

ENRIQUE BADILLO, Plaintiff, v. ALPHONZA J. CUNNINGHAM, CHRISTIE CUNNINGHAM, and FRANK OTIS BURROUGHS, JR., Defendants

NO. COA05-1252

Filed: 06 June 2006

Pleadings--sanctions--violation of discovery dates

The trial court did not abuse its discretion by dismissing plaintiff's personal injury action with prejudice allegedly without considering lesser sanctions based on plaintiff's failure to meet discovery due dates, because: (1) N.C.G.S. § 1A-1, Rule 37 allows the trial court to impose sanctions, including dismissal, upon a party for discovery violations; (2) the trial court is not required to list and specifically reject each possible lesser sanction prior to determining that dismissal is appropriate; and (3) the trial court expressly stated that lesser sanctions were urged by plaintiff, which leads to an inference that the trial court did in fact consider lesser sanctions.

Judge Wynn dissents.

Appeal by plaintiff from order entered 27 June 2005 by Judge W. Douglas Albright in Rockingham County Superior Court. Heard in the Court of Appeals 11 April 2006.

Wilson & Iseman, LLP, by G. Gray Wilson, and Peebles Law Firm, PC, by Todd M. Peebles, for plaintiff-appellant.

Teague, Rotenstreich & Stanaland, LLP, by Paul A. Daniels, for unnamed defendant-appellee Nationwide Mutual Insurance Company.

ELMORE, Judge.

Enrique Badillo (plaintiff) appeals an order of the trial court dismissing his action with prejudice. For the reasons stated herein, we affirm the order below.

Plaintiff filed a personal injury action in Rockingham County Superior Court in September 2001. After taking a voluntary dismissal without prejudice in July 2003, plaintiff re-filed this action on 13 November 2003. Plaintiff did not give any notice of the refiling to counsel for the unnamed defendant Nationwide Mutual

Insurance Company (Nationwide). During an administrative telephone conference on 15 November 2004, Superior Court Judge Melzer Morgan instructed plaintiff's counsel to provide proof of service and to serve copies of all pleadings on counsel for Nationwide. Judge Morgan scheduled the case for trial the week of 13 June 2005, with a 31 May 2005 discovery deadline. Counsel for Nationwide gave notice of appearance in the case on 15 December 2004.

On 16 December 2004 Nationwide moved to dismiss plaintiff's action for failure to prosecute and failure to provide proof of service and pleadings to Nationwide as requested by the trial court. Plaintiff complied with the court's order on 14 January 2005, just prior to the hearing on Nationwide's motion to dismiss. Nationwide served an Answer and written discovery on plaintiff on 24 January 2005. Plaintiff failed to respond, and Nationwide moved to compel discovery on 23 March 2005. In this motion, Nationwide asked the court to enter an order pursuant to Rule 37(d) of the North Carolina Rules of Civil Procedure requiring plaintiff to pay Nationwide's reasonable expenses and attorneys' fees related to obtaining an order compelling discovery. Nationwide's counsel stated that he made a good faith attempt to confer with counsel for plaintiff, in a letter dated 1 March 2005, before serving the motion to compel.

Nationwide's motion to compel was heard on 11 April 2005, and the trial court entered an order the same day. The court found that plaintiff's counsel did not seek an extension to respond to discovery and that counsel for Nationwide wrote to plaintiff's

counsel on 1 March 2005, reminding him of discovery past due. As of 11 April 2005, the parties were only six weeks from the close of the discovery period set by Judge Morgan. The court concluded that plaintiff's counsel conduct was an inexcusable failure to make discovery and to prosecute his client's case in violation of Rule 37(d) of the North Carolina Rules of Civil Procedure. Pursuant to its order entered 11 April 2005, the court dismissed plaintiff's action with prejudice. Plaintiff filed a Motion to Reconsider. The court held a hearing on this motion and entered an amended order of dismissal on 27 June 2005.

Plaintiff appeals from the 27 June 2005 order entered by Judge Albright. Plaintiff argues that the court erred in dismissing the action without actually considering lesser sanctions. Plaintiff also asserts that the court's findings of fact are insufficient to support its determination that lesser sanctions are inappropriate.

Rule 37 of the North Carolina Rules of Civil Procedure authorizes a trial judge to impose sanctions, including dismissal, upon a party for discovery violations. See N.C. Gen. Stat. § 1A-1, Rule 37(d) (2005); N.C. Gen. Stat. § 1A-1, Rule 37(b)(2) (2005). Generally, responses to discovery requests are due within thirty days of service. N.C. Gen. Stat. § 1A-1, Rule 33(a) (2005); N.C. Gen. Stat. § 1A-1, Rule 34(b) (2005). We review the trial court's decision of whether to dismiss an action based upon discovery violations for an abuse of discretion. See *Cheek v. Poole*, 121 N.C. App. 370, 374, 465 S.E.2d 561, 564, *cert. denied*, 343 N.C. 305, 471 S.E.2d 68 (1996). "The determination of whether to

dismiss an action because of noncompliance with discovery rules, 'involves the exercise of judicial discretion' and should not be disturbed unless 'manifestly unsupported by reason.'" *Id.* (quoting *Miller v. Ferree*, 84 N.C. App. 135, 136-37, 351 S.E.2d 845, 847 (1987)).

