IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
April 24, 2012 Session

IN RE: FOREIGN COURT SUBPOENA JANE DOE v. USA SWIMMING ET AL.

Appeal from the Circuit Court for Williamson County
No. 2011360 James G. Martin III, Judge

No. M2011-01718-COA-R3-CV - Filed June 12, 2012

A non-party deponent appeals the imposition of $6,635 in monetary sanctions under Tennessee Rule of Civil Procedure 37.01(4). The non-party deponent, a Tennessee resident, was subpoenaed to give a deposition concerning a civil action pending in a California state court pursuant to a foreign court subpoena, which was issued and served in accordance with the Uniform Depositions and Discovery Act, Tenn. Code Ann. §§ 24-9-201 through -207. During the deposition, the deponent's attorney objected to almost every question in an argumentative and suggestive manner, often without providing a proper basis for the objection, consulted with the deponent at length several times during questioning, and unilaterally terminated the deposition without seeking a protective order. The California defendants who attempted to take the deposition filed a motion to compel discovery and to recover their expenses pursuant to Tennessee Rule of Civil Procedure 37.01. The trial court granted the motion and held the non-party deponent liable for the defendants' expenses. The deponent appeals contending that he did not obstruct the deposition, that the sanctions are the result of his attorney's misconduct, and that his attorney should be solely responsible for the sanctions. Tennessee Rule of Civil Procedure 37.01(4) affords the trial court the discretion to require a deponent whose conduct necessitated a motion to compel, or the attorney advising such conduct, or both of them to pay to the moving party's reasonable expenses. The manner in which the deponent's attorney conducted the deposition amounted to clear violations of Tennessee Rules of Civil Procedure 30.03 and 30.04. Except for certain circumstances not at issue here, a lawyer's misconduct is attributable to and binding on the client; therefore, the deponent should not be excused from liability for his attorney's misconduct, especially considering the deponent is experienced in giving depositions and knew or should have known his attorney's conduct was outrageous and in violation of the rules of discovery. Moreover, because trial courts have broad discretion in determining when to impose sanctions and against whom, such decisions are reviewed on appeal pursuant to the very deferential abuse of discretion standard. Finding no abuse of discretion, we affirm.

Tenn. R. App. P.3 Appeal as of Right; Judgment of the Circuit Court Affirmed

FRANK G. CLEMENT, JR., J., delivered the opinion of the Court, in which ANDY D. BENNETT, J., and BEN H. CANTRELL, SP. J., joined.

Emily Todoran, Nashville, Tennessee for the appellant, Kenneth Stopkotte.

Thomas I. Carlton, Jr., and Ben M. Rose, Nashville, Tennessee, for the appellees, United States Swimming, Inc., and Pacific Swimming. Inc.

OPINION

On April 18, 2011, a foreign court subpoena was filed in the Circuit Court of Williamson County requiring the appellant, Williamson County resident Kenneth Stopkotte, to testify by deposition in a California civil action, *Jane Doe v. USA Swimming, et al.*, Case No. 1:09-CV-149813, filed in the Santa Clara County Superior Court in March 2010. In the California action, Jane Doe asserted various claims of sexual abuse and molestation against her former USA Swimming coach, Andrew King, as well as several claims of negligent hiring and supervision against Pacific Swimming, Inc., the regional affiliate that employed Mr. King, and USA Swimming, Inc., the nationwide organization that oversees all regional affiliates.

Mr. Stopkotte was never a party to the California action, but he was a long-time USA Swimming Coach in Indiana until March 2010, when he was banned from the organization for two years after purportedly falsifying swim times. Since the commencement of the *Jane Doe* litigation, Mr. Stopkotte made several public statements against USA Swimming related to its alleged tolerance of sexual abuse of swimmers by coaches. The defendants Pacific Swimming, Inc., and USA Swimming, Inc. ("Defendants") decided to take the deposition of Mr. Stopkotte to discover what he did and did not know relating to the issues in that action. Because Mr. Stopkotte was a resident of Williamson County, Defendants followed the appropriate protocol and filed a foreign court subpoena, which had been issued by the Santa Clara County California Superior Court, in the Circuit Court of Williamson County, pursuant to the Uniform Depositions and Discovery Act. *See* Cal. Civ. Proc. Code §§ 2029.100 through 2029.900 (West 2010); Tenn. Code Ann. §§ 24-9-201 through -207. The Williamson County Circuit Court Clerk then issued a Tennessee subpoena, which was duly served on Mr. Stopkotte in Williamson County on April 25, 2011. *See* Tenn. Code Ann. § 24-9-203(b).

