MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Jerry J. Finton, Jr.,
Appellant-Plaintiff,

v.

Nancy J. Wigent,
Appellee-Respondent

June 26, 2023

Court of Appeals Case No. 22A-PL-2682

Appeal from the Steuben Circuit Court

The Honorable Allen N. Wheat, Judge

Trial Court Cause No. 76C01-2111-PL-495

Memorandum Decision by Judge Mathias
Judges May and Bradford concur.

Mathias, Judge.

[1] Jerry Finton, Jr. appeals the Steuben Circuit Court's interlocutory order granting, in part, Nancy Wigent's summary judgment motion and denying his motion for rule to show cause in this will contest. Finton presents two issues for our review:

> I. Whether the trial court erred when it entered summary judgment for Wigent on Finton's request for attorney's fees.
>
> II. Whether the trial court abused its discretion when it denied his motion for rule to show cause seeking default judgment against Wigent for her alleged evasiveness and dishonesty in discovery responses.

[2] We affirm in part, reverse in part, and remand for further proceedings.

Facts and Procedural History

[3] This is the second appeal in this matter. In *Finton v. Wigert (In re Estate of Krieger)*, 165 N.E.3d 623, 625-28 (Ind. Ct. App. 2021) ("*Finton I*"), *trans. denied*, we stated the facts and procedural history as follows:

> Dean Kreiger had two daughters, Roberta Stellar and Nancy Wigent. Finton is Stellar's son. In December 2002, Kreiger executed a durable general power of attorney, which granted Wigent and her husband the ability to act on behalf of Kreiger in "all possible matters and affairs affecting property owned by" Kreiger. In January 2003, Kreiger executed a self-proved will[] that bequeathed: (1) $2,000.00 to Stellar if she was living at the time of Kreiger's death; (2) $10,000.00 each to two granddaughters; (3) $1,000.00 to a church; and (4) $500.00 each to three charities. Kreiger bequeathed the residuary estate to Wigent and, if she was not living at the time of Kreiger's death,

to Wigent's children. In the will, Kreiger named Wigent as the "Executrix (personal representative)."

In late 2012 or early 2013, Kreiger was admitted to a long-term care facility due to Alzheimer's disease. Kreiger died in February 2015 at the age of ninety-one. In March 2015, Wigent, as personal representative, filed a petition for probate of the will, issuance of letters testamentary, and for unsupervised administration. The trial court then entered an order probating the self-proved will and authorizing the issuance of letters testamentary for unsupervised administration. Stellar filed an objection to unsupervised administration, requested supervised administration, and requested an accounting of Kreiger's assets.

On April 13, 2015, Stellar separately filed a complaint to contest Kreiger's purported will and to object to the probate of the will. Stellar argued that the will was the product of undue influence upon Kreiger and that Kreiger was not of sound mind when he executed the will.

Shortly thereafter, Stellar provided discovery requests to Wigent, as the personal representative of the Estate. Among the requests for production of documents, Stellar requested a list of Kreiger's medical providers from 2002 until his death and a medical release form for each of the medical providers identified. Wigent refused to provide either the list or the medical release form because she claimed that the "medical records after 2002 until [Kreiger's] death are irrelevant."

In July 2015, Stellar filed a motion to compel discovery. Stellar requested an order compelling Wigent to execute releases for Kreiger's medical records from 2002 to the date of his death. A hearing on the matter was repeatedly continued by the parties and the trial court. In June 2016, Stellar filed a request for a hearing on the motion to compel discovery, but a hearing was not scheduled on Stellar's request. There was no further action in the matter until August 2017, when Stellar filed a motion for

payment of expenses and a motion for a status conference. The trial court scheduled a hearing on the matter, but the hearing was continued at Wigent's request.

