

IN THE SUPREME COURT OF OHIO
COLUMBUS, OHIO

08-2031

WILLIAM NORTON)	OHIO SUPREME COURT CASE
)	No. _____
Appellant)	
)	ON APPEAL FROM THE
-vs-)	SIXTH JUDICIAL DISTRICT
)	APPEALS CASE NO. L-07-1266
ENVIROSAFE SERVICES OF OHIO,)	
INC., ET AL,)	LUCAS COUNTY COMMON
)	PLEAS CASE NO. CI-2005-6762
Appellees.)	

MEMORANDUM IN SUPPORT OF JURISIDICIION
OF APPELLANT, WILLIAM NORTON

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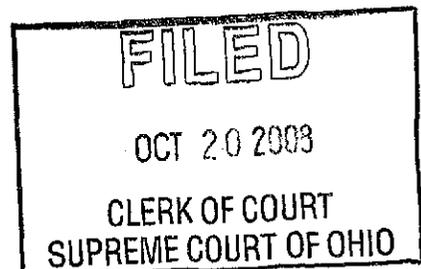


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I. EXPLANATION OF QUESTION OF GREAT GENERAL AND PUBLIC INTEREST PRESENTED

The Appellant respectfully submits that the question presented in this case certainly presents a question that the answer to which will greatly impact upon civil practice in the State of Ohio. In the case at bar, the Trial Court dismissed the Appellant's cause of action based upon alleged discovery violations by the Appellant. In so holding, the Trial Court ignored arguments by Counsel for Appellant concerning the proper evidentiary standard to be employed in such a hearing. On appeal, the Sixth District Court of Appeals literally ignored the same question and issued a decision based upon an "abuse of discretion" standard of review.

In his direct appeal, the Appellant raised two assignments of error, which included both the evidentiary question discussed above and the "abuse of discretion" by the Trial Court in imposing the most severe sanction upon Appellant. At this level, the Appellant recognizes that the "abuse of discretion" standard of review is well settled Ohio law with regard to imposition of discovery sanctions and, therefore, the Appellant does not raise that issue to this Court. Rather, the Appellant now only addresses the proper evidentiary standard in a proceeding before a trial court concerning a Motion to Dismiss based upon alleged discovery violations.

As is more fully discussed *infra* the only testimony at the hearing concerning Appellee's Motion to Dismiss was that of the Appellant and, certainly, the Appellant admit any significant discovery violations. Beyond that, the only "evidence" presented by the Appellee was clearly self-serving statements by Appellee's Counsel, none of which were substantiated by either documentation or sworn testimony and none of which were subject to cross examination.

In most cases, Ohio law is well settled and clear with regard to evidentiary standards in proceedings where dismissal of a civil action is sought. For example, in a summary judgment proceeding, pursuant to Civil Rule 56, it is axiomatic that the evidentiary materials submitted

must establish the lack of any material facts for resolution by a judge or jury. Similarly, when a Motion to Dismiss is sought pursuant to Civil Rule 12(B)(6), the movant must establish that the claimant cannot prove any set of facts for which relief may be granted as a matter of law.

However, with regard to Civil Rules 37 and 41, Ohio law is less clear concerning what evidentiary standard must be met and what proofs are necessary to meet that standard. Once again, the Appellant recognizes that a trial court has discretion to impose a sanction once a discovery violation is established. The Appellant does not challenge that rule. Rather, the Appellant submits that further guidance is needed from this Court concerning what evidence must be presented to a trial court to establish a discovery violation in the first instance.

It is clear that this question is important and the answer to this question could impact all civil cases filed in the State of Ohio. Finally, the Appellant submits that the case at bar presents an excellent opportunity for this Court to review such, since the record is practically devoid of any "evidence" supporting the Trial Court's factual finding of a discovery violation. Consequently, this Court should accept jurisdiction on this matter.

II. STATEMENT OF THE CASE

The extensive procedural history of this case is set forth in the trial court's July 10, 2007 Opinion and Judgment Entry, from which this appeal is taken. This is a personal injury action originally filed on June 30, 1998. Following a Civ.R. 41 dismissal without prejudice and another dismissal without prejudice, agreed upon by the parties and subject to refile within six months, Appellant did refile his action. Appellee responded, and discovery began.