Mr. Stopkotte requested that the deposition be taken at the office of his attorney, Richard (Rick) Kammen, in Indianapolis, Indiana. Defendants agreed.[1] Mr. Kammen is not licensed to practice law in Tennessee, and he did not make an appearance or file a notice of representation with the Williamson County Circuit Court. Mr. Kammen's involvement in this action was limited to the deposition of his client, Mr. Stopkotte, in Indianapolis, Indiana.

The deposition commenced at 10:00 a.m. on May 6, 2011 in Marion County, Indiana at Mr. Kammen's office as previously agreed. From the moment the deposition began until it was unilaterally terminated four hours later, Mr. Kammen behaved in an unprofessional and combative manner. He objected to almost every question presented to Mr. Stopkotte, often without stating a basis for the objection, and instructed Mr. Stopkotte to refrain from answering most of the remaining questions, frequently on the grounds that the question had been "asked and answered" in a previous deposition taken by USA Swimming in April 2010 for a case involving similar claims by a different plaintiff.

Defendants then filed a Motion to Compel Discovery and for Sanctions in the Williamson County Circuit Court pursuant to Tennessee Code Annotated § 24-9-205 and Tennessee Rule of Civil Procedure 37.01. They sought to resume the deposition of Mr. Stopkotte and to recover $6,635 for the following expenses: 10 hours preparing the motion to compel, 3 hours in court, and 16 hours traveling to Tennessee, at $195/hour; $974 in additional travel expenses to complete the deposition; and $6 for the re-issuance of the foreign court subpoena. At the hearing on the motion on July 6, 2011, the trial court found that Mr. Kammen's actions during the deposition violated Tennessee Rules of Civil Procedure 30.03 and 30.04, and on this basis granted the motion to compel and awarded the requested amount in monetary sanctions.[2]

The trial court entered the judgment against Mr. Stopkotte only, finding that it did not have jurisdiction over Mr. Kammen because Mr. Kammen did not make an appearance in the limited Tennessee proceedings. The final order was entered July 14, 2011. This appeal by Mr. Stopkotte followed.

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[1]Mr. Kammen also represented Mr. Stopkotte in criminal matters pending in Indiana.

[2] After the entry of the final order in this case, the *Jane Doe* litigation was dismissed by agreement between the parties and Mr. Stopkotte's deposition was not completed.

ANALYSIS

Mr. Stopkotte, the appellant, and Defendants, the appellees, identify the dispositive issue on appeal in very different terms. Mr. Stopkotte states that the issue is whether the trial court "erred in ordering monetary sanctions under Tennessee Rule of Civil Procedure 37.01(4) against a non-party deponent based entirely on his Indiana attorney's misconduct during a deposition conducted in Indiana." Defendants assert that the issue is whether the trial court "abused its discretion" in awarding monetary sanctions against Mr. Stopkotte "for discovery abuses in accordance with its inherent powers and its powers under the Tennessee Rules of Civil Procedure."

Because of the circumstances of this case, we start our analysis with the relevant statutory scheme concerning the Williamson County court's authority over discovery matters in the California action. The Uniform Interstate Depositions and Discovery Act is codified at Tennessee Code Annotated §§24-9-201 through -207. Section 203 of the Act, titled, *Foreign subpoena; request; issuance*, provides:

> (a) A party may submit a foreign subpoena to a clerk of court in the county in which discovery is sought to be conducted in this state. The request for and issuance of a subpoena in this state under this part shall not constitute making an appearance in the courts of this state.
>
> (b) When a party submits a foreign subpoena to a clerk of court in this state, the clerk, in accordance with the rules of court, shall promptly issue a subpoena for service upon the person to which the foreign subpoena is directed. The subpoena shall incorporate the terms used in the foreign subpoena and contain or be accompanied by the names, addresses, and telephone numbers of all counsel of record in the proceeding to which the subpoena relates and of any party not represented by counsel.

