IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
May 22, 2014 Session

GLADYS RAMIREZ v. AARON M. SCHWARTZ

Appeal from the Circuit Court for Davidson County
No. 12C4217 Carol Soloman, Judge

No. M2013-02285-COA-R3-CV - Filed August 12, 2014

This case arises from a personal injury lawsuit in which a plaintiff sought damages for injuries she sustained in a car accident. The defendant driver requested documents from plaintiff's healthcare provider. The healthcare provider failed to produce all of the requested documents and was held in civil contempt. As sanctions, the trial court, *inter alia*, discharged the healthcare provider's fees for medical services charged to the plaintiff and held the provider in violation of certain chiropractic regulations. On appeal, the healthcare provider asserts that the trial court lacks authority to discharge the healthcare provider's fees or to find it in violation of the chiropractic regulations. We agree that the trial court erred, and we vacate that portion of the trial court's order discharging the fees for medical services and finding a violation of the chiropractic regulations.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Vacated in Part

ANDY D. BENNETT, J., delivered the opinion of the court, in which FRANK G. CLEMENT, P.J., M.S., and W. NEAL MCBRAYER, J., joined.

Samuel P. Helmbrecht, Nashville, Tennessee, for the appellant, 1st Choice Spine & Rehab, P.C.

R. Kreis White, Brentwood, Tennessee, for the appellee, Aaron Schwartz.

OPINION

FACTUAL AND PROCEDURAL HISTORY

The underlying action at the center of this dispute is a personal injury lawsuit brought on October 19, 2012 by Gladys Ramirez against Aaron Schwartz for damages resulting from a car accident. Ms. Ramirez received chiropractic care from 1st Choice Spine and Rehab, P.C. following the accident. On December 19, 2012, Mr. Schwartz sent a subpoena *duces tecum* to the custodian of records at Antioch Wellness Center and 1st Choice Spine and Rehab, P.C. ("1st Choice") requesting, *inter alia*, Ms. Ramirez's medical records, records regarding the solicitation of patients, records related to division of fees, and telemarketing records. By letter dated January 9, 2013, 1st Choice produced some documents purporting to comply with the request for medical records; however, 1st Choice failed to produce documents related to the other requests.

On February 5, 2012, Mr. Schwartz filed a motion to enforce subpoena. On February 21, 2013, 1st Choice filed a motion for protective order asserting that the requested documents relating to "corporate matters outside of the professional medical treatment received by [Ms. Ramirez]" were unduly burdensome, irrelevant to the matters before the court, and involved trade secrets and confidential commercial and health information not subject to subpoena. By order entered June 6, 2013, the trial court limited the breadth of the subpoena *duces tecum* and ordered 1st Choice to produce the following records by May 31, 2013:

> 1. All records, contracts, transcripts and accounting entries dealing with all written or electronically generated documents or records pertaining to solicitation, in person or by live telephone contact, by the corporation, or by an agent, servant, employ, or independent contractor of a patient with whom the corporation has no family or prior professional relationship, including solicitation by targeted direct mail advertising or other forms of written, radio, or television advertising from November 28, 2011 through December 28, 2011.
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> 2. Records related to division of fees or agreeing to split or divide fees received for professional services with any person for bringing or referring a patient related to Ms. Ramirez only.
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> 3. Records related to telemarketing or telephonic solicitation by licensees, their employees, or agents to victims of accidents or disaster for the period of November 28, 2011 to December 28, 2011.
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> 4. Records related to telemarketing transcripts (required to be maintained for a period of two (2) years following their utilization) for the

period of November 28, 2011 to December 28, 2011.

5. Records related to a log of contacts (which must be maintained for a period of two (2) years following the telemarketing encounter) from November 28, 2011 to December 28, 2011.

In response to the June 6, 2013 order, 1st Choice produced chiropractic and primary physician records and billings related to the care of Ms. Ramirez, a copy of the Metro Police accident report, two copies of a discount coupon for chiropractic services, and an employment contract. On July 18, 2013, Mr. Schwartz filed a motion for contempt for failure to comply with the June 6, 2013 order. In particular, Mr. Schwartz alleged that 1st Choice failed to retain and produce various solicitation records.

The trial court held a hearing on August 23, 2013 and, by order entered September 10, 2013, the trial court held 1st Choice in contempt and imposed sanctions. The court ordered, as a consequence of the discovery abuses: (1) the chiropractic charges for services to Ms. Ramirez in the amount of $3,990.24 are forfeited and deemed discharged; (2) Mr. Schwartz is entitled to reasonable costs and attorney's fees in connection with the discovery abuses; (3) 1st Choice is enjoined from soliciting any Tennessee resident following any automobile accident or collision until 1st Choice fully purges its contempt by complying with the court's June 6, 2013 Order; (4) 1st Choice has willfully violated Tenn. Comp. R. & Regs. 0260-02-.20(6)[1]; (5) 1st Choice must produce additional records responsive to the court's June 6, 2013 order; and (6) 1st Choice shall identify one or more representatives with full knowledge and authority related to the documents described in the motion for contempt and produce such person within 45 days from entry of the order for a deposition.

