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IN THE
COURT OF APPEALS OF INDIANA

Dennis R. Nail,
Appellant-Plaintiff,

v.

Oliver N. Smith,
Appellee-Defendant.

November 1, 2021

Court of Appeals Case No.
21A-CT-563

Appeal from the Morgan Superior
Court

The Honorable Peter R. Foley,
Judge

Trial Court Cause No.
55D01-1806-CT-971

Bailey, Judge.

Case Summary

[1] Dennis R. Nail ("Nail") brings an interlocutory appeal of the trial court order finding him in violation of a discovery order and imposing sanctions for that violation.

[2] We affirm.

Issues

[3] Nail raises two issues on appeal which we restate as follows:

I. Whether the trial court abused its discretion when it found Nail in violation of an order compelling discovery responses.

II. Whether the trial court abused its discretion when it imposed sanctions in the form of attorney's fees for the discovery violation.

Facts and Procedural History

[4] On June 4, 2018, Nail filed a civil lawsuit against Oliver N. Smith ("Smith") alleging Smith acted negligently when his vehicle hit Nail's vehicle on June 9, 2016. Nail's lawsuit sought monetary damages for expenses he incurred as a result of his injuries allegedly caused by the motor vehicle collision. Smith was represented in the lawsuit by an attorney who was in-house counsel for his insurance company, American Family Mutual Insurance Company ("Insurance Co.").

[5] On December 6, 2018, Smith served upon Nail discovery requests which included Interrogatories and Requests for Production of Documents. Smith's Interrogatories requested, in relevant part, information about Nail's injuries,[1] the treatment of his injuries,[2] the monetary damages allegedly resulting from his injuries,[3] and potential payment of treatment costs by other sources. In his Request for Production of Documents, Smith sought documents also related to Nail's injuries, treatment, and monetary claims. Following two requests to Smith for additional time to respond to discovery, on March 8, 2019, Nail served upon Smith responses to the first six of Smith's Interrogatories. Nail objected to the remaining Interrogatories based on a local rule regarding the permissible number of interrogatories. In response to Interrogatory 6, which sought information about Nail's injuries, Nail stated such information "is detailed in the medical records previously provided." Nail App. at 42. In

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[1] Interrogatory 6 stated: "List each separate injury you sustained as a result of this occurrence, and for each such injury state the following: the nature of the injury, the location of the injury, the duration of the injury if resolved or the estimated duration of the injury if still present, and any activity or activities in which you are now unable to engage, if any, as a result of the injury." Nail App. at 25.

[2] Interrogatory 7 stated: "For each of the injuries you sustained as a result of this occurrence, state: the name, address and area of specialization of each medical provider who treated you for the injury; the date of each treatment received; the type of treatment; the itemized amount of medical expenses incurred; and the reason for each examination, consultation or treatment." *Id*.

Interrogatory 12 stated: "List by name and address each hospital, clinic, doctor, chiropractor, osteopath or other medical practitioner who has treated or examined you for any reason **since** this occurrence and state for each the following: the date of each examination or treatment, the type of practitioner, the injury or condition for which you were seen, the date of your release from the treatment and whether you allege the injury or condition to have been a result of this occurrence." *Id*. at 27 (emphasis original).

[3] Interrogatory 15 stated: "Please itemize a list of any monetary damages which you are claiming, a description of how the damages were calculated, along with an identification including the name, address and telephone number of all witnesses who support your damage claims along with all documents which would likewise lend support to the insured's damages claims." *Id*. at 28.

response to Smith's request for production of the medical records and bills related to Nail's injuries, Nail stated that Nail's former counsel had provided those documents on August 11, 2017—i.e., pre-lawsuit—to David Pohle, an insurance adjuster with Insurance Co. Nail's December 2018 discovery responses did not include any information regarding his worker's compensation claim or Medicare payments related to the accident and/or injury.

[6] On April 15, 2019, Smith filed a motion to compel Nail's complete responses to the December 6, 2018, discovery requests.[4] In an order of that same date, the trial court ordered Nail to "provide complete and signed responses to [Smith's] Interrogatories and Request for Production of Documents on or before April 30, 2019, or suffer sanctions herein." *Id*. at 52. On April 23, the trial court granted Nail's motion for additional time to respond to discovery, ordering that such responses be provided by June 14, 2019.

