident that occurred at 3:00 a.m. near Temple University in Philadelphia on April 5, 2008. According to the complaint, appellant, who was a Temple student, was retrieving a machete from the trunk of a car when he was accosted by a group of individuals that included off-duty Philadelphia police officers Travis Wolfe and Steven Robinson, Temple University student Colin Anderson, and Douglas Segars. This group asked appellant "what he had" and when appellant replied "none of your business," Officer Wolfe drew a gun on appellant. After appellant dropped his weapon, Wolfe, Robinson, Anderson,

and Segars either assaulted or attempted to restrain appellant. During this time, Temple University police officers Carl Binder and Chad Harvey joined in trying to assault or restrain appellant. The complaint asserted that these individuals acted excessively and caused appellant severe physical and psychological injuries. The complaint named all of these persons as defendants except Officer Wolfe. There also appears to be two lawsuits in federal court between appellant and Temple University and between appellant and Officer Wolfe regarding this matter.[1]

Appellant instituted this lawsuit on May 1, 2009 with the filing of a praecipe for writ of summons. The first complaint was filed on July 2, 2009. We note that the case was removed to federal court, but its remand to the Court of Common Pleas of Philadelphia was docketed on October 1, 2009. On October 2, 2009, appellant filed a praecipe for entry of default judgment against defendant Robinson for failure to file an answer. On that same date, defendant Robinson again removed the case to federal court. The federal court remanded the case on December 28, 2009. On February 8, 2010, appellant filed a praecipe for entry of default judgment against defendant Anderson for failure to file an answer. On March 8, 2010, a case management conference took place and an order was issued which, among other matters, directed that discovery would be completed no later than December 6, 2010. Discovery then proceeded over the next several months

[1] Notes of testimony, 7/7/10 at 13.

between appellant and defendants Binder and Harvey ("the Temple defendants") and defendant Segars.

On March 31, 2010, a discovery hearing took place to schedule the depositions of defendant Segars and appellant. During the hearing, counsel for appellant told the court that appellant might have difficulty attending depositions on consecutive days because he suffers from Lyme disease, which has severe debilitating physical and cognitive effects.[2] Thereafter, an order was issued by the Honorable Gary Glazer directing appellant to appear for deposition at 10:00 a.m. on May 17, 2010 and also at 10:00 a.m. on May 18, 2010 if the deposition from May 17 had not concluded. Defendant Segars was also directed to appear for deposition on May 17, 2010 at 2:00 p.m.

On April 8, 2010, the Temple defendants filed a motion to compel appellant to respond to interrogatories that had been served on appellant. On April 21, 2010, an order was entered by the Honorable Jacqueline Allen directing appellant to "serve full and complete responses, without objections, to [Temple] defendants' interrogatories within 10 days of this order or suffer sanctions." On April 26, 2010, appellant filed a motion for reconsideration of the April 21 order, requesting the court to permit appellant to make objections to the interrogatories. According to the Temple defendants, appellant's response to the interrogatories was received by letter dated

[2] We note that counsel for appellant is also his mother.

May 4, 2010. The response begins with 12 general objections. As to the seven individual questions framed by the interrogatories, appellant specifically objected to the fourth question pertaining to psychiatric records on the basis of patient-psychiatrist privilege, and answered the seventh question, "not applicable."

On May 17, 2010, appellant appeared as ordered for deposition. Although unfinished, the deposition concluded when appellant's father arrived to transport appellant. Counsel for appellant asserted that appellant was too sick to return the following day and that she would be filing a motion for a protective order. She also claimed that she had another, unrelated deposition scheduled for the following day. Appellant did not return the following day as required by the court's order. Counsel did file a motion for a protective order on May 18, 2010, asking the court to prevent appellant's deposition from going forward on that date because appellant was too sick and because appellant's counsel had scheduled two other depositions for that date. In response, the Temple defendants filed a motion for sanctions, also on May 18, 2010.

A discovery hearing was held on June 2, 2010 as to the motion for a protective order and the motion for sanctions. At the beginning of the hearing, counsel for defendant Segars requested to join the motion for sanctions filed by the Temple defendants; appellant objected. (Notes of testimony, 6/2/10 at 4-5.) This motion was never resolved and at the end

of the hearing, the court directed that it be resolved on anther date. (***Id.*** at 36.) During the hearing, Judge Allen read a letter from Dr. Jeffrey Darnell which briefly discussed appellant's medical condition:

> The above patient needs to be excused from prolonged depositions due to severe post Lyme fatigue and cognitive impairment. And I'll note that impairment is misspelled. Otherwise this kind of stressor would be detrimental to his health.

Id. at 9-10.

Thereafter, the court expressed its reluctance to accept counsel's own opinion as to the medical needs of her son. Ultimately, the court denied the motion for a protective order because of appellant's failure to present medically sufficient testimony as to his ability to move forward with deposition testimony. (***Id.*** at 26.)

Argument was then heard on the motions for sanctions. Counsel for the Temple defendants argued that counsel for appellant acted in bad faith because by scheduling two additional unrelated depositions for May 18, 2010, she demonstrated that she never intended to comply with Judge Glazer's March 31, 2010 order. (***Id.*** at 27-28.) Ultimately, the court granted the motion for sanctions and ordered appellant to present himself for deposition within 20 days. (***Id.*** at 35.)[3]

[3] The court also imposed monetary sanctions of $293.80 which represented the cost of the unused court reporter and videographer on May 18, 2010, as well as the cost of the motion for sanctions.