In September 2017, Finton was substituted as a party for Stellar as a result of Stellar's death.[] No further action was taken on the case until September 2018, when Finton filed a motion for accounting, a motion for a ruling on the objection to the unsupervised administration, and a motion for payment of attorney fees and expenses. A hearing was ultimately held in November 2018, but the trial court did not issue an order regarding the hearing. In December 2018, the trial court recused from the matter, and a special judge was assigned.

In August 2019, the trial court held a hearing on Finton's motion for an accounting, Finton's motion for a ruling on his objections to unsupervised administration and request for supervised administration, and Finton's motion for payment of expenses. The trial court ordered that Wigent had ten days to provide "subpoenas for medical records relating to Dean C. Kreiger's initial diagnosis of dementia"; Finton had ten days "from receipt to execute said subpoenas"; Finton "must have all intended depositions scheduled within 45 days;" and the motion for an accounting and payment of fees remained under advisement. In October 2019, the trial court issued another order and denied the motion for an accounting, denied the motion for payment of expenses, and granted the request for supervised administration of the Estate.

In October 2019, Wigent supplemented her responses to discovery. Contrary to the trial court's August 2019 order, Wigent provided medical releases for "treatment provided prior to January 16, 2003, the date of the execution of decedent's Will."[] In responses to interrogatories, Wigent stated:

> To the best of my knowledge, Dean C. Kreiger was never diagnosed nor has had medical work ups for

> dementia, Alzheimer's Disease, diminished mental capacity and/or senile dementia. I am further unaware of any symptoms exhibited by the decedent which would have caused such diagnosis.

On November 22, 2019, Finton filed a motion for rule to show cause and a motion to remove Wigent and appoint a special administrator. Finton argued, in part, that: (1) the time limitation in the medical release provided by Wigent conflicted with the trial court's order regarding medical releases; and (2) based upon medical records that Finton had been able to obtain, Wigent's responses regarding Kreiger's lack of a dementia/Alzheimer's Disease diagnosis were demonstrably false. Finton requested sanctions pursuant to Indiana Trial Rule 37 and asked that Wigent be found in contempt. Wigent filed a response and noted that, on December 2, 2019, she executed a release for Kreiger's medical records without any time limitation. After a hearing, the trial court issued an order denying Finton's motion for rule to show cause and Finton's petition to remove the personal representative.

On January 17, 2020, Wigent filed a motion for summary judgment. Wigent argued that: (1) she was entitled to summary judgment on Finton's claim for attorney fees; and (2) there is no evidence to rebut the presumption that Kreiger was of sound mind at the time he executed his will and that he did so voluntarily and without any undue influence. In support of Wigent's motion, she designated her affidavit and the affidavit of David Brewer, Kreiger's attorney when he executed the will.

In response, on the same day, Finton filed a verified motion for relief pursuant to Indiana Trial Rule 56(F). Finton noted that Wigent did not provide the proper medical release until December 2019; that Wigent has delayed responding to discovery; and that Finton had not yet received all of Kreiger's medical records. Finton requested the following:

> In the interests of justice, Petitioner submits that the Court should summarily deny the summary judgment motion without prejudice, hold a status conference to determine the status of discovery, and then set a briefing schedule for a later time, but only after depositions are complete. Petitioner respectfully submits that he should be allowed thirty (30) days after obtaining all of the Decedent's medical records and depositions have been taken.

Later, upon noticing that his motion was not listed on the CCS, Finton filed a notice with the trial court and refiled the motion. The trial court, however, did not respond to Finton's motion.

On February 14, 2020, Finton filed a response to Wigent's motion for summary judgment and designated, in part, Stellar's 2015 affidavit, Finton's affidavit, Finton's deposition, and some of Kreiger's medical records. Finton contended:

> Petitioner's deposition testimony establishes that in 2000, 2 years before the Decedent executed his will, he didn't recognize his only grandson or recall his oldest daughter, Roberta, even after being prompted by reminders by his wife, who admitted he had "Dementia". Roberta's Affidavit establishes that the Decedent ". . . would frequently repeat himself, lose his train of thought and talk nonsense. He often would ramble on about past events, such as the death of his son Doug, who committed suicide in September of 1989 and the death of his second wife, Phyllis. He frequently contradicted himself by saying one thing and then saying the exact opposite thing."