Tenn. Code Ann. § 24-9-203. In addition, section 205 provides:

> *When a subpoena issued under § 24-9-203 commands a person to attend and give testimony at a deposition*, produce designated books, documents, records, electronically stored information, or tangible things, or permit inspection of premises, the time and place and *the manner of the taking of the deposition, the production, or the inspection must comply with the Tennessee Rules of Civil Procedure relative to discovery*.

Id. § 205 (emphasis added). Finally, section 206 of the Act provides that an application may be made to the court to enforce, modify, or quash a foreign court subpoena and section 207 provides that when such a motion is made, "*the court in its discretion may award the prevailing party its reasonable attorney's fees and expenses.*" *Id.* § 207 (emphasis added).

Defendants properly submitted the Santa Clara County subpoena for the deposition of Mr. Stopkotte to the Williamson County Circuit Clerk, who in turn issued the Tennessee subpoena that was served on Mr. Stopkotte. Thus, the "manner of the taking" of Mr. Stopkotte's deposition "must comply with the Tennessee Rules of Civil Procedure relative to discovery." *Id.* § 205. We note this is the case regardless of whether the parties agreed, for the benefit of the deponent Mr. Stopkotte in this case, to take his deposition in another state.

II.

Having determined the Tennessee Rules of Civil Procedure were applicable during Mr. Stopkotte's deposition in Indiana, we now turn to the rules that are relevant to the issue on appeal. Rule 30.03, *Examination and Cross-Examination; Record of Examination; Oath; Objections*, reads as follows:

> Examination and cross-examination of witnesses may proceed as permitted at the trial under the Tennessee Rules of Evidence. The officer before whom the deposition is to be taken shall put the witness on oath and shall personally, or by someone acting under the officer's direction and in his presence, record the testimony of the witness. The testimony shall be taken stenographically or recorded by any other means ordered in accordance with Rule 30.02(4). If requested by one of the parties, the testimony shall be transcribed.
>
> All objections made at time of the examination to the qualifications of the officer taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall be noted by the officer upon the deposition. *Evidence objected to shall be taken subject to the objections. Any objection to evidence during a deposition shall be stated concisely and in a non-argumentative and non-suggestive manner. A deponent may be instructed not to answer only when necessary to preserve a privilege, to enforce a limitation on evidence directed by the court, or to present a motion to terminate or limit examination*.

Tenn. R. Civ. P. 30.03 (emphasis added). Further, regarding the prohibition on "speaking objections" as described in the emphasized language above, the comment to Rule 30.03 provides that:

> The added language in the second paragraph of Rule 30.03 admonishes lawyers not to make "speaking" objections, which unethically put lawyers' words in deponents' mouths. *"Instructions" to a deponent not to answer a deposition question are made not only without authority but are unethical and sanctionable*. *See First Tennessee Bank v. FDIC*, 108 F.R.D. 640 (E.D. Tenn. 1985). Some courts have reminded the bar that a deposition is a formal judicial proceeding – albeit absent a presiding judge – and consequently consultations between counsel and deponent during questioning are not to be tolerated any more than it would be in the courtroom. *See Hall v. Clifton Precision*, 150 F.R.D. 525 (E.D. Pa. 1993).

Tenn. R. Civ. P. 30.03, Advisory Commission's Comment to 1995 Amendment. (Emphasis added).

Tennessee Rule of Civil Procedure 30.04 provides that at any time during a deposition, on motion of a party or deponent, "upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party," the court may stop the examination or limit the scope and manner of the deposition as provided in Rule 26.03. Rule 30.04 also provides that "[t]he provisions of Rule 37.01(4) apply to the award of expenses incurred in relation to the motion." Tenn. R. Civ. P. 30.04.

