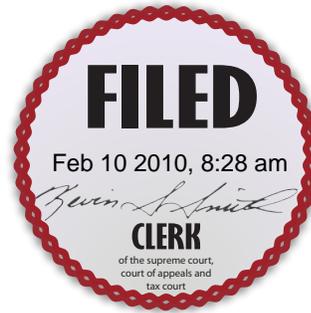


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

LAWANE CHANEY on Behalf of Himself and)
All Others Similarly Situated,)
)
Appellants-Plaintiffs,)
)
vs.)
)
CLARIAN HEALTH PARTNERS, INC.,)
)
Appellee-Defendant.)

No. 49A05-0905-CV-263

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Patrick L. McCarty, Judge
Cause No. 49D03-0703-PL-8796

February 10, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Ronald Weldy, former counsel for Lawane Chaney, appeals from a trial court order entered in Chaney's purported class action suit against Clarian Health Partners, Inc., which alleged violations of the Wage Payment Statute. Weldy presents three issues for review, but, as explained below, we address a single issue: whether the trial court abused its discretion when it imposed sanctions against Weldy under Trial Rule 37.¹

We affirm in part and dismiss in part.

FACTS AND PROCEDURAL HISTORY

On March 5, 2007, Chaney filed a complaint alleging that Clarian had violated the Wage Payment Statute, and he served on Clarian a set of discovery requests ("First Discovery Requests"), which related to Chaney's class allegations. On March 23, he filed a motion for class certification and a memorandum in support of that motion.² On April 12, Clarian filed a motion to dismiss the complaint, a memorandum in support of that motion, and a motion to stay briefing on Chaney's motion for class certification and to stay the deadline for responses to Chaney's discovery requests. On May 1, the trial court entered an order granting the motion to stay briefing on the motion for class certification and to stay "the deadline for Clarian's discovery responses until further order." Appellant's App. at 92. On May 3, Chaney filed his amended complaint and his

¹ As explained below, Chaney is no longer a party to this action, and Weldy is appealing sanctions imposed against him personally as purported class counsel. We will refer to Chaney as the party pursuing action in the case until the settlement of his claims. We will refer to Weldy when discussing the issue properly presented for our review as well as actions taken by Weldy regarding that issue.

² The parties have not included a copy of the March 5 complaint, the motion for class certification, or the supporting memorandum in the record on appeal.

opposition to the motion to dismiss. Following leave granted by the court, Chaney filed the amended complaint on June 1.³

On January 25, 2008, Chaney filed a motion to set deadlines to oppose class certification and responses to discovery requests and to set a hearing date. On January 30, Clarian filed its answer to the amended complaint and a counterclaim, alleging that Chaney had stolen three plasma televisions resulting in damages greater than \$37,800. On January 31, Chaney served a second set of interrogatories and requests for production (“Second Discovery Requests”), which were related to Clarian’s counterclaim. At a March 11 status conference, the court orally granted Clarian’s request to extend the stay entered May 1, 2007, but ruled that limited discovery was permissible regarding the adequacy of Chaney as class representative.⁴ Based on an agreed extension, Clarian served its answers to the January 31 discovery requests on April 4.

On July 21, Clarian filed its motion for sanctions and dismissal based on the difficulty scheduling Chaney’s deposition and Chaney’s failure to appear for his noticed deposition. On August 22, Chaney filed a response to the motion for sanctions and dismissal as well as a motion to compel discovery responses, seeking responses to the discovery requests that were subject to the stay entered on May 1, 2007, and extended on March 11, 2008. On September 8, Clarian filed its opposition to Chaney’s motion to

³ The Chronological Case Summary (“CCS”) shows that the trial court mistakenly entered the order granting leave to file the amended complaint because that matter had been set for hearing on July 2. The date that leave was granted is not material to the issues on appeal, and the parties do not dispute that the court eventually granted leave to file the amended complaint.

⁴ The record does not contain nor does the CCS reference the entry of a written order on issues determined at the status conference.

compel discovery responses. On September 9, the court granted the motion to compel, but on September 10 Clarian filed a motion to reconsider that order.