Finton contended that Wigent failed to meet her burden of proof and that summary judgment should be denied. Finton also asked that Wigent's affidavit and Brewer's affidavit be stricken. Wigent

filed a reply and a motion to strike certain portions of Stellar's affidavit, Finton's affidavit, and the medical records.

After a hearing, the trial court issued a written order addressing Finton's motion to strike, Wigent's motion to strike, and Wigent's motion for summary judgment. The trial court denied Finton's motion to strike Brewer's affidavit and partially granted Finton's motion to strike Wigent's affidavit. Regarding Wigent's motion to strike, the trial court granted the motion to strike certain portions of Stellar's affidavit and Finton's affidavit on hearsay grounds. The trial court denied Wigent's motion to strike the medical records. Regarding the motion for summary judgment, the trial court found:

> The Court therefore holds that there is no genuine issue of fact which is material to Finton's claim that the Will was the product of undue influence or that Kreiger was of unsound mind at the time that he made the Will. The Court further holds that Wigent is entitled to judgment as a matter of law on the Verified Complaint to Contest Purported Will of Dean. C. Kreiger and Objection to Probate, and therefore ORDERS that the Defendant's Motion for Summary Judgment on the request for an order invalidating the Will is GRANTED.

The trial court also granted summary judgment to Wigent on Finton's request for attorney fees.

(Citations omitted.)

[4] On appeal, we held that the trial court abused its discretion when it denied Finton's Trial Rule 56(F)[1] motion and remanded with instructions. In particular, we stated that

> Finton had been requesting a release to obtain Kreiger's medical records since 2015. *After numerous delays caused by both parties and the trial court*, motions to compel, and the passage of several years, Wigent finally provided the requested releases on December 2, 2019. Only a few weeks later, Wigent filed her motion for summary judgment. In his verified motion, Finton pointed out that he had not yet received all of the requested medical records from providers due to the holidays, the fact that some providers had moved, and the fact that time was needed to locate older medical records. Under these circumstances, we conclude that Finton showed "good cause" for the trial court to grant the motion.

Id. at 629 (emphasis added). Further, we held that, "[b]ecause discovery was not complete as a result of Wigent's delay in providing the medical releases, Finton's ability to designate evidence in response to Wigent's motion for summary judgment was hindered here. Therefore, Finton was prejudiced." *Id.*

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[1] Trial Rule 56(F) provides:

> Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

[5] On remand, the trial court, on September 23, 2021, issued an order stating in part as follows:

> 3. On or before November 23, 2021 [Wigent] shall provide to [Finton] the names and addresses of all health care providers who provided [Kreiger] with medical care for the years 2000-2015. This would include the names of all doctors, nurses and/or nursing home facilities.
>
> 4. Each name provided shall be accompanied by a properly executed and notarized consent which authorizes the medical care provider to release all requested medical records of [Kreiger] to [Finton] or his counsel.

Appellant's App. Vol 3, p. 160. Wigent responded on October 13, including eighteen medical authorization forms, and she supplemented that response again on October 15, including additional medical authorization forms.

[6] On November 3, Finton submitted his Third Supplemental Combined Discovery Requests to Wigent, which consisted of two interrogatories and one request for production. Finton asked Wigent whether she had requested or acquired or had directed someone to request or acquire "any medical or psychiatric records of Dean C. Kreiger at any time, . . . including, but not limited to, dementia, Alzheimer's Disease, diminished mental capacity or any other physical or mental health conditions." Appellee's App. Vol. 2, p. 146. On November 30, Wigent responded by objecting to the first interrogatory as "overly broad," but she also stated that she had only received such records from Finton in the course of the instant litigation. *Id.* at 149.