Rules 30.03 and 30.04 afforded Mr. Stopkotte and Mr. Kammen several options if they believed the questions presented at the deposition were objectionable, harassing or subject to a privilege; however, at no time did Mr. Stopkotte or his attorney exercise any of these available options. To the contrary, instead of properly and professionally making an objection, by stating "concisely and in a non-argumentative and non-suggestive manner," *see* Tenn. R. Civ. P. 30.03, Mr. Kammen was belligerent, insulting and most unprofessional. Rather than making his objection and then allowing the evidence, namely Mr. Stopkotte's testimony, to "be taken subject to the objection," Mr. Kammen gave long-winded speaking objections and instructed his client not to answer. *See id.* Furthermore, many times Mr. Kammen instructs Mr. Stopkotte not to answer on the basis of Mr. Stopkotte's Fifth Amendment right against self-incrimination. We recognize such an instruction is permissible "when necessary to preserve a privilege." *Id.* However, there are several instances when Mr. Kammen refuses to allow Defendants' counsel to complete her question before he objects on the grounds of Mr. Stopkotte's Fifth Amendment rights. There are more instances when Mr. Kammen simultaneously objects on Fifth Amendment grounds and on the grounds that Mr. Stopkotte was asked the question in a previous civil deposition and provided the answer. Finally, although Mr. Kammen repeatedly accuses Defendants' counsel of conducting the

deposition for the purpose of harassing and abusing Mr. Stopkotte, at no point in time, before, during or after the deposition, did Mr. Kammen file a motion for a protective order in the Williamson County Circuit Court, as is expressly authorized by Tennessee Rule of Civil Procedure 30.04. Mr. Kammen and Mr. Stopkotte simply left the deposition in the middle of questioning, and Mr. Kammen took no further action in the case.

For the above reasons and many more we have not addressed, we conclude, as the trial court did, that the *manner* in which Mr. Kammen conducted the deposition amounts to a violation of Rules 30.03 and 30.04 of the Tennessee Rules of Civil Procedure. *See also* Tenn. Code Ann. § 24-9-205 ("the time and place and the manner of the taking of the deposition, the production, or the inspection must comply with the Tennessee Rules of Civil Procedure relative to discovery").

III.

We now turn to the issue of the proper remedy for these discovery abuses, as provided in Tennessee Rule of Civil Procedure 37, *Failure to Make or Cooperate in Discovery, Sanctions*. Section 37.01 provides in relevant part:

> A party, upon reasonable notice to other parties and all persons affected hereby, may apply for an order compelling discovery as follows:
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> (1) APPROPRIATE COURT. An application for an order to a party *or to a deponent who is not a party*, may be made to the court in which the action is pending.
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> (2) MOTION. *If a deponent fails to answer a question propounded or submitted under Rule 30 or 31*, *. . . the discovering party may move for an order compelling an answer*, or a designation, or an order compelling inspection in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order.
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> If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 26.03.
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> (3) EVASIVE OR INCOMPLETE ANSWER. For purposes of this subdivision *an evasive or incomplete answer is to be treated as a failure to answer.*

> (4) AWARD OF EXPENSES OF MOTION. *If the motion is granted, the court shall*, after opportunity for hearing, *require the party or deponent whose conduct necessitated the motion* or the party *or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees*, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

Tenn. R. Civ. P. 37.01 (emphasis added). For other types of discovery abuses, Rule 37 authorizes trial courts to strike pleadings in whole or in part, hold a party or witness in contempt, or designate facts as established. *See* Tenn. R. Civ. P. 37.02. As for situations which are not particularly addressed in the Tennessee Rules of Civil Procedure, "trial judges have inherent authority to take such action as is necessary to prevent discovery abuse." *State ex rel. Gibbons v. Smart*, No. W2007-017680COA-R3-CV, 2008 WL 4491728, at *10 (Tenn. Ct. App. Oct. 8, 2008) (citing *Lyle v. Exxon Corp.*, 746 S.W.2d 694, 699 (Tenn. 1988); *Mercer v. Vanderbilt Univ., Inc.*, 134 S.W.3d 121, 133(Tenn. 2004)). Thus, "the authority to impose sanctions for abuse of the discovery process derives from the Rules and the court's inherent powers." *Id.* (citing *Butler v. Butler*, No. 02A01-9807-CH-00184, 1999 WL 418351, at *4 (Tenn. Ct. App. June 22, 1999)).