Although appellant was required to be deposed by June 22, 2010, no deposition occurred. On June 10, 2010, the Temple defendants notified appellant to appear for deposition on June 15, 2010. Appellant's counsel responded that appellant was too sick to appear and that she would be out of town that week. Thereafter, on June 15, 2010, the Temple defendants notified appellant to appear for deposition on June 21, 2010. On June 18, 2010, appellant filed a motion for protective order and reconsideration of the court's June 2, 2010 order. A hearing was held on this motion on July 7, 2010.

At this hearing both the Temple defendants and defendant Segars appeared and opposed the motion. Appellant's motion had another letter from Dr. Jeffrey Darnell, dated June 11, 2010, attached to it. Therein, Dr. Darnell briefly summarized appellant's physical and cognitive disabilities and concluded:

> As a result of these physical and mental impairments he is unable to participate in ongoing litigation, particularly depositions involving his participation, which could exacerbate and worsen his condition.

Letter, 6/11/10.

The defendants made several arguments in response. First, they indicated that appellant's responses to their interrogatories were in violation of the court's order. Second, they noted that the Temple defendants' counsel also represented Temple University in one of appellant's federal lawsuits. Counsel related that they encountered great difficulties in getting

appellant's deposition in that case, but that they had eventually fully deposed appellant. Third, the defendants argued that the court really needed to hear testimony from the doctor in order to determine appellant's ability to be deposed. Finally, the defendants offered to let the court view the May 17, 2010 videotaped deposition of appellant so that the court could see that he had no difficulty being deposed.

Judge Allen responded:

> THE COURT: Here's my problem Counsel for Plaintiff: There have been any number of orders, at least two to my recollection, one that I'm looking at dated June 2nd with regard to this Court saying the deposition go forward. I don't know how many times I have tried to clearly and in a distinct way say that discovery was to move forward, specifically the deposition of Plaintiff. And I now get a letter dated June 11th talking about this Plaintiff being under the care of this doctor since some point in 2009.
>
> [Appellant's counsel]: Yes, that is true.
>
> THE COURT: I'm not questioning the truth of that. What I am questioning is the extent to which this letter does not address his present inability to present for deposition –
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> [Appellant's counsel]: Well, I think –
>
> THE COURT: -- when in light of the fact I have heard from you and your opposition that he has in the recent past appeared, during a period of time which he was under the care of this very doctor.
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> [Appellant's counsel]: Well, Your Honor –
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> THE COURT: Nothing in this letter would indicate that there is anything that currently prohibits him from presenting himself.

Notes of testimony, 7/7/10 at 19-20.

The court at this point expressed its willingness to grant appellant a continuance in order to obtain better proof that appellant was medically unable to be deposed. Counsel for appellant stated that she did not know what more the doctor could say. (***Id.*** at 22.) Counsel further questioned whether the court was not listening to her and then made a remark concerning President Obama. (***Id.*** at 23-25.) Thereafter, instead of granting a continuance, the court simply denied the motions for a protective order and for reconsideration of the June 2, 2010 order.

On July 8, 2010, Judge Allen entered an order denying appellant's outstanding motion for reconsideration of the April 21, 2010 order pertaining to interrogatories. This order again directed appellant to "serve full and complete responses, without objection" within 10 days. Appellant failed to respond. On July 27, 2010, the Temple defendants filed a motion to compel a response to the interrogatories and for sanctions. On August 3, 2010, appellant submitted supplemental answers to the interrogatories. Appellant preliminarily argued that objections to interrogatories are not waived if they are not filed within 30 days. Appellant again refused to answer question four, pertaining to mental health records, on the basis of patient-psychiatrist privilege. On August 13, 2010, Judge Allen entered an order granting the motion for sanctions, imposing sanctions of $200 and directing appellant to serve full and complete responses to the interrogatories within five days.

The language "without objections" was not included, presumably allowing appellant to file objections. On August 19, 2010, appellant filed a motion to reconsider this order.

Meanwhile, on July, 12, 2010, the Temple defendants had filed a motion to compel the deposition of appellant and for sanctions. On July 19, 2010, appellant filed a motion for recusal, complaining that the case had become racially charged at the July 7, 2010 hearing. Appellant argued that he could not receive a fair hearing where the judge, counsel for the Temple defendants, defendant Segars, and Officer Wolfe were all African-American. On July 22, 2010, appellant also filed a motion to stay proceedings. This motion had attached as exhibits Dr. Darnell's letter of June 11, 2010 and a July 19, 2010 letter of Dr. Dominick Braccia which opined:

> Due to the daily time requirement for [appellant's] care both in clinic and at home and the disabling signs and symptoms as mentioned that [appellant] is currently displaying, I believe it would be detrimental to [appellant's] health to participate at this time in the litigation proceedings at hand. These proceedings would pose excessive stress on [appellant's] already compromised state of health both physically and mentally. Litigation proceedings should be postponed until [appellant] is mentally and physically ready.