Appellee filed a Motion to Compel responses to its discovery on March 7, 2006, a Motion to Dismiss or Compel on October 27, 2006, and a Motion to Dismiss or Compel and for Sanctions on January 18, 2007. Hearings were held following each motion. The trial court

clarified discovery at each stage and set forth discovery requirements and cut-offs for both parties. While the Court denied Appellee's first two motions, it granted the January 18, 2007 Motion, dismissing Appellant's case for discovery violations. On September 5, 2008, the Sixth District Court of Appeals of Lucas County affirmed.

This appeal follows.

III. STATEMENT OF FACTS

The only "facts" before the trial court were established through the testimony of Appellant, through his cross-examination during the hearing on Appellee's June 28, 2007 Motion to Dismiss. During that hearing, Appellant testified that he had made a good faith effort to disclose all of the hospitals and physicians with whom he had treated, as outlined in the discovery requests. He testified that he was not trying to hide anything from Appellee as to his medical records. When Appellee claimed that Appellant had never provided certain medical records to Appellee, Appellant testified that he thought that he had provided such. Appellee asserted that Appellant had made false excuses for delaying a deposition, but Appellant testified that he had a medical condition that prohibited him from traveling at that time. Finally, Appellant testified as to the doctors with whom he had treated, and stated that he did not recognize other names suggested by Appellee.

Appellee presented no physical evidence at the hearing and offered no witnesses.

Such other facts as are relevant to the issues raised herein will be addressed in the "Argument" portion of this Brief.

IV. ARGUMENT

PROPOSITION OF LAW NO. 1: A trial court errs by granting a motion to dismiss pursuant to Civ.R. 37 and 41(B), where said motion is unsupported by any evidence whatsoever.

It is axiomatic that a movant bears the burden of proof. In the proceedings below, however, it seemed as if Appellee's allegations of a discovery violation were taken as true, and Appellant was required to prove that he had substantially complied with Appellee's discovery requests, or face dismissal. This is most strongly illustrated by the Court's grant of Appellee's Motion absent any evidence at all.

Case law is replete with holdings that statements of counsel are not evidence. In Haas v. Mather Co. (Aug. 24, 1984), Lucas App. No. L-84-095, unreported, the Sixth District Court of Appeals reversed the trial court's grant of summary judgment, and remanded the matter for further proceedings. The court reasoned that the trial court's holding was based solely upon the statements of counsel, that such statements were not evidence, and that to proceed with an appeal containing no evidence would require "an unbridled and unnecessary speculation as to the parties' conduct." A court "must base its grant of a motion for summary judgment on evidence meeting the standards of Civ.R. 56(C), quality evidence, not on statements counsel makes to the court regarding what a party intends or does not intend to prove." McNamara v. Rittman (1998), 125 Ohio App.3d 33, (appeal to the Supreme Court of Ohio was allowed in (1998), 82 Ohio St.3d 1414, then dismissed as having been improvidently allowed in (1999), 85 Ohio St.3d 9. In Corporate Exchange Buildings IV & V v. Franklin Cty Bd of Revision (1998) 82 Ohio St.3d 297, this Court affirmed the Board of Tax Appeals decision as to the allocation and valuation of certain property, reasoning that the arguments of the landowner were not based upon evidence, but only upon argument. The Court stated:

Moreover, the only reference in the BTA record as to how the allocation could be made is contained in the opening statement of counsel for Partnership. He stated that the purchase price was allocated based on square footage and that he "believe[d] there will be testimony that this is also a reasonable way in this type of property to apportion." However, statements of counsel are not evidence. In

State v. Green (1998), 81 Ohio St.3d 100, 104, 689 N.E.2d 556, 559, we stated that a "statement of facts by a prosecutor does not constitute evidence." This premise is adopted in VI Wigmore, Evidence (Chadbourn Rev.1976) 349, Section 1806, wherein it is stated that in an argument to the jury by counsel, any representation of fact "must be based solely upon those matters of fact of which evidence has already been introduced or of which no evidence need ever be introduced because of the notoriety as judicially noticed facts."

In this case, Appellee presented no evidence, except for the "testimony" of its own counsel.

The trial court was fairly unhappy with the comment by plaintiff's counsel that "I would like to state[,] since it seems to be okay for attorneys to testify[,] that..." The trial court found the comment to be "inappropriate." However, the court's Opinion illustrates that it had relied solely upon defense counsel's "testimony." The Opinion states that "After discovery stalled, Defendant apparently undertook self help relative to identifying Plaintiff's medical providers and treatment." It continues by describing Appellee's supposed efforts to "blanket" various areas to discover "as many as two dozen previously undisclosed providers as well as evidence of prior injury to, and treatment of, Plaintiff's neck." This is interesting, in light of the fact that *there is no evidence to support these statements*. Appellee offered no testimony to support these statements. Appellee attached nothing to its Motion to illustrate that it had discovered documents that Appellant should have provided, but did not provide. The trial court's holding is based solely upon unsworn allegations made by Appellee's attorney.