In this case, the trial court granted the motion to compel and ordered Mr. Stopkotte to pay a $6,635 judgment to Defendants for their attorney fees and other expenses. Mr. Stopkotte insists the trial court erred in entering the award of monetary sanctions against him because he was not guilty of misconduct, only his attorney Mr. Kammen was.

We begin this analysis with the full recognition that "[t]rial courts have wide discretion to determine the appropriate sanction to be imposed." *Mercer*, 134 S.W.3d at 133. As such, the imposition of Rule 37 sanctions is reviewed on appeal pursuant to the very deferential abuse of discretion standard. *Amanns v. Grissom*, 333 S.W.3d 90, 97 (Tenn. Ct. App. 2010). When we review a discretionary decision by the trial court, we "begin with the presumption that the decision is correct and should review the evidence in the light most favorable to the decision." *Mercer*, 134 S.W.3d at 133 (quoting *Overstreet v. Shoney's Inc.*, 4 S.W.3d 694, 709 (Tenn. Ct. App. 1999)). A trial court abuses its discretion only when it "applie[s] an incorrect legal standard, or reache[s] a decision which is against logic or reasoning that cause[s] an injustice to the party complaining." *Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn. 2001) (quoting *State v. Shirley*, 6 S.W.3d 243, 247 (Tenn.1999)). Furthermore, we will set aside the trial court's decision as to sanctions when "the trial court . . . has acted inconsistently with the substantial weight of the evidence." *Mercer*, 134 S.W.3d at 133 (citing *White v. Vanderbilt Univ.*, 21 S.W.3d 215, 223 (Tenn. Ct. App. 1999)).

However, we will not set aside a trial court's imposition of sanctions "even though reasonable judicial minds can differ concerning their soundness." *Id.*

Rule 37.01(4) permits the imposition of monetary sanctions for discovery abuse against a deponent, a deponent's attorney, or "both of them." Tenn. R. Civ. P. 37.01(4). The evidence in this record reveals that the active obstructionist was Mr. Kammen; indeed, Mr. Stopkotte was largely silent during the deposition. Thus, the question for this court to address is whether the trial court abused its discretion in determining Mr. Stopkotte was sufficiently culpable for Mr. Kammen's behavior that the monetary award to Defendants was not unjust. *See* Tenn. R. Civ. P. 37.01(4) (stating that if the court grants the motion to compel, the court "shall" award the moving party its expenses "unless the court finds that . . . other circumstances make an award of expenses unjust.").

This court dealt with a very similar issue in the case of *Mansfield v. Mansfield*, No. 01A019412CH0058, 1995 WL 643329 (Tenn. Ct. App. Nov. 3, 1995). In that case, the trial court ordered the plaintiff, Mr. Mansfield, to pay $5,580 to the defendant, Ms. Mansfield, for legal expenses incurred in filing a motion to compel Mr. Mansfield to respond to interrogatories and requests for production of documents. *Id.* at *8. Mr. Mansfield did not deny that discovery abuses occurred, however, he asserted that monetary sanctions were not warranted against him because "his former lawyer was responsible for the abuses." *Id.* at *5. Finding that Mr. Mansfield was "directly responsible for many of the discovery delays and that *he was aware of his former lawyer's inadequate responses* to Ms. Mansfield's discovery requests," the court found "little merit" in this claim.[3] *Id.* at *5 (emphasis added). In a detailed analysis of a client's responsibility for his lawyer's conduct, the *Mansfield* court stated:

> Mr. Mansfield attempts to avoid the monetary sanctions by laying the responsibility for the discovery abuses at his former lawyer's feet. We will not permit him to distance himself from his former lawyer because the record indicates that he was not completely innocent with regard to the untimely and incomplete interrogatories, the failure to return the signed authorizations to gain access to his financial records, and the failure to respond timely and appropriately to the request for production of documents.

[3]Mr. Mansfield also argued that the sanctions against him were not warranted for two additional grounds: "(2) Ms. Mansfield did not adequately document her claimed expenses, and (3) Ms. Mansfield's claimed expenses involved routine discovery matters, . . ." *Mansfield*, 1995 WL 643329, at *5. The appellate court also found "little merit in these claims." *Id.* We also note Mr. Stopkotte does not take issue with the *amount* of the monetary sanctions entered against him in this case.