Letter, 7/19/10.

On August 12, 2010, appellant filed a memorandum in support of the motion to stay proceedings. Attached to this memorandum was an

August 2, 2010 letter from yet a third doctor, Dr. Vicki O. Morrow, who stated:

> It is my medical recommendation that [appellant] not have to provide anymore depositions at this time, as his cognitive processes are diminished. Due to the cognitive impairments it would be questionable whether any obtained deposition could be viewed as accurate and valid as [appellant] does suffer with poor concentration, confusion, and disorientation at times.

Letter, 8/2/10.

On July 28, 2010, Judge Glazer entered an order granting the Temple defendants' motion, directing that appellant present himself within 20 days for deposition, and imposing $500 in sanctions for the violation of the June 2, 2010 order. On July 31, 2010, appellant filed a motion for reconsideration of this order. On August 16, 2010, Judge Glazer vacated the July 28, 2010 order pending the decision of Judge Allen as to appellant's motion to stay proceedings.

Meanwhile, on August 19, 2010, an order was entered on the docket by Judge Allen directing a rule to show cause on the motion to stay proceedings. As part of this order, the court expressly warned appellant:

> The Court having denied [appellant's] motion for protective order which raised the same or similar issue, i.e., [appellant's] medical condition and the specific limitations on his ability to participate in this litigation, counsel is cautioned to supplement or otherwise add to the evidence already presented in this regard.

Order, 8/19/10.

On September 16, 2010, a hearing was held on the motions for recusal and to stay proceedings. After denying the motion for recusal, Judge Allen heard argument on the motion to stay proceedings. Appellant reiterated his previous argument as to his illness and called attention to the new letters from other physicians. At one point, however, appellant conceded that if the court insisted, appellant could be made available for a deposition on a Saturday or Sunday. (Notes of testimony, 9/16/10 at 22.) The Temple defendants called the court's attention to the fact that appellant was having no trouble proceeding in federal court, but that they had encountered similar obstruction in that case. Counsel for defendant Segars noted that they had discovery still outstanding from May 25, 2010. Ultimately, the court found that appellant's evidence was insufficient to merit granting the stay. The court also attached significance to appellant's offer to be deposed on a Saturday or Sunday. (Notes of testimony, 9/16/10 at 27.) Thereafter, the court ordered (entered September 21, 2010) that a date be set for appellant's deposition within 20 days (October 6, 2010), and be completed within 30 days (October 16, 2010).

Appellant failed to provide the defendants with dates for a deposition prior to the October 6, 2010 deadline. On October 14, 2010, the Temple defendants filed a motion for sanctions asking the court to dismiss appellant's complaint with prejudice. A hearing was held on October 27, 2010. At the hearing, counsel for defendant Segars asked to join the motion

for sanctions. (Notes of testimony, 10/27/10 at 7.) Appellant did not object. Thereafter, the defendants argued that appellant's repeated failure to appear for deposition, failure to give full answers to interrogatories, and failure to release mental health records merited dismissal. In the alternative, the defendants requested that the discovery deadline be extended, that appellant be directed to execute authorizations to release his mental health records, and that sanctions be imposed. Ultimately, Judge Allen expressed reluctance to invoke the severe sanction of dismissal, and instead ordered the following: 1) that appellant execute three authorizations for the release of his mental health records and provide them to the defendants within five days (November 1, 2010); 2) that appellant answer defendant Segars' outstanding interrogatories without objection within 20 days; 3) that appellant present himself for deposition within 45 days; 4) that appellant provide the Temple defendants complete responses to their interrogatories within 20 days; 5) that appellant pay monetary sanctions of $2000 within 30 days; 6) that discovery be extended 90 days; and 7) that if appellant failed to comply with each and every one of these conditions, the complaint would be dismissed with prejudice upon motion. (Notes of testimony, 10/27/10 at 24-26.) For unknown reasons, this order was never recorded on the docket.

On November 2, 2010, the Temple defendants filed a motion for sanctions requesting dismissal of the complaint with prejudice. As of

November 1, 2010, appellant had provided the defendants with only one of the three authorizations for release of his mental health records. On November 4, 2010, appellant filed a motion for reconsideration asking the court to reconsider and vacate the order of September 21, 2010, reverse the rulings at the October 27, 2010 hearing, and grant the motion for recusal.

At a hearing on these matters on November 18, 2010, counsel for appellant Segars requested to join the Temple defendants' motion for sanctions. (Notes of testimony, 11/18/10 at 13.) Although not employing the term "objection," appellant appears to have objected to this motion. (***Id.*** at 14.) Thereafter, counsel for appellant argued that she had not given the defendants all three authorizations because the court's order had not been docketed and she was unsure what authorizations were intended. Counsel stated that she provided the defendants with one authorization, but had executed the other two and served them on the court instead, because she believed the other records were subject to a patient-psychiatrist privilege that she wanted to preserve. On November 17, 2010,[4] the court entered separate orders dismissing appellant's motion for reconsideration and granting the motion for sanctions, dismissing appellant's complaint with prejudice as to the Temple defendants and defendant Segars. Appellant

[4] We are unable to explain the discrepancy between the hearing date and the date the order was entered on the docket.

filed a motion for reconsideration on December 17, 2010 that was subsequently denied on February 3, 2011.