Another clear illustration of the trial court's reliance upon counsel's argument, rather than upon evidence, is the court's statement that its Opinion was based on "the number of providers and the breadth of treatment clearly demonstrated by Defendant as undisclosed." Here again, the line of questioning to which the court is referring is not evidence of undisclosed treating physicians, but statements by Appellant that he did treat with certain physicians and did not remember others. There was no evidence that those physicians or hospitals from whom Appellant did receive treatment were undisclosed, or that those physicians or hospitals that Appellant did not recall actually provided him with any treatment. Rather, the trial court treated mere suggestions within Appellee's questions as evidence.

Finally, the trial court expresses its erroneous burden shifting by stating “the Court finds Plaintiff’s defense on the matter to be hollow and incredible.” At no point, however, does the trial court state when, exactly, the burden of proving Appellee’s motion shifted to Appellant’s burden to defend against such. Again, Appellee presented no evidence to support its motion. At best, the only **evidence** which even comes close to establishing a discovery violation was Appellant’s **testimony** concerning a physician he fairly recently saw concerning a penile dysfunction, in a case where there is not and never has been an allegation that such was caused by the accident in question!

It is almost certain that Appellee will argue that an old affidavit of **prior** counsel for Appellee, in which counsel summarizes what was requested during discovery, etc. constitutes evidence in support of its Motion. However, this is not, and was never converted to, a summary judgment proceeding - this was a Motion to Dismiss. Defense counsel’s affidavit constitutes nothing more than self-serving allegations of items that it requested, which may or may not even exist. Further, the trial court’s Opinion makes absolutely no mention of the affidavit or Notice to anyone that it was proceeding under Civ. R. 56. Thus, one can only assume that it was not.

Relying upon the rather antiquated affidavit, the court dismissed Appellant’s action based upon an alleged discovery violation of which there was no evidence.

A trial court’s imposition of dismissal cannot be disturbed unless the dismissal was an abuse of the trial court’s discretion. Toney v. Berkemer (1983), 6 Ohio St.3d 455. However, “It is an abuse of discretion for a trial court to grant a default judgment for failing to respond to discovery requests when the record does not show willfulness or bad faith on the part of the responding party.” Id. This Court reiterated this point in Moore v. Emmanuel Family Training Ctr. (1985), 18 Ohio St.3d 64 at 67, stating,

This court has indicated its disfavor of granting default judgments for negligent failure to comply with discovery orders. Toney v. Berkemer (1983), 6 Ohio St.3d 455. Sanctions other than the harsh remedy of dismissal, such as not allowing the expert testimony as evidence, would have been more appropriate in this case. Id. at 459. See, also, Paugh & Farmer, Inc. v. Menorah Home for Jewish Aged

(1984), 15 Ohio St.3d 44, where we upheld a trial court's exclusion of expert testimony when the party calling the expert had failed to name the expert as ordered by the court.

If there was any evidence to support the trial court's holding that Appellant had violated its discovery orders, there is certainly nothing in the record to indicate that such alleged violation was willful or unduly prejudice Appellee. Rather, the only evidence in this regard was the testimony of Appellant - that he had submitted any and all medical records and information that he could recall, that he had provided releases for defense counsel to seek any additional records that he could not recall or obtain, and that he had seen so many different doctors in the 25 year scope of the discovery request that he simply could not remember every treatment and every doctor.

Unfortunately for Appellant, a less than photographic memory is apparently a willful violation of discovery rules. That conclusion, however, is nonsense, and contrary to this Court's holding in Berkemer, *supra*. The trial court abused its discretion by dismissing Appellant's case for an alleged discovery violation, where a less severe sanction would have sufficed.

V. CONCLUSION

In light of the above, the Appellant respectfully submits that this Court should accept jurisdiction of this matter.

