

TRIAL COURT'S SANCTIONS FOR DISCOVERY VIOLATIONS WERE TOO SEVERE

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Today, the Indiana Court of Appeals held that a trial court's sanctions for discovery violations were too severe in *Whitaker v. Becker*, Case No. 02A03-1006-CT-303. The Court emphasized that a trial court should not impose severe sanctions for discovery violations without first warning the party that these sanctions were a possibility.

In December 2008, Whitaker filed a complaint for damages against Becker after Becker rear-ended Whitaker's vehicle, injuring him. Before filing suit, Whitaker's counsel had corresponded with Becker's insurance claims representative, informing him that Becker was expected to need surgery to address his injuries. On January 19, 2009, Becker filed his interrogatories and request for production. Whitaker did not respond to those discovery requests. Beginning on April 14, 2009, Becker's counsel wrote to Whitaker's counsel every two weeks, requesting responses to the discovery. Becker's counsel did not receive any answer from Whitaker's counsel. On May 27, 2009, Becker filed a motion to compel, which the trial court granted. Whitaker's discovery responses were now due on June 16, 2009.

On June 15, 2009, Whitaker served his sworn discovery responses on Becker. Three days later, on June 18th, Whitaker had surgery – a fact not indicated in the discovery he provided. On June 18th, Becker's counsel received a letter dated June 17th stating that Becker was "scheduled to have surgery on June 18, 2009." Becker moved for sanctions, including dismissal and fees, for concealing the plan to have surgery. Whitaker did not file a response, but argued against the motion at a hearing. After the hearing, the trial court found that Whitaker was in violation of the order compelling discovery and, as a sanction, dismissed the action and awarded Becker attorney's fees.

Whitaker filed a motion to correct error, arguing that he had not concealed his need for the surgery and that Becker was not prejudiced so severely that it could only be cured by dismissal. Whitaker's motion was not granted.

On appeal, the Court held that the sanctions imposed by the trial court were too severe.

Our ultimate conclusion is that our decision here should be viewed as akin to one in equity, and that our resolution of this appeal must turn on fairness and Indiana's "marked judicial deference for deciding disputes on their merits and for giving parties their day in court." We find that based upon the facts and circumstances before the trial court, the dismissal of Whitaker's action was an abuse of discretion. Therefore, we reverse the trial court's order of dismissal.

It is noteworthy to point out that one of the factors the Court considered when determining that the sanction of dismissal was inappropriate was the trial court's failure to warn Whitaker that this was a possibility.

We have stated that "in deciding whether a sanction is just, this court has routinely considered whether or not a trial court expressly warned a party that failure to comply could result in dismissal." There was no such warning or any such indication in this case. Thus, we cannot conclude that Whitaker was "clearly aware that the trial court was considering" the "death knell" sanction of dismissal.

Thus, the Court affirmed the trial court's finding that there were grounds for sanctions, but held that different sanctions were appropriate in this case. Dismissal was inappropriate. However, "the conduct complained of ... could have been avoided except for the failure of Whitaker's counsel." Therefore, the Court ordered Whitaker's counsel to pay Becker a lesser amount of attorney's fees.

The Court's decision demonstrates great leniency, especially considering that the standard of review was abuse of discretion. However, this whole issue could have largely been avoided if Whitaker's counsel had simply communicated with Becker's counsel. This is always the better practice.

Lessons:

1. A trial court should only dismiss a case because of discovery violations in extreme circumstances.
2. Not communicating with opposing counsel concerning discovery matters invites unnecessary motion practice.