On September 15, the court held a hearing on Clarian's motion for sanctions and its motion to reconsider. On September 17, entered an order that: (1) granted Clarian's motion to reconsider and vacated the September 9 order compelling discovery responses; (2) imposed sanctions under Trial Rule 37; and (3) granted Clarian's motion for sanctions against Chaney individually, including reasonable expenses and attorney's fees caused by Chaney's failure to attend the July 8 deposition. On October 1, Clarian filed its motion for fees incurred as a result of Chaney's failure to attend his deposition

On October 31, Chaney telephoned Clarian's counsel directly. Chaney told counsel's assistant that he did not want to be represented by his counsel, that he did not want to be involved in a class action, and that he had "cussed and yelled at" his counsel about the case. Appellee's App. at 71. When Clarian's counsel received this message later that day, she contacted Chaney's counsel by email to inquire about the status of Chaney's representation. Having received no response, Clarian's counsel emailed Chaney's counsel again on November 11. On November 12, Chaney's counsel replied by email that his "office has not received any communication from Mr. Chaney stating that this office does not represent [Chaney] or the proposed class." *Id.* at 75. On November 17, Clarian filed a motion for Chaney to show cause why his counsel should not be disqualified as Chaney's counsel. The matter was set for a hearing on December 11, and the court ordered Chaney to attend.

When Chaney did not appear at the December 11 hearing, Clarian moved to dismiss the case and to disqualify Chaney's counsel. The trial court set those matters as well as other pending matters for hearing on January 16 and again ordered Chaney to appear. Chaney did not appear at the January 16 hearing, and the court took matters under advisement. On April 6, 2009, the court entered an order in which it denied Chaney's motion to reconsider and found that all matters concerning Chaney had been settled by the parties. The court further dismissed the case with prejudice for lack of a class representative, but it denied Clarian's request for attorney's fees. This appeal ensued.

DISCUSSION AND DECISION

In the appellant's brief Weldy presents three issues: (1) whether the trial court abused its discretion when it imposed sanctions against him under Trial Rule 37(A)(4); (2) whether the trial court "erred by denying Proposed Class Representative discovery concerning the members of the Proposed Class[;]" and (3) whether the trial court erred by "dismissing this case with prejudice without permitting proposed Class Counsel [Weldy] to find a substitute class representative." Appellant's Brief at 1. We consider the first issue below. The second and third issues arise from Chaney's amended complaint and Clarian's counterclaim.

Because Chaney and Clarian have settled their claims against each other, those claims are no longer live and Chaney no longer has an interest in the outcome in the event we were to consider issues two and three. Chaney's settlement left the action without a plaintiff because Chaney had not named any other purported class members,

nor had the case been certified as a class action. As such, those issues are moot. See Ind. Pesticide Rvw. Bd. V. Black Diamond Pest & Termite Control, Inc., 916 N.E.2d 168, 179 (Ind. Ct. App. 2009), trans. denied. We dismiss issues two and three accordingly.

Weldy also contends that the “sanction against [him] pursuant to Trial Rule 37(A)(4) must be vacated.”⁵ Appellant’s Brief at 7. Specifically, he argues that the motion may have been improperly titled as a motion to compel, but it was not filed under Trial Rule 37. Instead, he argues that the motion was merely a request for the trial court to lift the stay on discovery. As a result, he claims that the trial court had no basis for imposing sanctions. We cannot agree.

Chaney’s motion to compel reads as follows:

1. On March 5, 2007, [Chaney] served discovery requests on [Clarian] including Interrogatories and Requests for Production.
2. On March 20, 2007, [Chaney] filed his Motion for Class Certification.
3. According to [Clarian], as of February 25, 2008, [Clarian’s] responses to [Chaney’s] written discovery served on March 5, 2007[,] was due on March 4, 2008. See (Exhibit 1—e-mail exchange between [Clarian’s counsel] and [Chaney’s counsel] on February 25, 2007).
4. [Clarian’s counsel] requested an extension to and including March 21, 2008[,] to serve [Clarian’s] responses to [Chaney’s] discovery requests. See (Exhibit 1).
5. Before the undersigned would respond to this request, he asked [Clarian’s counsel] to agree that no further extensions of time would be requested and that [Clarian] would not file or request a protective order with regard to these requests. See (Exhibit 1).

⁵ The September 17, 2008, order awarded Clarian expenses and reasonable attorney’s fees, but it does not specify whether the sanctions are imposed against Chaney individually, his counsel, or both. On appeal, the parties treat the issue on appeal as involving a sanction imposed against Chaney’s counsel.

