

Aug. 22, 2019 Order Granting Plaintiff's Motion for Sanctions

STATE OF SOUTH CAROLINA COUNTY OF ANDERSON)	IN THE COURT OF COMMON PLEAS FOR THE TENTH JUDICIAL CIRCUIT
)	
RITA JOYCE GLENN , Individually and as Personal Representative of the Estate of THOMAS HAROLD GLENN ,)	C/A No.: 2015-CP-04-01607
)	
Plaintiff,)	ORDER ON DEFENDANT FISHER CONTROLS INTERNATIONAL LLC'S POST-TRIAL MOTIONS
v.)	
FISHER CONTROLS INTERNATIONAL LLC, et al.)	RECEIVED
)	SEP 20 2019
Defendants.)	SC Court of Appeals

Plaintiff Rita Joyce Glenn, Individually and as Personal Representative of the Estate of Thomas Harold Glenn, deceased, moved for sanctions against Defendant Fisher Controls International LLC (“Fisher Controls”) for its abuse of the discovery and trial processes. For the reasons set forth herein, Plaintiff’s motion for sanctions is **GRANTED**.

FINDINGS OF FACT

Thomas Glenn died February 17, 2015, as a result of his mesothelioma. Mr. Glenn’s pathology from Emory Hospital in Atlanta, Georgia included approximately 96 slides taken from approximately 15-30 blocks of preserved tissue from procedures during his lifetime. Plaintiff provided the 96 slides of pathology material to counsel for Fisher Controls and every other defense counsel that requested the pathology materials, including the preserved tissue. Defendants were provided with medical authorizations to obtain this tissue soon after Mr. Glenn’s death in 2015. In November of 2018, using the authorizations provided by Plaintiff, Fisher Controls obtained additional pathology material, including additional preserved tissue. On December 6, 2018, Plaintiff was informed, near the eve of trial, that counsel for Fisher Controls intended to digest and destroy some of the preserved tissue.

Plaintiff objected to the late-requested tissue digestion and reminded Fisher Controls that, pursuant to the South Carolina Standing Discovery and Scheduling Order approved and signed by Judge D. Garrison Hill in June of 2015, “[n]o alteration or destruction of any pathology materials may occur without agreement of all parties or a court order.” Nevertheless, the parties attempted to reach an agreement regarding the protocol for the digestion and the equal division of tissue. Without waiting for agreement with Plaintiff regarding the digestion protocol, Fisher Controls directed that the tissue be sent from Dr. Timothy Oury to Drew R. Van Orden at RJ Lee labs with instruction that the tissue digestion could proceed. Plaintiff requested that any division of the tissue be completed by a neutral lab. RJ Lee labs is a lab known to be frequently used by defendants and is not an unbiased or neutral lab. Plaintiff requested that any tissue division be done to leave two mirror images. This was not done. Fisher Controls unilaterally destroyed Mr. Glenn’s tissue without agreement of the Plaintiff or order of the court. This was first made known to Plaintiff less than 30 days before the start of trial.

Less than one month later, Fisher Controls unilaterally noticed a Trial Preservation Deposition of its expert, Dr. Timothy Oury. Plaintiff objected to the deposition and moved this Court for a motion of protection, prohibiting Fisher Controls from taking Dr. Oury’s deposition which would permit Dr. Oury to change his previously disclosed causation opinions based on the results of the disputed tissue digestion. Importantly, Dr. Oury’s causation opinions were significantly altered after the destructive testing on Mr. Glenn’s tissue. Before the destructive testing, Dr. Oury stated that he was unable to ascertain if Mr. Glenn’s mesothelioma was asbestos related. After the destructive testing, Dr. Oury opined that Mr. Glenn’s mesothelioma was caused by amosite asbestos. This Court, by Order entered on January 7, 2019, prohibited the Trial Preservation Deposition of Timothy Oury from going forward. The Court noted that Dr. Oury’s

deposition was judicially postponed until a final decision had been reached regarding the propriety of permitting Fisher Controls to submit the results of the unapproved tissue digestion as evidence. Despite this written prohibition from this Court, and prior to any ruling from this Court regarding the use of the tissue digestion results, Fisher Controls deposed Dr. Oury regarding his new opinions and the results of the disputed tissue digestion without any notification to the Plaintiff or to this Court. At the pre-trial hearing, one day after Dr. Oury's private deposition, Fisher Controls neglected to mention that Dr. Oury had been deposed. Fisher Controls also failed to preview Dr. Oury's new causation opinions in substance or detail to the Court at the hearing in the manner that had been done during this deposition. This Court ruled that the tissue digestion was inadmissible because it was completed in the absence of an agreement between the parties, but Dr. Oury was not struck as a witness and the Court left open to Fisher Controls the ability to do additional testing after meeting with Plaintiff regarding a protocol. Fisher Controls chose not to do further testing and chose not to call Dr. Oury as a witness for any purpose.