On September 1, 2011, damages were assessed against defaulting defendants Steven Robinson and Colin Anderson in the amount of $500,000. On September 22, 2011, appellant filed a praecipe to enter judgment on the docket, and the November 17, 2010 judgment against appellant was so entered. On September 28, 2011, appellant filed this timely appeal. On October 5, 2012, subsequent to the filing of briefs by appellant, the Temple defendants, and defendant Segars, appellant discontinued his appeal against the Temple defendants. Thus, this appeal involves only defendant Segars. We note that although defendant Segars had counsel for the proceedings below, he is proceeding ***pro se*** on appeal.[5] Defendant Segars' ***pro se*** brief adopts the brief of the Temple defendants.

Appellant raises the following issues on appeal:

> 1. Did the Lower Court violate [appellant]'s procedural due process rights under the Fourteenth Amendment and Article I, Section I of the Pennsylvania Constitution by dismissing his case against defendants Binder, Harvey and Segars, when there was no prejudice to the defendants, with the discovery deadline extended to March 6, 2011, and any non-compliance due to [appellant]'s chronic illness and not due to bad faith or willfulness in failing to comply with the Court's Order?

[5] The record indicates that defendant Segars is a college student of limited means. (Notes of testimony, 7/7/10 at 17.)

2. Did the Lower Court err in its November 17, 2010 dismissal of the case since it was based on the alleged violation of a non-docketed Order stated during a colloquy at an October 27, 2010 discovery hearing on a sanction motion filed by defendants Binder and Harvey, when there was never an Order entered and the docket entries reflect neither the entry of an Order nor the issuance of a Rule 236 notice to the parties as mandated by the Pennsylvania Rules of Civil Procedure?

3. Should the Lower Court have dismissed the case based on the erroneous facts as reflected in the Lower Court's January 20, 2012 Memorandum Opinion? (The Opinion fails to state that [appellant] did appear for a deposition on May 17, 2010; fails to state that [appellant] answered Interrogatories; fails to reflect that Judge Glazer vacated the Order imposing a $500.00 fine; states that defendant Segars filed motions, when no motions were ever filed by defendant Segars; states that there were discovery violations for more than a year when a discovery deadline was not set until March 8, 2010; and does not mention the numerous motions filed by [appellant], including for protective orders, stay of proceedings, recusal, and reconsideration, to name a few.

4. Did the Lower Court abuse its discretion in failing to enter either a protective order or a stay of proceedings when medical evidence from three separate physicians was presented that due to chronic lyme disease symptoms and treatment, [appellant] was physically and mentally unable to participate in litigation?

5. Should the Lower Court have dismissed this case as to defendant Segars, who never filed a motion in this case, including any Motions for Sanctions; whose attorney, Edith Pearce, Esquire, on May 17, 2010, deposed

[appellant]; and who propounded Interrogatories and Requests for Production of Documents to [appellant] which were answered by [appellant] as acknowledged by Segars' counsel at the November 17, 2010 hearing? (The Lower Court erroneously found that Segars was part of the Motion for Sanctions, dismissing as to him).

6. At the July 7, 2010 discovery hearing, should the Lower Court have reversed its decision to continue [appellant]'s Motion for Protective Order, and allow [appellant] additional time to obtain a medical report from infectious disease doctor, Jeffrey Darnall [sic], M.D., finding the presented report inadequate, and then changing her mind when [appellant]'s attorney mentioned President Obama, to which Judge Allen took umbrage as an African-American, reversing the prior grant of a continuance, drawing a line through the proposed Protective Order submitted by [appellant] and writing DENIED at the bottom of the page?

7. Should the Lower Court have granted [appellant]'s Recusal Motion made on several different occasions after stating that "The Court was African-American," exhibiting a bias against [appellant]'s attorney, who is not African-American, and a favoritism towards defense attorneys of the Tucker Law Group, which consists of African-American lawyers, including Joe Tucker, Reilly Ross and Shernese Woodbine, who represented defendants Binder and Harvey in this case?

8. Should the Lower Court have held [appellant] in civil contempt, imposing a $2,000.00 fine, (without stating the reason or purpose for the fine, the manner in which the amount was calculated, and if compliance with the Order would expunge the fine) without conducting an evidentiary hearing using the five step process required to fine a litigant in civil contempt, and

> without determining [appellant]'s ability to pay a $2,000.00 fine, considering his chronic illness prevents him from school or work?
>
> 9. Should the Lower Court have dismissed [appellant]'s case for forwarding authorizations for psychiatric records to Judge Allen with a request for an ***in camera*** review of the records and allow [appellant] to create a privilege log and issuance of an order for confidentiality prior to forwarding the authorizations to the attorneys representing defendants Binder and Harvey (indicating to the Judge, however, that release of the records was her decision)?

Appellant's brief at 5-7.

Because defendant Segars is the only remaining appellee, we will begin our analysis with appellant's fifth issue, which questions the propriety of dismissing appellant's complaint as to Segars because Segars never filed a motion for sanctions. Thus, if the complaint was improperly dismissed on this basis as to Segars, we need not reach the remaining issues. Nonetheless, we find that the complaint was not improperly dismissed as to Segars.