[7] On June 12, 2019, Nail provided his "Revised Answers" to Smith's discovery requests. Smith App. at 26. In response to the portions of Smith's Interrogatory 6 that sought answers about the nature, location, and duration of Nail's alleged injuries from the accident, Nail again stated that they were "detailed in the medical records previously provided." *Id*. at 28. Similarly, in

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[4] Nail notes on appeal that Smith did not comply with Indiana Trial Rule 26(F) by seeking to informally resolve the discovery dispute before filing the April 2019 motion to compel. However, Nail failed to raise that issue in the trial court and may not raise it now for the first time on appeal. *See, e.g.*, *First Chicago Ins. Co. v. Collins*, 141 N.E.3d 54, 61 (Ind. Ct. App. 2020) (noting an appellant may not raise an argument or issue for the first time on appeal).

response to Interrogatory 7 which presented questions regarding Nail's treatment for his injuries and costs of treatment, Nail stated: "See the medical records and billing." *Id*. at 29. In response to Interrogatory 12, seeking information about treatment received since the date of the accident, Nail provided the names and locations of some medical providers but stated that he could "not remember all of the information requested," and "[t]here may be additional medical practitioners who I cannot recall at this time." *Id*. at 30. In response to Interrogatory 15 which sought information about Nail's claimed monetary damages, Nail stated: "The monetary damages which are being claimed have not yet been determined. Discovery is continuing. See medical bills provided. Witnesses and exhibits will be provided in accordance with the Court order." *Id*. at 32.

[8] Nail also stated in his Interrogatory responses that he had filed a worker's compensation claim for injuries he sustained as a result of the accident.[5] Nail did not provide information regarding the date of the workers' compensation claim or the status of that claim. Nail further stated that he had Medicare at the time of the accident and provided his Medicare number; however, he stated, "I do not remember any other information" in reference to the Interrogatory questions about any claims and payment made from another source. *Id*. In response to Smith's request for production of the medical records and bills related to Nail's injuries, Nail provided medical records "predating the

[5] At the time of the collision, Nail was engaged in his employment with Hopkins Trucking.

collision" and stated that medical records "from the date of the collision forward" were "previously provided" by Nail's former counsel. *Id*. at 38. Nail's June 2019 discovery response did not include any documents related to his worker compensation claim and/or Medicare payments related to the accident and his injuries.

[9] On October 21, 2019, Smith's counsel issued a letter to Nail's counsel in which Smith stated that, pursuant to Indiana Trial Rule 26(F), he was seeking to informally resolve the parties' continuing discovery dispute. Smith noted he still needed information related to medical expenses resulting from the accident, including any lien for conditional payments Medicare made for Nail's medical expenses. On March 17, 2020, Smith's counsel sent an e-mail to Nail's counsel noting that Nail had also failed to provide documentation related to the worker's compensation claim referenced in the July 12, 2019, response to Interrogatories and requesting such documentation.

[10] On July 8, 2020, Smith filed his Motion for Order to Appear and Show Cause why the lawsuit should not be dismissed due to Nail's failure to comply with the trial court's April 15, 2019, order compelling discovery responses. In his motion, Smith noted that Nail had failed to provide requested records related to medical expenses, as ordered, and instead provided only a listing of expenses. On July 9, 2020, Nail filed a response in which he asserted that the medical records Smith sought were provided to Insurance Co. by Nail's former counsel in August of 2017. Nail further asserted that those medical records were "not in the custody of [Nail's] current counsel or [Nail] himself," Nail App. at 99, and

that Nail "has produced every document [Smith] has requested that is in [Nail's] possession and [Nail's] current Counsel's possession," *id*. at 102. On July 18, 2020, Nail provided Smith with additional medical records which Nail stated he had received on July 17, 2020.