[7] On January 6, 2022, following a status hearing, the trial court ordered Finton to serve upon Wigent "any additional discovery deemed necessary" within thirty days. Appellant's App. Vol. 2, p. 236. On January 27, Finton served Wigent with one final round of interrogatories and requests for admissions, to which Wigent responded on February 8.

[8] On February 9, Wigent filed another motion for summary judgment. Wigent argued that she was entitled to judgment as a matter of law on the substance of Finton's will contest and on Finton's request for attorney's fees. Following a hearing on that motion on March 23, the trial court denied Wigent's motion in part, but granted it with respect to Finton's request for attorney's fees. Both parties filed motions to correct error, which the trial court denied except to correct a scrivener's error.

[9] On June 3, Finton filed a motion for rule to show cause

> as to why . . . Wigent should not be sanctioned for her consistent and contumacious refusal to cooperate in discovery and to comply with four (4) Court Orders compelling her to disclose the health care providers who may have tested and diagnosed Dean C. Kreiger with cognitive problems, including dementia and Alzheimer's Disease.

Appellant's App. Vol. 3, p. 102. Finton alleged that,

> [m]ost egregious is the fact that despite four (4) court orders, [Wigent] never listed two doctors who actually diagnosed and tested Kreiger for cognitive problems: Dr. Lloyd Williams and Dr. John Mathew. Finton's attorneys found these doctors' names

> in nursing home records. Wigent's responses to discovery are demonstrably false.

Id. at 114. The trial court denied that motion. And the court ordered the parties to mediation. This appeal ensued.

Discussion and Decision

Issue One: Attorney's Fees

[10] Finton contends that the trial court erred when it entered summary judgment for Wigent on his request for attorney's fees. Our standard of review is well settled:

> We review summary judgment de novo, applying the same standard as the trial court: "Drawing all reasonable inferences in favor of . . . the non-moving parties, summary judgment is appropriate 'if the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.'" *Williams v. Tharp*, 914 N.E.2d 756, 761 (Ind. 2009) (quoting T.R. 56(C)). "A fact is 'material' if its resolution would affect the outcome of the case, and an issue is 'genuine' if a trier of fact is required to resolve the parties' differing accounts of the truth, or if the undisputed material facts support conflicting reasonable inferences." *Id.* (internal citations omitted).
>
> The initial burden is on the summary-judgment movant to "demonstrate [ ] the absence of any genuine issue of fact as to a determinative issue," at which point the burden shifts to the non-movant to "come forward with contrary evidence" showing an issue for the trier of fact. *Id.* at 761-62 (internal quotation marks and substitution omitted).

Hughley v. State, 15 N.E.3d 1000, 1003 (Ind. 2014) (alterations original to *Hughley*).

[11] Finton moved the trial court to award him attorney's fees pursuant to Indiana Code section 29-1-10-14, which provides:

> (a) As used in this section, "devisee" shall include any person prosecuting or defending any will under IC 29-1-7-16 or IC 29-1-7-17.5 and, if multiple wills are being challenged under IC 29-1-7-17.5, any person prosecuting or defending a will next prior to the earliest will being challenged under IC 29-1-7-17.5.
>
> (b) When any person designated as executor in a will, or the administrator with the will annexed, or if at any time there be no such representative, then any devisee therein, defends it or prosecutes any proceedings in good faith and with just cause for the purpose of having it admitted to probate, whether successful or not, the devisee shall be allowed out of the estate the devisee's necessary expenses and disbursements including reasonable attorney's fees in such proceedings.