On October 14, 2010, the Temple defendants filed a motion for sanctions which asked the court to dismiss appellant's complaint with prejudice. At the beginning of the ensuing hearing on October 27, 2010, counsel for defendant Segars, Carolyn M. Purwin, Esq., requested to join the motion for sanctions and appellant failed to object:

> MS. PURWIN: Good afternoon, Your Honor. We would also like to join in the motion for sanctions. I

> have produced discovery and including my client for deposition which was taken and completed pursuant to the agreed upon Order that counsel referenced to you, which is the March 31st order that I have if Your Honor would like a copy. I believe that it's attached to the motion that you have.
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> [Temple defendant's counsel]: Yes.
>
> MS. PURWIN: Plaintiff's counsel continuously refuses to comply with any of the orders put before the Court. In addition to the March 31st Order, other orders including one entered by Your Honor, has precluded us from pursuing this matter. Also, I know this matter is not before Your Honor this morning; however, as the discovery deadline has been closely approaching and for purposes of judicial economy, because numerous motions have been filed in this case.
>
> [Appellant's counsel]: Your Honor, I would object to something that has been –
>
> THE COURT: Well, can we wait to see what is being said?

Notes of testimony, 10/27/10 at 7.

Appellant appears to have been objecting to one of counsel's remarks rather than the motion to join the motion for sanctions. More importantly, appellant never returned to this objection and never specified to what he was objecting and never raised any objection to the motion to join. Because appellant failed to object to defendant Segars' motion to join, he cannot now assert, for the first time on appeal, that Segars never filed a motion for sanctions. Appellant also cannot now complain that such motion violated Philadelphia Local Rules because that likewise was not raised below. Clearly,

defendant Segars joined the Temple defendants' October 14, 2010 motion for sanctions without objection.

Further, at the October 27, 2010 hearing, the court ordered six conditions that appellant had to satisfy, and added a seventh condition that a failure to meet each and every of those six conditions would result in dismissal of the complaint with prejudice upon motion. We find it to be of no moment that it was the Temple defendants who filed the November 2, 2010 motion for sanctions informing the court that appellant had failed to meet the first condition, and that appellant objected to defendant Segars' motion to join the November 2, 2010 motion. Appellant was still subject to the October 27, 2010 order to which defendant Segars was a valid party. Thus, when it came to the court's attention by any party's motion, that appellant had failed to meet each and every condition of the October 27, 2010 order, the court had the right to dismiss the case as to all parties, including defendant Segars.

Turning now to the other issues on appeal, we will first discuss the propriety of the trial court's dismissal of appellant's case in general, and then we will briefly discuss each of the separate concerns identified by appellant's issues.

Where a discovery sanction results in the effective dismissal of a case, our standard of review is "strict scrutiny" and the following considerations must be made:

Under these circumstances appellate review is stringent. ***Cove Centre, Inc. v. Westhafer Const., Inc.***, 965 A.2d 259, 261 (Pa.Super.2009) (citing ***Croydon Plastics Co., Inc. v. Lower Bucks Cooling & Heating***, 698 A.2d 625, 629 (Pa.Super.1997); ***Steinfurth v. LaManna***, 404 Pa.Super. 384, 590 A.2d 1286, 1288-1289 (1991) (recognizing "strict scrutiny" standard of review where discovery sanction imposed is tantamount to dismissal of underlying action)). Pa.R.C.P. 4019 authorizes the trial court to enter a default judgment against a defendant who fails to comply with the trial court's discovery orders. Pa.R.C.P. 4019(c)(3); ***Judge Technical Services, Inc. v. Clancy***, 813 A.2d 879, 889 (Pa.Super.2002). "[A] default judgment entered pursuant to Pa.R.C.P. 4019(c)(3) is comparable to a judgment entered after hearing." ***Judge Technical Services***, 813 A.2d at 890 (quoting ***Miller Oral Surgery, Inc. v. Dinello I***, 342 Pa.Super. 577, 493 A.2d 741, 743 (1985)).

Generally, imposition of sanctions for a party's failure to comply with discovery is subject to the discretion of the trial court, as is the severity of the sanctions imposed. ***Cove Centre, Inc.***, 965 A.2d at 261 (citing ***Reilly v. Ernst & Young, LLP***, 929 A.2d 1193, 1199 (Pa.Super.2007); ***Croydon Plastics Co.***, 698 A.2d at 629). Nevertheless, the court's discretion is not unfettered: because "dismissal is the most severe sanction, it should be imposed only in extreme circumstances, and a trial court is required to balance the equities carefully and dismiss only where the violation of **the discovery rules is willful** and the opposing party has been prejudiced." ***Cove Centre, Inc.***, 965 A.2d at 261-262 (emphasis supplied) (quoting ***Stewart v. Rossi***, 452 Pa.Super. 120, 681 A.2d 214, 217 (1996)). Consequently, where a discovery sanction either terminates the action directly or would result in its termination by operation of law, the court must consider multiple factors balanced against the necessity of the sanction. ***Id.*** (citations omitted).