> Clients in civil proceedings cannot easily avoid the consequences of actions of their voluntarily chosen attorneys. *Link v. Wabash R.R.*, 370 U.S. 626, 633-34 (1962); *Johnson v. Allis Chalmers Corp.*, 470 N.W.2d 859, 867-68 (Wis. 1991). Except for certain circumstances not at issue here, a lawyer's conduct during the course of litigation is attributable to and binding on his or her client. *Hart v. First Nat'l Bank*, 690 S.W.2d 536, 539 (Tenn. Ct. App. 1985). Thus, our courts have found that clients are responsible for the manner in which their lawyer initiated a bad check case, *Coffee v. Peterbilt of Nashville, Inc.*, 795 S.W.2d 656, 659-60 (Tenn. 1990), and for their lawyer's failure to pursue adequate discovery and to insist on a jury trial. *Memphis Bd. of Realtors v. Cohen*, 786 S.W.2d 951, 952-53 (Tenn. Ct. App. 1989).
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> Tenn. R. Civ. P. 37.01(4) and Tenn. R. Civ. P. 37.02 permit imposing monetary sanctions for discovery abuse against a party, the party's lawyer, or both. These sanctions must relate directly to the particular type of abuse involved in the case and must not be excessive. The punishment, in other words, must fit the crime and must be visited upon the criminal. Accordingly, as the Supreme Court of Texas has noted,
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> > The trial court must at least attempt to determine whether the offensive conduct is attributable to counsel only, or to the party only, or to both. This we recognize will not be an easy matter in many instances. On the one hand, a lawyer cannot shield his [or her] client from sanctions; a party must bear some responsibility for its counsel's discovery abuses when it is or should be aware of counsel's conduct and the violation of discovery rules. On the other hand, a party should not be punished for counsel's conduct in which it is not implicated apart from having entrusted to counsel its legal representation.

Id. at *5-6 (quoting *Transamerican Natural Gas Corp. v. Powell*, 811 S.W.2d 913, 917 (Tex.1991)) (footnote omitted).

Applying these legal principles to the case at bar, we find the trial court did not abuse its discretion in holding Mr. Stopkotte liable for the monetary sanctions.

We are mindful of the fact that it was at the request of Mr. Stopkotte and his attorney that the deposition took place in Indiana at Mr. Kammen's office, outside of the trial court's jurisdiction. The parties agreed to accommodate Mr. Stopkotte in his request, which served

to substantially reduce the fee and expenses Mr. Stopkotte would have been obliged to pay Mr. Kammen had the deposition taken place in Williamson County, Tennessee.[4]

We also recognize from the record on appeal that the underlying proceedings, *Jane Doe v. USA Swimming*, were extremely acrimonious, and that Mr. Stopkotte has a troubled history with USA Swimming, Inc., relating to his own participation in the *Jane Doe* litigation as well as his career as a swim coach. As such, we find it disingenuous to suggest that Mr. Stopkotte played no role in the planning and execution of his deposition "apart from having entrusted to [Mr. Kammen his] legal representation." *See Mansfield*, 1995 WL 643329, at *6. Put another way, Mr. Stopkotte's acquiescence about his attorney's conduct speaks volumes. This court understands that as a non-lawyer, Mr. Stopkotte is not expected to understand the nuanced details of the Tennessee Rules of Civil Procedure concerning depositions; however, Mr. Kammen's conduct was a far cry from a subtle or highly technical violation of legal rules. He repeatedly insulted and threatened opposing counsel, instructed Mr. Stopkotte to not answer questions as basic as, "Mr. Stopkotte, have you ever been known by any other names?" and answered several questions himself, sarcastically, before Mr. Stopkotte began speaking.