On January 23, 2019—after the close of Plaintiff's case and after the presentation of the defendants' evidence—Fisher Controls attempted to proffer the "sworn statement" from Dr. Oury and have the statement admitted as a court exhibit. At that same time, Plaintiff informed the Court that she had not previously received this "sworn statement" and was not aware of the circumstances surrounding the taking of the "sworn statement." On the following day, this Court ascertained that Plaintiff was not aware of Dr. Oury's "sworn statement" until the statement was presented to the Court as part of Fisher Controls' attempted proffer. The Court also ascertained that attorneys Timothy W. Bouch, Yancey A. McLeod, III, and Phillip Reid were all aware of Dr. Oury's "sworn statement" and the opinions therein prior to the attempted proffer on January 23, 2019, and during the pre-trial hearings. While the proffer was labeled sworn statement, this Court noted that the

statement was taken on the date and time of the deposition in front of a court reporter in question and answer fashion. Fisher Controls proceeded with the deposition in direct violation of this Court's January 7, 2019 order.

The deposition and the attached exhibits were not produced to the parties or the Court until just before the close of the defendants' cases in chief. The timing of the production of this information kept the Plaintiff and other Defendants from assessing relevant information. Fisher Controls offered no explanation for sitting on evidence that it claimed was crucial.

On January 24, 2019, the jury returned a verdict against Fisher Controls, finding that Fisher Controls was negligent and that its negligence was the proximate cause of Plaintiff's injuries.

FINDINGS OF LAW

The selection of a sanction for discovery violations is within the trial court's discretion. *Kershaw County Bd. of Educ. v. United States Gypsum Co.*, 302 S.C. 390, 396 S.E.2d 369 (1990). Rule 37 of the South Carolina Rules of Civil Procedure expressly grants a trial court the power, *inter alia*, to strike pleadings, enter a judgement of default, order reasonable attorney fees, and order "just" relief for violations of the discovery process. S.C. R. Civ. P. 37. Sanctions can range up to default or dismissal, and "[i]n determining the appropriateness of a sanction, the court should consider such factors as the precise nature of the discovery and the discovery posture of the case, willfulness, and degree of prejudice." *Griffin Grading & Clearing, Inc. v. Tire Service Equip. Mfg. Co.*, 334 S.C. 193, 199, 511 S.E.2d 716, 719 (Ct. App. 1999) (citing *Laney v. Hefley*, 262 S.C. 54, 202 S.E.2d 12 (1974)). The sanction should be aimed at the specific conduct of the party sanctioned. *Id.* (citing *Balloon Plantation, Inc. v. Head Balloons, Inc.*, 303 S.C. 152, 399 S.E.2d 439 (Ct. App. 1990)).

A court may award reasonable expenses, including attorneys' fees, for a party's failure to

make or cooperate in discovery. SCRCP 37(b); *see, e.g., Davis v. Parkview Apartments*, 409 S.C. 266, 762 S.E.2d 535 (2014) (affirming award of attorneys' fees and costs as sanctions for refusal to comply with discovery rulings); *Arnal v. Arnal*, 363 S.C. 268, 297, 609 S.E.2d 821, 836 (Ct. App. 2005), *aff'd as modified*, 371 S.C. 10, 636 S.E.2d 864 (2006) (court imposed sanctions awarding attorneys' fees for discovery abuse); *Scott v. Greenville Hous. Auth.*, 353 S.C. 639, 644, 579 S.E.2d 151, 154 (Ct. App. 2003) (trial court granted attorneys' fees for failure to participate in discovery); *Hundley ex rel. Hundley v. Rite Aid of S.C., Inc.*, 339 S.C. 285, 305, 529 S.E.2d 45, 56 (Ct. App. 2000) (trial court assessed attorneys' fees for discovery abuses); *Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co.*, 334 S.C. 193, 511 S.E.2d 716 (Ct. App. 1999) (trial court awarded attorneys' fees for failure to comply with discovery order).