1st Choice appeals the trial court's sanctions regarding the discharge of fees for services provided to Ms. Ramirez and the court's finding that 1st Choice willfully violated Tenn. Comp. R. & Regs. 0260-02-.20(6).

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[1] Tennessee Rule 0260-02-.20(6) states as follows:

Telemarketing.

(a) Telemarketing or telephone solicitation by licensees, their employees, or agents to victims of accidents or disaster shall be considered unethical if carried out within thirty (30) days of the accident or disaster, and subject the licensee to disciplinary action pursuant to T.C.A. §§ 63-4-114.
(b) Telemarketing transcripts shall be maintained for a period of two (2) years following their utilization.
(c) A log of contacts must be maintained for a period of two (2) years following the telemarketing encounter.

STANDARD OF REVIEW

We review a trial court's decision whether to impose civil contempt sanctions under the abuse of discretion standard. *Konvalinka v. Chattanooga-Hamilton Cnty. Hosp. Auth.*, 249 S.W.3d 346, 358 (Tenn. 2008). A trial court abuses its discretion when "'it applies an incorrect legal standard, or reaches a decision which is against logic or reasoning that causes an injustice to the party complaining.'" *Caldwell v. Hill*, 250 S.W.3d 865, 869 (Tenn. Ct. App. 2007) (quoting *Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn. 2001)). We review the trial court's factual findings with a presumption of correctness unless the evidence preponderates otherwise. Tenn. R. App. P. 13(d); *Konvalinka*, 249 S.W.3d at 358.

ANALYSIS

This case requires us to consider what sanctions a trial court can impose on a noncompliant corporate witness. Here, the trial court found 1st Choice in civil contempt for its failure to comply with the court's June 6, 2013 order. As a sanction, the trial court, *inter alia*, discharged 1st Choice's fees for services and entered a finding that 1st Choice willfully violated Tenn. Comp. R. & Regs. 0260-02-.20(6). 1st Choice does not dispute the trial court's finding of contempt; rather, it argues that the trial court was without authority to impose the foregoing sanctions.

Pursuant to Tenn. Code Ann. § 16-1-103, "every court is vested with the power to punish for contempt." *See also Konvalinka*, 249 S.W.3d at 354 ("The power to punish for contempt has long been regarded as essential to the protection and existence of the courts and the proper administration of justice."). Due to the potential for abuse of this "power to punish," our legislature has enacted statutes and rules to define and limit the contempt power. *Id.* Thus, "the courts' contempt power is now purely statutory." *Id.* The conduct punishable as contempt is outlined in Tenn. Code Ann. § 29-9-102. Specifically, as related to the issue in this appeal, a trial court may find a person in contempt for "willful disobedience or resistance of any officer of the such courts, party, juror, witness, or any other person, to any lawful writ, process, order, rule, decree, or command of such courts." Tenn. Code Ann. § 29-9-102(3).

An act of contempt may be punished as delineated in Tenn. Code Ann. § 29-9-103:

> (a) The punishment for contempt may be by fine or by imprisonment, or both.
> (b) Where not otherwise specially provided, the circuit, chancery, and appellate courts are limited to a fine of fifty dollars ($50.00), and imprisonment not exceeding ten (10) days, and, except as provided in § 29-9-108, all other courts are limited to a fine of ten dollars ($10.00).

Tennessee Rule of Civil Procedure 37.02 also discusses the sanctions that may be imposed against a "deponent; party; an officer, director, or managing agent of a party; or, a person designated under Rule 30.02(6) or 31.01 to testify on behalf of a party" for the failure to "obey an order to provide or permit discovery." Under this rule, the trial court in which the action is pending may:

> make such orders in regard to the failure as are just, and among others the following:
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> (A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
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> (B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;
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> (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;
>
> (D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;
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> (E) Where a party has failed to comply with an order under Rule 35.01 requiring the party to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this rule, unless the party failing to comply shows that he or she is unable to produce such person for examination.
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> 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 the party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

Tenn. R. Civ. P. 37.02.

After reviewing the trial court's ruling and the relevant statutes and rules, we agree

with 1st Choice that the trial court lacked authority to impose the sanctions in dispute against a nonparty witness. The sanctions imposed by the trial court were not authorized by either Tenn. Code Ann. § 29-9-103 or Tenn. R. Civ. P. 37.02. In our view, the trial court strayed beyond the framework of applicable legal standards by discharging the fees for medical services rendered by 1st Choice and in finding a violation of Tenn. Comp. R. & Regs. 0260-02-.20(6). *See Konvalinka*, 249 S.W.3d at 358. Therefore, we vacate that portion of the trial court's order in which the court discharged the medical service charges between Ms. Ramirez and 1st Choice and found 1st Choice in violation of the rules promulgated by the Board of Chiropractic Examiners.

CONCLUSION

For the foregoing reasons, we conclude that the trial court erred in imposing the disputed sanctions, and we vacate those sanctions from the contempt order. Costs of the appeal are assessed against the appellee, Aaron Schwartz.

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ANDY D. BENNETT, JUDGE