For example, in response to counsel's routine and straightforward admonition of Mr. Stopkotte of the importance of not speculating and giving the best and most truthful answer during the deposition, as distinguished from changing an answer to a substantive question after the deponent has the opportunity to read the transcript of the deposition, Mr. Kammen stated,

> Well, I've been doing this for 40 years, and I've been doing it all over the county. And let me tell you, I've never before heard . . . a lawyer suggest and try to intimidate a witness like you're doing here. This is absolutely unprofessional. It's . . . just showing that you would do this. . . . [Y]ou attempt to poison the atmosphere of this deposition.

In response to opposing counsel's statement that a particular question was not asked in a previous deposition, Mr. Kammen stated, "You had him there for hours. If you guys didn't ask that question, that's your problem." Mr. Kammen then refused to locate the alleged

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[4]Had the deposition been taken in Williamson County, as the subpoena directed, Mr. Kammen would have traveled from Indiana to Tennessee and charged Mr. Stopkotte for the additional hours of professional time required to travel and the expense of travel and lodging, etc. As Mr. Kamen stated, had the deposition been conducted in Tennessee "[t]hen we would have had to drive 12 hours . . . running up the bill for [Mr. Stopkotte]." Transcript of May 6, 2011 Deposition of Kenneth Stopkotte, p. 236, lines 1-5 (hereafter, "Transcript").

same question in the transcript of a prior deposition stating, "[w]ell, he's not answering it here. Next question."

Mr. Kammen responded to opposing counsel's efforts to establish inconsistencies between two news articles about USA Swimming, by stating, "This is exactly the same article. . . . Oh, are you accusing somebody of modifying it and then putting it on the Internet?" Mr. Kammen answered another question, "I'm sure the answer is no," before objecting or allowing Mr. Stopkotte to answer. And then, in response to the question "Do you have an iPhone," to Mr. Stopkotte, Mr. Kammen answered, "Yes, I do. I don't know about [Mr. Stopkotte]. Same objection."

For his final act, Mr. Kammen responded to opposing counsel's inquiry into why Mr. Stopkotte and Mr. Kammen decided to end the deposition early, Mr. Kammen stated, "What part of . . . 'we're not going to answer questions' don't you get?"[5]

Admittedly, the impermissibly obstructive, indeed unprofessional, behavior was that of Mr. Kammen, however, we cannot ignore the fact that this was not Mr. Stopkotte's first deposition. Indeed, as we have discussed in this opinion, many of Mr. Kammen's instructions not to answer questions were allegedly based on Mr. Stopkotte's previous depositions in a separate but similar case. In sum, we find Mr. Stopkotte's experience coupled with the outrageous nature of the discovery violations in this case suggest that Mr. Stopkotte was not completely innocent in necessitating Defendants' motion to compel. *See Mansfield*, 1995 WL 643329, at *5.

The foregoing notwithstanding, another very important factor to recognize is the limited scope of appellate review of a trial court's decision to impose discovery sanctions. This court is *not* to determine "whether we would have reached the same decision" as the trial court; instead, we must determine whether the trial court misapplied the controlling law or acted inconsistently with the substantial weight of the evidence. *Buckner*, 44 S.W.3d at 83. The trial court had the authority to enter a monetary judgment in favor of Defendants, both under Rule 37 and the court's inherent powers. *See* Tenn. R. Civ. P. 37.01; *Lyle*, 746 S.W.2d at 698-99. Moreover, under the unique circumstances of this case, the fact that Mr. Kammen was the active abuser of the rules governing the discovery process does not render the trial court's decision to assess monetary sanctions against Mr. Stopkotte unjust. The

[5]It must be noted that the foregoing excerpts from the deposition do not adequately convey the frequency and impropriety of Mr. Kammen's objections or the hostile tenor of his behavior during Mr. Stopkotte's deposition, however, we see nothing to be gained by quoting more. Mr. Kammen did not make an appearance in this action and is not licensed in Tennessee. Thus, as the trial court found, we have no jurisdiction over him and may not impose sanctions against him.

weight of the evidence supports the trial court's decision; therefore, we affirm the assessment of monetary sanctions against Mr. Stopkotte in the amount of $6,635.

IN CONCLUSION

The judgment of the trial court is affirmed, and this matter is remanded with costs of appeal assessed against the appellant, Kenneth Stopkotte.

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FRANK G. CLEMENT, JR., JUDGE