> In determining whether dismissal is appropriate, this Court has instructed that the following factors are to be considered:
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> (1) the nature and severity of the discovery violation;
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> (2) the defaulting party's willfulness or bad faith;
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> (3) prejudice to the opposing party;
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> (4) the ability to cure the prejudice; and
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> (5) the importance of the precluded evidence in light of the failure to comply.
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> ***Croydon Plastics Co.***, 698 A.2d at 629; ***Steinfurth***, 590 A.2d at 1288; ***Pride Contracting, Inc. v. Biehn Construction, Inc.***, 381 Pa.Super. 155, 553 A.2d 82 (1989), ***appeal denied***, 523 Pa. 643, 565 A.2d 1167 (1989). We are mindful that each factor represents a necessary consideration, not a necessary prerequisite. ***Croydon Plastics Co.***, 698 A.2d at 629.

Rohm and Haas Co. v. Lin, 992 A.2d 132, 141-142 (Pa.Super. 2010). Additionally, other cases have recognized a sixth factor in the form of the number of discovery violations. ***City of Philadelphia v. Fraternal Order of Police Lodge No. 5 (Breary)***, 604 Pa. 267, 286, 985 A.2d 1259, 1270 (2009).

Appellant's conduct in this case would appear to offer a paradigm for the extreme sanction of dismissal. First, the nature and severity of the violations are extreme. Appellant denied the defendants access to both his full deposition and full and complete interrogatories. In a personal injury action such as the one brought by appellant, liability will rise or fall upon

which of the competing theories, violent assault or lawful arrest, is believed by the jury. Where the parties at trial will be in such a "he said-she said" relationship, it is utterly vital to know ahead of trial what exactly "he said." Furthermore, the interrogatories pertained, in addition to facts necessary to evaluate appellant's claims, facts intrinsic to the measurement of potential damages. All of these items were of critical importance to the raising of any defense.

Next, appellant and his counsel exhibited bad faith in obstructing discovery. Nothing could be more exemplary of this bad faith than counsel's cavalier decision to schedule two additional, unrelated depositions for May 18, 2010, the second day already scheduled for appellant's deposition. Counsel tries to argue that appellant did not appear for the second day of deposition because he was too ill, but it appears from counsel's scheduling of two other depositions that she and appellant had no intention whatsoever of attending the May 18, 2010 deposition long before they could have known whether appellant would be well enough to attend.

The repeated failure to turn over appellant's mental health records also demonstrated bad faith. The claim of patient-psychiatrist privilege raised here appears disingenuous. The patient-psychiatrist privilege is waived in a civil action where the patient puts the confidential information at issue in the case. ***Gormley v. Edgar***, 995 A.2d 1197, 1204 (Pa.Super.

2010). Paragraph 25 of appellant's third amended complaint put appellant's psychiatric condition at issue:

> 25. The actions of each of the defendants as described herein caused severe head injuries to [appellant] as well as bruises and contusions to his knees and legs, permanent facial scarring and ongoing pain to both knees as well as scarring to them, in addition to continuing and ongoing emotional injuries, and permanent emotional suffering and anguish.

Third amended complaint, paragraph 25, page 9 (emphasis added). Furthermore, paragraph 49 of the third amended complaint raised a claim of intentional infliction of emotional distress against the Temple defendants. Clearly, appellant was claiming psychiatric injuries and thereby waived any patient-psychiatrist privilege to his mental health records. To continue invoking such a privilege under these circumstances and refusing to release mental health records is to engage in bad faith obstructionism.

Next, as to the prejudice to the defendants, we find appellant's refusal to be deposed or to offer full and complete responses to the interrogatories to be an almost complete block to evaluating appellant's claims and the ability to raise a defense to them. Appellant insisted that the defendants reveal their side of the story while refusing to reveal his own. The prejudice to the defendants is extreme.

Next, as to the ability to cure the prejudice, we find that appellant had two readily available alternatives. First, appellant could have complied with the order to be deposed as he apparently was able to do in related federal

lawsuits. Second, if truly unable to comply because of medical condition, present sufficient evidentiary proof of that condition.

On August 19, 2010, almost a month prior to the September 16, 2010 discovery hearing, the court entered an order specifically warning appellant that the medical evidence that had been already presented was insufficient to carry his burden in this regard. This evidence consisted of letters from Drs. Darnell, Braccia, and Morrow, each of which contained a one paragraph summary conclusion that appellant was either unable to sit for deposition, that a deposition could possibly worsen his condition, or that a deposition was unreliable because of appellant's diminished cognitive ability. We agree with the trial court that these single paragraph summations were insufficient to meet appellant's burden in this regard, yet appellant appeared on September 16, 2010, with nothing more in hand. Ideally, appellant should have presented one of his doctors for examination so that the court and the defendants could explore appellant's ability to be deposed through cross-examination. Short of that, appellant could have presented an expert medical report by one or more of these physicians prepared as though the doctor would be called to testify as a medical expert at trial. Finally, it is obvious that the defendants had no ability whatsoever to cure or diminish the prejudice to them. In sum, there were easy methods available to appellant to cure the prejudice here, but none were attempted.