Respectfully submitted,



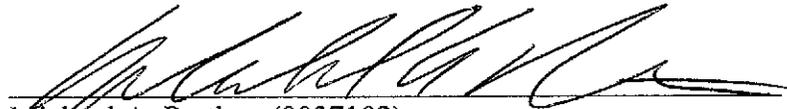
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Attorney for Appellant

CERTIFICATE OF SERVICE

A copy of the foregoing **Assignments of Error and Brief of Appellant**, is being served via regular U.S. Mail, postage prepaid on this 17th day of October, 2008, upon:

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Terrence K. Davis
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COMMON PLEAS COURT
BERNIE GUILTER
CLERK OF COURTS

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

William Norton

Court of Appeals No. L-07-1266

Appellant

Trial Court No. CI-2005-6762

v.

Envirosafe Services of Ohio, Inc., et al.

DECISION AND JUDGMENT

Appellee

Decided:

SEP 05 2008

* * * * *

Michael A. Partlow, for appellant.

Terrance K. Davis and John J. Siciliano, for appellee.

* * * * *

OSOWIK, J.

{¶ 1} This is an appeal from a judgment of the Lucas County Court of Common Pleas which granted appellee Envirosafe's motion to dismiss pursuant to Civ.R. 37 and 41(B). For the reasons set forth below, this court affirms the judgment of the trial court.

{¶ 2} Appellant, William Norton, sets forth the following two assignments of error:

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{¶ 3} "No. I: The trial court erred by granting appellee's motion to dismiss, as said motion was not supported by any evidence.

{¶ 4} "No. II: The trial court abused its discretion by dismissing appellant's complaint for alleged discovery violations."

{¶ 5} The following undisputed facts are relevant to the issues raised on appeal. This case stems from an accident occurring in February 1997. Appellant fell from the trailer of a truck he had driven to an Envirosafe facility located in Toledo, Ohio.

{¶ 6} On June 30, 1998, appellant filed his first suit against Envirosafe in connection to the incident. Envirosafe filed its answer and served written discovery requests upon appellant. Appellant failed to respond to discovery. In February 1999, appellant dismissed his case without prejudice. On February 1, 2000, appellant refiled the case. This second filing was subsequently stayed due to a bankruptcy filing. The bankruptcy stay was lifted in 2004.

{¶ 7} In May 2004, following the lifting of the stay, Envirosafe again submitted standard discovery requests to appellant. The discovery requests sought appellant's medical condition and treatment history to enable evaluation of proximate cause and damages.

{¶ 8} Appellant again failed to respond to discovery necessitating the filing of a motion to compel. On February 18, 2005, the trial court granted the motion to compel and issued a discovery order to appellant mandating appellant produce the discovery.

Appellant again failed to comply and did not produce discovery. Appellant dismissed the case without prejudice for the second time.

{¶ 9} On December 8, 2005, appellant refiled the 1997 case a third time.

Envirosafe once again submitted the discovery that went unanswered during the first two filings of the case. Appellant again failed to comply and did not produce the discovery. On March 7, 2006, Envirosafe filed another motion to compel. Faced with the pending motion to compel, appellant produced some discovery. The discovery produced was minimal.

{¶ 10} The perception of Envirosafe's counsel of this minimal discovery was that it was likely incomplete. Accordingly, counsel for Envirosafe undertook independent efforts to investigate appellant's history of medical treatment and medical service providers. It was quickly discovered that the scant discovery produced had omitted a substantial quantity of relevant information. Counsel for Envirosafe identified at least sixteen medical service providers and four medical service institutions responsive to the discovery requests that were not disclosed.

{¶ 11} Given the concerning status of discovery, Envirosafe sought to depose appellant and have him submit to an independent medical examination ("IME") in an effort to fill in some of the apparent information gaps. Appellant refused to comply, claiming to be physically unable to travel to Ohio from his home in Tennessee. The records independently obtained by Envirosafe contradicted appellant's claim.

{¶ 12} On October 27, 2006, Envirosafe filed a motion to compel or dismiss pursuant to Civ.R. 37 and 41(B) given appellant's ongoing refusal to be deposed, submit to an IME, and fully furnish discovery. On December 19, 2006, oral arguments were heard by the trial court. In response to oral arguments, the trial court issued a specific ten-part discovery order to appellant and ordered compliance by January 12, 2007.

{¶ 13} On January 11, 2007, the day prior to the discovery deadline, appellant sought and was granted a three-week extension. Nevertheless, appellant did not comply with the trial court's extended discovery deadline. Appellant sent correspondence to counsel for Envirosafe on the extended discovery deadline. The correspondence provided de minimis additional information and was not responsive to the bulk of the court's ten-part discovery order.