[11] On September 3, 2020, the court had a hearing on Smith's July 8 motion to show cause. In an order dated September 4, the trial court held that Nail was "in violation of the Order to Compel issued April 14, 2019," and that sanctions for said violation were appropriate. *Id.* at 15. The court denied Smith's request to dismiss the lawsuit as a sanction but ordered Smith's counsel to file with the court an affidavit for attorney's fees. The court further ordered Nail to "provide all worker's compensation information to [Smith] by September 18, 2020." *Id*. Nail provided Smith with Medicare and worker's compensation documents on September 14, 2020. The Medicare documents were dated 2018 and showed that Medicare had made some conditional payments of some of Nail's medical expenses in 2016 and 2017. The worker's compensation documents showed Nail applied in 2016 for worker's compensation for his injuries sustained in the June 2016 accident and entered into a settlement regarding that claim in May of 2018. On November 9, 2020, Nail filed a motion to reconsider the court's September 4, 2020, order.

[12] On three dates in February of 2021, the court conducted a hearing on the attorney's fees sanction. In an order dated March 5, 2021, the trial court denied Nail's motion to reconsider the September 4 order and found that an attorney's

fee award of $3,295.00 was appropriate as a sanction for Nail's discovery violations. This interlocutory appeal taken as of right[6] ensued.

Discussion and Decision

[13] Nail challenges the trial court order finding he violated the discovery rules and imposing sanctions accordingly. Trial courts have wide discretionary latitude to assess and manage discovery matters, and their orders carry a strong presumption of correctness. *Towne & Terrace Corp. v. City of Indianapolis*, 156 N.E.3d 703, 716 (Ind. Ct. App. 2020) (citing *Care Grp. Heart Hosp., LLC v. Sawyer*, 93 N.E.3d 745, 757 (Ind. 2018)), *trans. denied*. We will reverse such an order "only when the appealing party can show an abuse of discretion." *Nagel v. N. Ind. Pub. Serv. Co.*, 26 N.E.3d 30, 39 (Ind. Ct. App. 2015), *trans. denied*. An abuse of discretion occurs when a trial court reached a conclusion that is against the logic and effect of the circumstances before it. *Id.*; *see also Towne & Terrace*, 156 N.E.3d at 716 ("We will not overturn a decision [regarding discovery matters] absent clear error and resulting prejudice.").

Violation of Order Compelling Discovery Responses

[14] Indiana has liberal discovery procedures; under Indiana Trial Rule 26(B)(1), "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject-matter involved in the pending action whether it relates

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[6] *See* Ind. Appellate Rule 14(A)(1).

to the claim or defense of the party seeking discovery[.]" The purposes of our liberal discovery rules are to "provid[e] litigants with information essential to the litigation of all relevant issues, eliminate surprise[,] and … promote settlement." *Doherty v. Purdue Prop. I, LLC*, 153 N.E.3d 228, 235 (Ind. Ct. App. 2020) (internal quotations omitted) (citing *Canfield v. Sandock*, 563 N.E.2d 526, 528 (Ind. 1990)*), trans. denied*. Thus, we have "consistently rejected a gaming view of the litigation process." *Outback Steakhouse of Fla., Inc. v. Markley*, 856 N.E.2d 65, 76, 77 (Ind. 2006) (noting the purpose of pretrial discovery is to "make a trial less a game of blindman's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent") (quotations and citations omitted).

[15] In accord with these principles, Trial Rule 33 requires that answers to interrogatories "must be responsive, full, complete[,] and unevasive." *Id*. at 76 (quotation and citation omitted). Thus, we have held that "vague, general response[s]" that merely state "see complaint" were insufficient under the trial rules, "no matter how detailed the complaint may be." *Castillo v. Ruggiero*, 562 N.E.2d 446, 452 (Ind. Ct. App. 1990), *trans. denied*; *see also Kadambi v. Express Scripts, Inc.*, No. 1:13-cv-321-JD-SLC, 2015 WL 10985383, at *4 (N.D. Ind. July 14, 2015) ("[A]nswering interrogatories simply by directing the proponent to rummage through other discovery materials falls short of the obligations

imposed by Rule 33." (quotations and citation omitted));[7] *Dana Corp., v. Am. Standard*, No. 3:92-CV-581RM, 1994 WL 228537, at *1 (N.D. Ind. April 15, 1994) (noting an interrogatory response "should be complete in itself and should not [only] refer to the pleadings, or to depositions or other documents, or to other interrogatories, at least where such references make it impossible to determine whether an adequate answer has been given without an elaborate comparison of answers").

[16] A discovery response is insufficient if it merely states that the answering party does not currently have possession of information that is within his control.