Next, the precluded evidence left the defendants with no idea as to what appellant might testify at trial. Likewise, the defendants had no idea what proof of emotional injuries would be presented, and no indication if a pre-existing condition was present or was exacerbated. Essentially, the precluded evidence completely shielded appellant's intended trial strategy, hid in large part potential damages, and left the defendants entirely guessing as to what they would face. The whole point of modern discovery is to avoid such a situation. Thus, the precluded evidence was of vital importance.

Finally, as to the number of discovery violations, we count at least seven discovery orders that appellant failed to obey: 1) March 31, 2010 order directing appellant to appear for deposition on May 18, 2010; 2) April 21, 2010 order to serve full responses to interrogatories within 10 days; 3) June 2, 2010 order to appear for deposition within 20 days; 4) July 8, 2010 order to serve full responses to interrogatories within 10 days; 5) August 13, 2010 order to serve full responses to interrogatories within 5 days; 6) September 16, 2010 order to set date for deposition within 20 days and complete deposition within 30 days; and 7) October 27, 2010 order to provide three authorizations for the release of mental health records within 5 days. Appellant and counsel repeatedly ignored the directives of the trial court.

In sum, appellant repeatedly failed to comply with numerous discovery orders over a period of nine months. The record also indicates that appellant's obstructionism was conducted in bad faith. At long last, the trial court came to the conclusion that appellant was simply unwilling to comply with the court's orders under any circumstances. The court imposed the extreme sanction of dismissal only after affording appellant generous opportunities to comply or adequately demonstrate why he could not comply. Upon review of the record, we find that the trial court acted appropriately.

We will now briefly review any concerns raised by appellant's issues on appeal not already sufficiently addressed by the foregoing discussion. Appellant complains that his case was improperly dismissed for failing to obey the order of October 27, 2010. Appellant contends that this order was unenforceable because it was never reduced to writing, was never docketed, and notice pursuant to Pa.R.C.P., Rule 236, 42 Pa.C.S.A. was never issued.[6] First, appellant's case was not dismissed for failing to obey the October 27, 2010 order. Appellant's case was dismissed for failing to obey the October 27, 2010 order and six other court orders preceding it.

[6] Appellant also contends he was improperly held in contempt without a hearing. Appellant was not held in contempt; rather, the actions of the trial court were the imposition of sanctions for failure to provide discovery.

Second, appellant is incorrect that the order was never reduced to writing. The transcription of the October 27, 2010 hearing itself reduced the order to writing. Appellant could have requested a transcript of the hearing.

Third, appellant is also mistaken in his contention that an unwritten, undocketed order cannot be enforced. "[A] court order need not be a formal order which is entered on the docket." ***In re Contempt of Cullen***, 849 A.2d 1207, 1210 n.1 (Pa.Super. 2004). In ***Cullen*** this court affirmed a finding of contempt where the court directed counsel by telephone to appear at a certain time and date for hearing and counsel failed to appear. No order was entered on the docket.

Finally, the failure of the prothonotary to file Rule 236 notice is no reason to reverse the sanctions imposed below. Such notice would apply only to docketed orders and not to orders given in open court. Moreover, as noted by the defendants, Rule 236 notice is intended to ensure that all interested parties are alerted to any case activity. Appellant was present at the October 27, 2010 hearing and cannot assert that he was unaware of what the court had ordered.

Appellant next complains that the trial court's January 20, 2012 opinion contains numerous factual errors and omissions and that his case did not merit dismissal given those misstatements. To this we respond that we have examined the entire record and even ignoring the trial court opinion,

we find that the record supports the trial court's decision to dismiss appellant's case.

Appellant next argues that at the July 7, 2010 hearing, the court should not have reversed its decision to grant a continuance to allow appellant to obtain additional medical evidence based upon a misperceived racial slight.

Appellant has mischaracterized the trial court's actions. The court did not reverse a decision to grant a continuance. The court was explaining to appellant that the one-paragraph conclusion of Dr. Darnell in his letter of June 11, 2010 was insufficient to prove that appellant was medically unable to presently sit for a deposition. The court thereafter offered appellant to continue the matter in order to obtain additional evidence. Rather than accept the opportunity, counsel continued to argue with the court that what had been presented was sufficient:

> [Appellant's counsel]: Could you tell me what proof would be, because I thought this would have been sufficient?
>
> THE COURT: I don't practice law.
>
> [Appellant's counsel]: It says he's unable to participate in ongoing litigation, particularly depositions involving his participation, which could exacerbate, worsen his condition. I don't know what else the doctor could say.
>
> THE COURT: Again, it is not my job to practice law or to advise counsel as to the appropriate action to take. The Court is however giving you two options, having advised you that you have not met your

> burden, whether you want a continuance date, or whether the Court shall deny it. It is your option.
>
> [Appellant's counsel]: Well, I would request a continuance then, Your Honor, and I'll try to see what the doctor is able to do. He is treating with another doctor. I'm trying to get him into a study at Columbia University. They are conducting a study on Lyme disease. These are all things that are in the future, but he's unable to participate –
>
> THE COURT: I'll try one more time. I need a definitive statement from the treating physician as to the nature and extent of the inability of the [appellant] to appear for deposition, and more specifically in the afternoon, when he apparently, based upon Counsel's representations, is up and, quote, moving about, such that he cannot sit to answer questions regarding the lawsuit he has filed.
>
> [Appellant's counsel]: Your Honor, I don't know whether you are not listening. He's got cognitive memory problems. So, how can he sit in a deposition with cognitive problems. I thought Obama said a compassionate jurist. I was hoping we would find one.
>
> THE COURT: Excuse me?