[12] This Court has interpreted the statute to mean that, "when a will is challenged, 'any devisee therein' may be entitled to attorney fees under certain circumstances," and we have held that "'devisee' includes a person who stands to benefit directly if the challenged will is set aside[.]" *Stibbins v. Foster*, 45 N.E.3d 419, 425 (Ind. Ct. App. 2015), *trans. denied*. Here, Finton correctly asserts that, as the summary judgment movant, Wigent had the burden to prove that Finton did not stand to benefit directly if the 2003 will were set aside. And Finton argues that Wigent did not designate evidence to satisfy that burden. We agree.

[13] In her summary judgment motion, Wigent argued that Finton is entitled to attorney's fees under the statute only if he can show that he would not "stand to benefit under a prior will." Appellant's App. Vol. 2, p. 211. She alleged that, should the 2003 will be set aside, Kreiger's 1999 will would govern and that will does not leave anything to Finton (or Stellar). Wigent designated as evidence in support of that assertion her affidavit, which included as an exhibit an *unsigned* copy of the 1999 will.

[14] However, the unsigned copy of the 1999 will would be inadmissible at trial. It is well settled that, in ruling on a motion for summary judgment, our courts will only consider evidence which would be admissible at trial. *See Seth v. Midland Funding, LLC*, 997 N.E.2d 1139, 1141 (Ind. Ct. App. 2013). Accordingly, we agree with Finton that Wigent did not sustain her burden as summary judgment movant. And the trial court erred when it entered summary judgment for Wigent on this issue.[2]

Issue Two: Motion for Rule to Show Cause

[15] Finton next contends that the trial court abused its discretion when it denied his motion for rule to show cause as to why Wigent should not be sanctioned for discovery violations. As this Court has explained,

> [d]iscovery matters are fact-sensitive by nature and, therefore, a trial court's ruling "is cloaked with a strong presumption of

[2] Of course, whether Finton will ultimately be successful in his claim for attorney's fees is a question for another day.

> correctness on appeal." [*Allstate Ins. Co. v.]Scroghan*, 851 N.E.2d [317,] 323[(Ind. App. Ct. 2006)]. "Trial [Court] Judges stand much closer than an appellate court to the currents of litigation pending before them, and they have a correspondingly better sense of which sanctions will adequately protect the litigants in any given case." *Whitaker v. Becker*, 960 N.E.2d 111, 115 (Ind. 2012). "Absent clear error and resulting prejudice, the trial court's determination with respect to violations and sanctions should not be overturned." *Carter v. Robinson*, 977 N.E.2d 448, 455 (Ind. Ct. App. 2012), *trans. denied*.

Doherty v. Purdue Props. I, LLC, 153 N.E.3d 228, 240 (Ind. Ct. App. 2020), *trans. denied*. "Indiana Trial Rule 37(B)(2)(c) expressly provides that a trial court may impose sanctions, including outright dismissal of the case or default judgment, if a party fails to comply with an order to compel discovery." *Whitaker*, 960 N.E.2d at 115.

[16] Finton argues that "Wigent's consistent pattern of stonewalling and demonstrably false responses to discovery on the history and onset of Kreiger's incompetence warrant [the] imposition of sanctions." Appellant's Br. at 33. And he maintains that "[t]his case is one in which it is hard to conceive of a clearer example in which the ultimate sanction of default would be more appropriate." *Id.* at 34. We disagree.

[17] The core issue here is Finton's difficulty in obtaining medical records to determine the date of any diagnosis for Kreiger of dementia or Alzheimer's disease. Finton's will contest depends in large part on proof that Kreiger was not of sound mind when he executed the 2003 will. Wigent has maintained

throughout discovery that she was not aware of any diagnoses for Kreiger of "dementia, Alzheimer's Disease, diminished mental capacity and/or senile dementia." Appellant's App. Vol. 3, p. 144. Finton is incredulous and insists that Wigent's responses are "demonstrably false" and warrant sanctions. Appellant's Br. at 33.