> If the objecting party takes the position that the information is not available, it is that party's burden to show that it is not available. 2 W. Harvey, Indiana Practice § 33.4 (1987). Moreover, it is a general rule that a party may not refuse to answer an interrogatory on the ground that the party would have to consult records in order to answer. *Id*. *See also Flour Mills of America, Inc. v. Pace* (E.D.Okla.1977), 75 F.R.D. 676. Lastly, a party may not respond by saying that the information is unavailable because it is in the attorney's possession and has not yet been given to the party. Harvey, supra, at § 33.4.

Castillo, 562 N.E.2d at 453.[8]

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[7] *Kadambi* related to Rule 33 of the Federal Rules of Trial Procedure. That rule uses substantially similar language to the Indiana rule regarding interrogatories; therefore, authorities relating to the federal rule are relevant in construing the Indiana rule. *See Coster v. Coster*, 452 N.E.2d 397, 400 (Ind. Ct. App. 1983) (noting same regarding discovery Rule 26).

[8] We note that Nail did not seek a protective order limiting Smith's discovery for any reason under Trial Rule 26(C).

[17] A discovery response may also be insufficient where it states that the answering party "does not know" the answer at that time or "cannot remember" it at that time and is not later supplemented. A party has a duty to supplement his discovery responses regarding "the identity and location of persons having knowledge of discoverable matters," Ind. Trial Rule 26(E)(1)(a), and when he obtains information "upon the basis of which he knows that the [prior discovery] response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment," *id*. at 26(E)(2)(b).

[18] Nail did not provide complete, and therefore adequate, responses to Smith's discovery until September 14, 2020—fifteen months after being ordered to do so[9] and almost two years after Smith served the discovery requests. Prior to that date, in response to the specific questions asked in Smith's Interrogatories 6, 7, 12, 15, and 16, Nail merely referred to medical records which had been provided to Insurance Co. before the lawsuit was filed, alleged that he did not have those documents in his possession, stated that he did not "remember" the information requested, and/or stated the answers had "not yet been determined." Smith App. at 30, 32. Those responses were insufficient for several reasons. First, they were vague, general responses that were incomplete. *See Castillo*, 562 N.E.2d at 452. Second, they did not show why the information

[9] Although the court initially ordered the complete responses by April 30, 2019, it subsequently granted Nail's request to extend the response time to June 14, 2019.

was not available to Nail through his current counsel, prior counsel, and/or medical providers.[10] *Id*. at 453. And, third, Nail showed no reason why he could not timely supplement his answers as required under Trial Rule 26(E).

[19] The trial court did not abuse its discretion when it held Nail in violation of its order compelling him to provide complete discovery responses by June 14, 2019, or else face sanctions.

Attorney's Fees Sanction for Discovery Violation

[20] Nail asserts that the trial court abused its discretion when it ordered him to pay Smith's attorney's fees as a sanction for Nail's discovery violations, pursuant to Trial Rule 37.[11] Nail points out that Smith did not pay the fees for his lawyer, who was in-house counsel employed by Insurance Co. Nail maintains that the attorney's fees order was therefore an "unjust" "windfall" to Insurance Co. because Insurance Co. would pay the lawyer her salary whether she was working on this case or not. Nail Br. at 15.

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[10] We note that the Medicare and worker's compensation documentation Nail provided in September of 2020 was dated as being created in 2016, 2017, or 2018. Obviously, the documents from 2018 could not have been provided to Insurance Co. by Nail's prior counsel in August of 2017. However, that documentation should have been available to, and accessible by, Nail at the time of his June 2019 deadline for providing complete information. Yet Nail did not provide the 2018 Medicaid and worker's compensation documentation on that date, nor did he state any reason why it was not available to, and accessible by, him at that time.

[11] Although Nail asserts in his statement of the issues that he is challenging the *amount* of the attorney fees, Nail Br. at 4, 13, his argument is only that Smith is not *entitled* to attorney's fees, regardless of the amount, because Smith did not pay for his attorney. On appeal, Nail does not provide cogent argument challenging either the attorney's hourly rate or the number of hours charged. Therefore, he has waived an argument challenging the amount of the attorney's fees award. App. R. 46(A)(8).