Notes of testimony, 7/7/10 at 22-24.

The court then took umbrage at a perceived injection of race into the matter by appellant's counsel.[7] Actually, we are equally offended by counsel's questioning whether the court was listening because this directly implies that either the court is not listening or the court is not intelligent enough to understand. Nonetheless, our reading of the transcript leads us

[7] Judge Allen noted from the bench that she is African-American.

to conclude that the court ruled against appellant not because of racial or other offense, but simply because, when offered a continuance, counsel continued to argue that what had already been presented was sufficient. We see no error here.

Appellant next contends that the court erred in failing to grant the motion for recusal. The bases of appellant's claim are: 1) the trial court's taking offense at counsel's Obama remark; 2) the fact that the court, some of defense counsel, and defendant Segars are African-American, while appellant and counsel are Caucasian; and 3) perceived hostility by the court toward appellant's counsel.

> Our standard of review of a trial court's determination not to recuse from hearing a case is exceptionally deferential. We recognize that our trial judges are "honorable, fair and competent," and although we employ an abuse of discretion standard, we do so recognizing that the judge himself is best qualified to gauge his ability to preside impartially.
>
> [***Commonwealth v.***] ***Bonds***, 890 A.2d [414] at 418 [(Pa.Super. 2005)] (citing ***Commonwealth v. Abu-Jamal***, 553 Pa. 485, 720 A.2d 79, 89 (1998)).
>
> The party who asserts that a trial judge should recuse bears the burden of setting forth specific evidence of bias, prejudice, or unfairness. ***See Commonwealth v. Perry***, 468 Pa. 515, 364 A.2d 312, 318 (1976). "Furthermore, a decision by the trial court against whom the plea of prejudice is made will not be disturbed absent an

> abuse of discretion." ***Commonwealth v. Buehl***, 540 Pa. 493, 658 A.2d 771, 782 (1995).
>
> ***Commonwealth v. Stafford***, 749 A.2d 489, 501 (Pa.Super.2000). ***See also Commonwealth v. Tedford***, 598 Pa. 639, 731, 960 A.2d 1, 55–56 (2008) ("[I]t is the burden of the party requesting recusal 'to produce evidence establishing bias, prejudice or unfairness which raises a substantial doubt as to the jurist's ability to preside impartially.'").

Commonwealth v. Harris, 979 A.2d 387, 391-392 (Pa.Super. 2009).

We see no indication of bias or prejudice in the trial court's conduct following the July 7, 2010 hearing when counsel made the remark about President Obama. Indeed, we are more struck by the court's continuing attempt to make every allowance for appellant and continuing reluctance to impose greater sanctions than were imposed. As for appellant's theory that the court would be biased toward the defendants because their counsel, one of the defendants, and the court are all African-American, we would respond that under that theory a Caucasian jurist could not sit either because that judge would be biased toward appellant and appellant's counsel who are both Caucasian. Finally, as to appellant's claim that the trial court has continuously exhibited hostility toward appellant's counsel, we suggest that, if true, the cause might be appellant's counsel's dilatory conduct rather than the color of her skin. Simply stated, appellant has not shown sufficient bias or prejudice on the part of the trial court and we find that the motion for recusal was properly denied.

Finally, appellant complains that the trial court erred in finding him in civil contempt at the October 27, 2010 hearing and in imposing a fine of $2000. Appellant claims that the court failed to use the criteria of ***Diamond v. Diamond***, 715 A.2d 1190 (Pa.Super. 1998).[8]

This issue has been waived. At the time the court imposed the $2000 sanction, appellant failed to object on this, or any, basis. Counsel merely informed the court that appellant could not afford the sanction because he was not working and had no money. (Notes of testimony, 10/27/10 at 26-27.) Appellant made no mention of contempt, civil or criminal, and made no argument that the court failed to employ the ***Diamond*** criteria. Rather than afford the trial court an opportunity to correct any error, appellant instead raises the matter for the first time on appeal. An issue cannot be raised for the first time on appeal. Pa.R.A.P., Rule 302(a), 42 Pa.C.S.A.

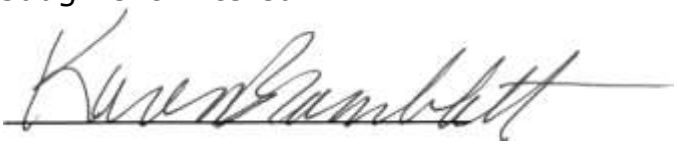
Finally, before concluding our review, we note that defendant Segars has an open motion to quash this appeal on the basis that appellant failed to file with this court a sufficient record for review. As subsequent filings have largely cured that defect, we will deny the motion to quash.

Accordingly, having found no error in the issues raised on appeal we will affirm the judgment entered below.

Judgment affirmed. Motion to quash denied.

[8] We note that the ***Diamond*** criteria apply to criminal rather than civil

Judgment Entered.



Prothonotary

Date: 5/9/2013

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contempt.