[18] However, while it might be incredible to Finton, it is not outside the realm of possibility that Wigent was unaware of a diagnosis of dementia or Alzheimer's for Kreiger, and Wigent's assertions on that issue are consistent with the allegedly contrary evidence put forth by Finton. For instance, Finton directs us to an advance directives document for Kreiger, which is dated August 2010 and signed by Wigent as his power of attorney. In a blocked-off section for physicians only, which was *below* Wigent's signature block, a physician hand-wrote the following and attached his own signature: "Mr. Kreiger is unable at this time to make a decision such as this that requires a reasoning thought process." Appellant's App. Vol. 3, p. 15. But while the physician's statement reasonably suggests that Kreiger was impaired at the time of the DNR, there is no evidence that the physician wrote his note prior to Wigent signing the document.[3] Further, Wigent's role as power of attorney gave her the authority to execute the DNR regardless of Kreiger's decision-making abilities at the time. *See* Appellant's App. Vol. 2, p. 120. Thus, while this document might

[3] Wigent's signature only pertained to the DNR order and made no indication of her opinion regarding his decision-making abilities at that time.

make Wigent's statement *arguably* false, it is not, as Finton maintains, conclusively so such that we must say that the trial court abused its discretion in deciding this pretrial discovery issue.

[19] Similarly, Finton directs us to nursing home records from July 2010 showing that, at that time, Kreiger had "dementia." Appellant's App. Vol. 2, p. 67. In her interrogatory responses dated February 2022, Wigent stated that,

> [p]rior to June 30, 2010, the words dementia and Alzheimer's were NEVER attached to my dad's name, to my knowledge. My dad lived independently and self-sufficiently at his home until June 30, 2010. I did not ever think he needed to be evaluated for any type of "cognitive" problem. I'm not sure exactly where, when, or by whom this terminology originated, and from what means. To my recollection, I have yet to see any physician's notes detailing a thorough exam of my dad, blood work, CT of brain, etc., to explain such.

Appellant's App. Vol. 3, p. 10. Again, Finton does not believe Wigent on this point and makes clear to this Court that he does not believe Wigent to be credible. But Wigent's credibility, or lack thereof, is not for this Court to say. On the record before us, there is simply no evidence that Wigent's assertions relevant to a diagnosis of Kreiger's dementia or Alzheimer's are, as a matter of law, demonstrably false.

[20] Further, while Wigent may well have been dilatory in providing releases for Kreiger's medical records, the fact is that, even with all of the medical releases now in hand, Finton has been unable to find the evidence he seeks. And, as we observed in *Finton I*, both Wigent and Finton, as well as the trial court, caused

"numerous delays" between 2015 and 2019, so Wigent is not solely to blame for this protracted litigation. 165 N.E.3d at 629. In any event, Finton has not shown that the trial court abused its discretion when it did not sanction Wigent for the alleged discovery violations.

[21] In sum, Finton has not shown that the trial court abused its considerably broad discretion when it denied his motion for rule to show cause. While the evidence shows that Wigent could have been more forthcoming in responding to discovery, especially with regard to the medical releases, the trial court acted within its discretion when it declined to enter default judgment against Wigent under these circumstances. And Finton's characterization of Wigent as being untruthful with respect to her knowledge of her father's medical diagnoses is not a conclusion that we can say is compelled by the record in this still-pretrial proceeding. *Cf.* *Whitaker*, 960 N.E.2d at 116-17 (affirming trial court's entry of default as sanction for discovery violation where plaintiff's counsel violated order to compel "by providing false and misleading answers that expressly denied any future plans for Whitaker to undergo future medical treatment when, in fact, Whitaker had already scheduled a surgery to have a disc removed and vertebrae in his spine fused").

Conclusion

[22] The trial court erred when it granted summary judgment for Wigent on the issue of Finton's request for attorney's fees under Indiana Code section 29-1-10-14. But the trial court did not abuse its discretion when it denied Finton's motion for rule to show cause.

[23] Affirmed in part, reversed in part, and remanded for further proceedings.

May, J., and Bradford, J., concur.