{¶ 14} On February 22, 2007, Envirosafe filed a second motion to compel or dismiss. On May 1, 2007, oral arguments were heard by the trial court. On May 10, 2007, the trial court issued a second discovery order to appellant. This sequel discovery order mandated discovery compliance by May 24, 2007. It also admonished appellant that it would not entertain further delays, set up a hearing for the following month, mandated appellant's appearance at same, and expressly notified appellant that appellee's pending motion to dismiss would be addressed at the next hearing.

{¶ 15} Appellant again failed to comply with the bulk of the trial court's discovery order. No supplemental information regarding treating medical service providers,

numerous of whom had been independently uncovered and identified by Envirosafe, was furnished by appellant.

{¶ 16} On June 28, 2007, the trial court resumed the hearing on the status of appellant's discovery compliance. The trial court found appellant's explanation of the significant and ongoing discovery omissions regarding information requisite to proximate cause and damages assessment unpersuasive. Appellant asserted that he thought that he had complied with discovery and claimed lack of memory when confronted with various gaps and inconsistencies between the independently retrieved medical records compared with appellant's discovery assertions.

{¶ 17} The trial court granted appellee's motion to dismiss pursuant to Civ.R. 37 and 41(B) based upon appellant's gross failure to comply with its discovery orders. Timely notice of appeal was filed.

{¶ 18} Appellant's two assignments of error are substantively analogous and will be addressed simultaneously. In his assignments of error, appellant maintains that Envirosafe's motion to dismiss was not supported by any evidence and that any such evidence is so scant that the granting of the motion should be construed an abuse of discretion.

{¶ 19} This court has repeatedly affirmed the legal principle that Civ.R. 37 expressly authorizes the trial court to utilize dismissal as a sanction in response to a failure to comply with a trial court discovery order. *West v. Toledo Police Dept.*, 6th Dist. No. L-05-1312, 2006-Ohio-6051.

{¶ 20} It is equally well established that an appellate court reviews involuntary dismissals for failure to comply with discovery orders pursuant to the abuse of discretion standard of review. *Quonset Hut Inc. v. Ford Motor Co.* (1997), 80 Ohio St.3d 46, 48. As such, such a dismissal will not be reversed unless the record shows the trial court's actions to be unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶ 21} Civ.R. 41(B)(1) establishes the type of involuntary dismissal being disputed as, "Where the plaintiff fails to prosecute, or comply with these rules or any court order, the court upon motion of a defendant or its own motion may, after notice to plaintiff's counsel, dismiss an action or claim."

{¶ 22} We have carefully reviewed the record for any indicia sufficient to persuade us that the dismissal was an abuse of discretion. On the contrary, we find the record establishes that appellant was given countless opportunities to comply with the discovery rules and the trial court's discovery orders issued in response to appellant's failure to comply. The record shows that the trial court went to great lengths over a lengthy period of time to avoid an involuntary dismissal.

{¶ 23} The record establishes that even after appellant was made aware that Envirosafe discovered substantial discovery gaps in appellant's discovery through its own investigation and efforts, appellant persisted in failing to abide by the explicit discovery orders of the court. This transpired despite repeated discovery extensions to appellant

and clear warnings and notice by the trial court to appellant that ongoing failure to comply could result in dismissal.

{¶ 24} We find that the trial court properly and sufficiently notified appellant of specific deficiencies in discovery that needed to be complied with and of the potential dismissal consequences of the ongoing failure to do so. We find that the trial court gave appellant numerous extensions and repeated opportunities to avoid such an outcome. There is ample evidence in the record in support of the trial court's actions. The trial court did not abuse its discretion. We find appellant's assignments of error not well-taken.

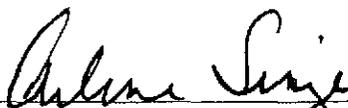
{¶ 25} On consideration whereof, the judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay the cost of this appeals pursuant to App.R. 24. Judgment for the clerk's expense incurred in preparation for the record, fees allowed by law, and the fee for filing the appeal is awarded to Lucas County.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Norton v. Envirosafe Servs.
of Ohio, Inc.
C.A. No. L-07-1266

Arlene Singer, J.



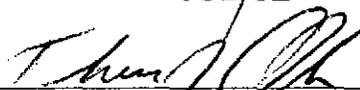
JUDGE

William J. Skow, J.



JUDGE

Thomas J. Osowik, J.



JUDGE

CONCUR.

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.