“In determining the appropriateness of a sanction, the court should consider such factors as the precise nature of the discovery and the discovery posture of the case, willfulness, and degree of prejudice.” *Id.* at 199, 511 S.E.2d at 719. In *Samples v. Mitchell*, 329 S.C. 105, 495 S.E.2d 213 (Ct. App. 1997), the South Carolina Court of Appeals stated “[t]he entire thrust of the discovery rules involves full and fair disclosure, to prevent a trial from becoming a guessing game or one of surprise for either party.” *Id.* “Discovery sanctions are imposed to penalize those whose conduct may be deemed to warrant such a sanction, and to deter those who might be tempted to such conduct in the absence of such a deterrent.” *Creighton v. Coligny Plaza Ltd. P'ship*, 334 S.C. 96, 123, 512 S.E.2d 510, 524 (Ct. App. 1998).

Here, Fisher Controls displayed a pattern and practice of disregard for this state's long-standing Discovery and Scheduling Order, the case management order and established case deadlines, the South Carolina Rules of Civil Procedure, and orders from this Court. In the handling of this issue with the tissue digestion alone, Fisher Controls repeatedly violated court orders. Fisher

Controls offered no explanation for waiting until the eve of trial, years after obtaining Thomas Glenn's pathology, to perform a tissue digestion analysis. The case management order in place since June 25, 2015, mandated that a party could not destroy tissue without the agreement of the parties or court order. Fisher Controls ignored this order. Next, Fisher Controls wholly disregarded this Court's order prohibiting Dr. Timothy Oury's deposition. Although Fisher Controls labeled the deposition a "sworn statement," the statement is clearly a deposition submitted under a label which would not immediately invoke the Court's ire. The statement was transcribed by an official Court Reporter on the day and at the time that Fisher Controls had originally scheduled Dr. Oury's deposition—a deposition prohibited by an Order of Protection from this Court. Further, the statement consists of more than just a rote recitation of Dr. Oury's new causation conclusions. Counsel for Fisher Controls engaged in a lengthy examination of Dr. Oury and asked that he not only disclose his new opinions but explain the bases for his new opinions. The problematic nature of this conduct is compounded by the fact that Dr. Oury's new opinions were based on the results of the unauthorized tissue digestion—one in which the tissue was unequally divided and left the Plaintiff without sufficient tissue to conduct her own digestion. Moreover, Fisher Controls, despite being represented at pre-trial hearings and during multiple days of trial, concealed its conduct regarding its violation of Court Orders until the close of the presentation of evidence at the trial in this matter. The failure to produce this information during the pendency of trial, denying counsel information alleged to be "critical," is an abuse of the discovery and trial processes. It also left Plaintiff unable to respond to Fisher Controls' attempted proffer. This pattern and practice of discovery abuse is unacceptable for any party. But for Plaintiff's counsel's request to limit sanctions to a written order, greater sanctions would have been imposed as the gravity and repetitive disregard for the rules of court would have warranted substantial sanctions.

As a result of Fisher Controls' abuse of the discovery and trial processes, this Court, in lieu of more serious sanctions, finds as follows:

1. Fisher Controls has intentionally and deliberately violated Orders from this Court regarding the discovery and trial processes which created a presumed prejudice of Plaintiff's ability to accurately and fairly present her case to the jury in this matter; and
2. The record shall reflect that Fisher Controls has repeatedly and deliberately engaged in a pattern and practice of sanctionable conduct.

For the foregoing reasons, Plaintiff is entitled to the sanctions as outlined above.

AND IT IS SO ORDERED.

Jean Hofer Toal, Chief Justice of
the South Carolina Supreme Court,
Retired, Acting as Circuit Court
Judge

June _____, 2019

Columbia, South Carolina.



Anderson Common Pleas

Case Caption: Rita Joyce Glenn , plaintiff, et al VS Air & Liquid Systems Corporation , defendant, et al
Case Number: 2015CP0401607
Type: Order/Sanctions

IT IS SO ORDERED.

s/ Jean H. Toal #2758