[21] Trial Rule 37(B)(2) allows a trial court to impose sanctions, including attorney's fees, if a party fails to comply with an order compelling discovery. The purpose of sanctioning discovery violations is two-fold: to penalize those who violate the discovery rules and to "'deter those who might be tempted to such conduct in the absence of such a deterrent.'" *Whitaker v. Becker*, 960 N.E.2d 111, 115 (Ind. 2012) (quoting *Nat'l Hockey League v. Metro Hockey Club, Inc.*, 427 U.S. 639, 643 (1976)). Compensating a party for fees that should never have been incurred is only an incidental purpose of sanctions in the form of attorney's fees. *Textor v. Bd. of Regents of N. Ill. Univ.*, 711 F.2d 1387, 1396 (7th Cir. 1983).

[22] Here, the trial court award's award of attorney's fees to Smith serves the purposes of discovery sanctions; it punishes Nail for his violation of a discovery order and is designed to deter such conduct in the future. Nail's assertion that the award is unjust because it does not compensate Smith directly for fees paid to his attorney ignores the primary purposes of discovery sanctions.[12]

[23] Moreover, it is not "unjust" to order as a discovery sanction the payment of attorney's fees incurred by in-house counsel simply because that counsel was paid a salary. *See Sahara Mart, Inc. v. Ind. Dep't of State Revenue*, 114 N.E.3d 36, 49 (Ind. Tax Ct. 2018) (noting the "only limitation on [a] court in determining

[12] Smith's attorney did not testify, as Nail claims, that the attorney's fees award "would not go to pay any legal fees" but only "other expenses." Nail Br. at 14. In support of that claim, Nail cites to the argument of his own attorney, not Smith's counsel's testimony. Smith's counsel testified that the attorney fee award would be used by Insurance Co. for "the expenses that have been spent on this claim" which would obviously include attorney's fees for time spent on the claim. Tr. at 74.

an appropriate sanction is that the sanction must be just" (quotation and citation omitted)). Neither party points to legal authority directly addressing such an order, and we find no such state caselaw. However, the federal courts have directly addressed the issue of a sanction in the form of an attorney's fees award to those with in-house counsel. In *Wisconsin v. Hotline Indus., Inc.*, the Seventh Circuit addressed a contention that the State did not incur any reasonable attorney's fees because its lawyers already were on the government payroll as salaried employees. The Court noted that "salaried government lawyers, like in-house and non-profit counsel, do incur expenses if the time and resources they devote to one case are not available for other work." 236 F.3d 363, 365 (7th Cir. 2000); *see also Textor v. Bd. of Regents of N. Ill. Univ.*, 711 F.2d 1387, 1396-97 (7th Cir. 1983) (noting, in response to the "faulty assumption that in-house counsel would do nothing that would benefit [the party entitled to fees] had they not been involved in th[e] litigation," that a "more realistic assessment of the situation would indicate that for every hour in-house counsel spent on th[e] case [the party entitled to fees] lost an hour of legal services that could have been spent on other matters").

[24] We agree with the reasoning in *Hotline Indus.* and *Textor*. That reasoning is consistent with the punishment and deterrent purposes of sanctions under Trial Rule 37. And, as the trial court noted, to deny reimbursement of the attorney's fees under these circumstances would thwart those purposes because a party who violated the discovery rules would never be sanctioned with an attorney's fees award so long as the opposing party was represented by in-house counsel.

See Hotline Indus., 236 F.3d at 366 ("To deny reimbursement under these circumstances would indirectly penalize the institution, be it public or private, for providing its own legal counsel throughout a case."); *Textor*, 711 F.2d at 1397 (noting refusal to award attorney fees as sanctions when in-house counsel represents the opposing party "would either force th[e opposing party] to abandon in-house counsel for a more inefficient system or leave them open to [sanctionable behavior] by unscrupulous counsel undeterred by the threat of a fee award").

[25] The trial court did not abuse its discretion when it sanctioned Nail for his discovery violation by awarding Smith his reasonable attorney's fees.

Conclusion

[26] The trial court acted within its discretion when it found that Nail violated the discovery rules and imposed sanctions for that violation in the form of attorney's fees to Smith's counsel.

[27] Affirmed.

Crone, J., and Pyle, J., concur.