Plaintiff is correct that a trial judge must consider less severe sanctions prior to dismissing an action with prejudice for failure to respond to discovery requests. See *Goss v. Battle*, 111 N.C. App. 173, 176-77, 432 S.E.2d 156, 158-59 (1993). However, where the record on appeal permits the inference that the trial court considered less severe sanctions, this Court may not overturn the decision of the trial court unless it appears so arbitrary that it could not be the result of a reasoned decision. See *Hursey v. Homes by Design, Inc.*, 121 N.C. App. 175, 179, 464 S.E.2d 504, 506 (1995).

We reject plaintiff's argument that the trial court's conclusory statements that it considered lesser sanctions, without listing which specific sanctions it considered, are insufficient to support the ruling that lesser sanctions are inappropriate. Here, the trial court stated that:

the Court having reconsidered this matter and the arguments of counsel, as well as the applicable case law, and having considered certain lesser discovery sanctions as urged by plaintiff, the Court being of the opinion that dismissal of the case was and remains the only appropriate sanction in view of the totality of the circumstances of the case, which circumstances amply demonstrate the severity of the disobedience of counsel for plaintiff in failing to make discovery and thereby impeding the necessary and efficient

administration of justice, the Court being of the opinion that lesser sanctions in this case would be inappropriate

We hold that the trial court is not required to list and specifically reject each possible lesser sanction prior to determining that dismissal is appropriate. In *In re Pedestrian Walkway Failure*, 173 N.C. App. 237, 618 S.E.2d 819 (2005), this Court addressed the plaintiff's assertion that the trial court erred in dismissing his claims without considering lesser sanctions. The order dismissing the claims stated that:

the Court has carefully considered each of [plaintiff's] acts [of misconduct], as well as their cumulative effect, and has also considered the available sanctions for such misconduct. After thorough consideration, the Court has determined that sanctions less severe than dismissal would not be adequate given the seriousness of the misconduct . . .

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In re Pedestrian Walkway Failure, 173 N.C. App. at 236, 618 S.E.2d at 828-29. The Court held that this language sufficiently demonstrated that the trial judge in fact considered lesser sanctions. *Id.*

We see no material difference between that language and the order of the trial court in the instant case. Judge Albright states that, given the severity of disobedience by plaintiff's counsel, lesser sanctions would be inappropriate. The record supports the seriousness of plaintiff's misconduct: Plaintiff did not answer or object to any of Nationwide's interrogatories or requests for production of documents. Neither did plaintiff seek a protective order or proffer any justification for this inaction.

This Court has previously upheld a trial court's dismissal of an action based upon similar circumstances of a disregard of discovery due dates. See *Cheek*, 121 N.C. App. at 374, 465 S.E.2d at 564 (plaintiff did not object to discovery requests and failed to respond within extended time to comply); *Fulton v. East Carolina Trucks, Inc.*, 88 N.C. App. 274, 276, 362 S.E.2d 868, 869-70 (1987) (plaintiffs did not answer, object, or respond in any way to defendants' requests for discovery). Moreover, Judge Albright expressly states that lesser sanctions were *urged by the plaintiff*. As such, we can infer from the record that the trial court did in fact consider lesser sanctions. On this record, plaintiff simply fails to establish an abuse of the trial court's discretion in dismissing the action. We affirm.

Affirmed.

Judge LEVINSON concurs.

Judge WYNN dissents by separate opinion.

WYNN, Judge, dissenting.

"[B]efore dismissing a party's claim with prejudice pursuant to Rule 37, the trial court must consider less severe sanctions."¹ While the majority concludes that the trial court considered less severe sanctions before dismissing the claim, as the record does not support this conclusion, I would reverse and remand for

¹ *Hursey v. Homes by Design, Inc.*, 121 N.C. App. 175, 179, 464 S.E.2d 504, 507 (1995) (citing *Goss v. Battle*, 111 N.C. App. 173, 177, 432 S.E.2d 156, 159 (1993)); see also N.C. Gen. Stat. § 1A-1, Rule 37(d) (2005).

consideration of less severe sanctions. Accordingly, I must respectfully dissent.

The majority correctly notes that Rule 37(d) of the North Carolina Rules of Civil Procedure authorizes a trial court to sanction a party pursuant to Rule 37(b)(2) for failure to serve answers or objections to interrogatories. N.C. Gen. Stat. § 1A-1, Rule 37(d). The trial court is given broad discretion to "make such orders in regard to the failure as are just" and authorized to, *inter alia*, dismiss the action, or render judgment against the disobedient party. N.C. Gen. Stat. § 1A-1, Rule 37(b)(2) (2005).

While the trial court is afforded discretion in imposing discovery sanctions, because a dismissal with prejudice is the ultimate punishment in a civil case, "before dismissing a party's claim with prejudice pursuant to Rule 37, the trial court must consider less severe sanctions." *Hursey*, 121 N.C. App. at 179, 464 S.E.2d at 507 (citing *Goss*, 111 N.C. App. at 177, 432 S.E.2d at 159). The trial court is not required to impose lesser sanctions, but only to consider lesser sanctions. *Goss*, 111 N.C. App. at 177, 432 S.E.2d at 159.

The following procedural history occurred prior to Judge Albright's dismissal order:

13 November 2003: Plaintiff files Complaint

9 December 2004: Order calendaring case for trial the week of 13 June 2005 and setting a 31 May 2005 discovery deadline

15 December 2004: Notice of Appearance by counsel for Unnamed Defendant Nationwide Insurance Companies

24 January 2005: Nationwide filed its Answer and sent Plaintiff Interrogatories

1 March 2005: Letter from Nationwide's counsel to Plaintiff's counsel regarding overdue interrogatories

23 March 2005: Nationwide filed a Motion to Compel Discovery asking for expenses and attorneys' fees

11 April 2005: Order dismissing case with prejudice

In this case, the trial court did not state in its original dismissal order that it had considered lesser sanctions. Only after Plaintiff filed a motion to reconsider did the trial court make the conclusory statement that the trial court had "considered certain lesser discovery sanctions[.]" But it is not evident from the record or from the trial court's orders what form of lesser sanctions the trial court had considered.

Significantly, Nationwide never asked for dismissal of the case. Indeed, the trial court dismissed this action with prejudice in an order responding to Nationwide's motion to compel discovery which requested expenses and attorneys fees. The trial court never entered an order compelling responses to interrogatories nor does it appear from the record that it considered awarding expenses and attorneys' fees to Nationwide, the requested sanction.

Furthermore, while Plaintiff was late in responding to interrogatories, as of the first dismissal order, there was still over a month left until the 31 May 2005 discovery deadline. Also, Plaintiff had never violated a court order to compel discovery, as

the trial court never took that initial step before dismissing the case with prejudice.

The majority cites to *In re Pedestrian Walkway Failure*, __ N.C. App. __, 618 S.E.2d 819 (2005), to support its conclusion that the trial court's conclusory statement was sufficient to determine it had considered lesser sanctions. But in *In re Pedestrian Walkway Failure*, the defendant filed a motion which requested that the plaintiff be sanctioned with the dismissal of his claims but also requested, in the alternative, lesser sanctions. *Id.* at __, 618 S.E.2d at 828. Moreover, the trial court in *In re Pedestrian Walkway Failure* dismissed the case pursuant to Rule 37(d) and Rule 41(b) for the plaintiff's repeated attempts to frustrate the discovery process and a court order by failing to turn over his 2001 tax records, giving evasive and contradictory answers to a court ordered deposition, and falsely representing to the court the status of his 2001 tax filings. *Id.* at __, 618 S.E.2d at 826-27.

Also in both *Cheek v. Poole*, 121 N.C. App. 370, 372, 465 S.E.2d 561, 563 (1996) and *Fulton v. East Carolina Trucks, Inc.*, 88 N.C. App. 274, 275, 362 S.E.2d 868, 869 (1987), the other cases cited by the majority, the defendant's requested dismissal as a sanction for discovery violations, unlike here, where Nationwide only requested expenses and attorneys' fees as a sanction.

The sanction imposed in this case was harsh. This Court has previously stated:

Dismissal is the most severe sanction available to the court in a civil case. An underlying purpose of the judicial system is to decide cases on their merits, not dismiss

parties' causes of action for mere procedural violations. In accord with this purpose, claims should be involuntarily dismissed only when lesser sanctions are not appropriate to remedy the procedural violation.

Wilder v. Wilder, 146 N.C. App. 574, 576, 553 S.E.2d 425, 427 (2001) (internal citations omitted).

Dismissal with prejudice is the ultimate sanction, and it must be evident from the record that the trial court first considered lesser sanctions. See *Goss*, 111 N.C. App. at 177, 432 S.E.2d at 159. It is evident from the record that Plaintiff had never violated a court order, therefore, an order compelling discovery and awarding attorneys' fees would have been an appropriate remedy to the procedural violation. See *Wilder*, 146 N.C. App. at 576, 553 S.E.2d at 427. The trial court's conclusory statement is not sufficient for this Court to determine if lesser sanctions were considered and why they were inappropriate to remedy the procedural violation. Therefore, this case should be reversed and remanded.