6. [Clarian's counsel] made those assurances. See (Exhibit 1).
7. The undersigned agreed to extend the deadline for [Clarian] to respond to [Chaney's] March 5, 2007 discovery requests until March 21, 2008. See (Exhibit 1).
8. On March 11, 2008, this Court held a Status Conference.
9. At the Status Conference, [Clarian] requested that the Court extend or stay responses to [Chaney's] discovery requests.
10. On March 11, 2008, this Court granted [Clarian's] requests to extend or stay responses to [Chaney's] discovery requests.
11. [Clarian] contends that [Chaney] is not an adequate Class Representative.
12. Given that adequacy is at issue, [Chaney] should have the opportunity to seek additional or alternative Class Representatives from the pool of potential Class Members.
13. [Chaney] cannot do so until such time as [Clarian] responds to [Chaney's] discovery responses.
14. Good cause exists for the discovery of this information.
15. If [Clarian] does not wish to provide this discovery, then it can withdraw its adequacy objection.
16. Given that [Clarian] has had [Chaney's] written discovery requests since March 5, 2007, this Court should compel responses within 30 days, no extensions.

WHEREFORE, [Chaney] prays that the Court compel [Clarian] to respond to [Chaney's] Interrogatories and Requests for Production of Documents within 30 days, and for all other just and proper relief.

Appellant's App. at 73-75.

We note initially that, even if we read the motion without regard to its title or the material inaccuracies discussed below, we cannot agree with Weldy that his motion should be construed as a motion to lift the stay. In the opening paragraph, Chaney

“move[d] the Court to compel [Clarian] to respond to discovery requests[.]” Appellant’s App. at 73. He later acknowledged the court’s extension of the stay, which the court had entered on May 1, 2007, and extended on March 11, 2008, but he did not request the court to lift the stay. Instead, Chaney referred to discovery served March 5, 2007, and, in paragraph 16, requested the court to compel Clarian’s responses “within 30 days, no extensions.” Id. at 74. Similarly, in the prayer for relief, Chaney requested the court to “compel [Clarian] to respond to Plaintiff’s Interrogatories and Requests for Production of Documents within 30 days, and for all other just and proper relief.” Id. at 75. Chaney’s motion did not request the court to reconsider a prior ruling, nor did it specifically request the court to lift or take any action regarding the stay.

Weldy contends that the “purpose of the Motion was clearly stated,” and, in support, he cites paragraph 10 of the Motion. Appellant’s Brief at 8. But paragraph 10 merely states that the court granted an extension of the stay. That paragraph did not put the court on notice that Chaney was requesting action with regard to the stay. Weldy’s argument that the motion was merely improperly titled must fail.

Weldy also argues that there was no legal basis for a sanction under Trial Rule 37 because his motion to compel was not filed pursuant to, nor did it reference, that trial rule. Trial Rule 37(A)(4) requires the trial court to award expenses and attorney’s fees in cases where a motion to compel is denied:

If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party . . . who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney’s fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

As discussed above, Chaney's motion asked the court to compel discovery responses. Also, Clarian requested fees under Trial Rule 37 in its motion to reconsider the order granting Chaney's motion to compel.

In Chaney's motion he stated, in relevant part, that he had served discovery requests on Clarian on March 5, 2007 (the First Discovery Requests); that Clarian had requested an extension from the March 4, 2008, due date to March 21, 2008 to respond to discovery; and that on March 11, 2008, the court had extended an order staying responses to "Plaintiff's discovery requests until after determining the adequacy of Mr. Chaney to act as Class Representative in this matter[.]" Appellant's App. at 74. Chaney also attached copies of email correspondence with Clarian's counsel to show Clarian's request for the extension.

But Chaney did not inform the court that he had served the Second Discovery Requests on Clarian on January 31, 2008. The email correspondence does not specify whether Clarian was seeking an extension for responding to the First or the Second Discovery Request. And Clarian's statement that its discovery responses were due on March 5, 2008, while the stay was still in effect, should have put Chaney on notice that Clarian's request for an extension referred to responses due on the Second Discovery Requests.

Moreover, and significantly, Clarian immediately contacted Weldy after receiving the motion to compel. In correspondence dated August 27, 2008, Clarian explained that its request for an extension had related to the Second Discovery Requests and pointed out misleading portions of Chaney's motion to compel. Clarian asked Weldy to withdraw the

motion and stated that, if Weldy did not do so by August 29, Clarian would seek “fees for preparing a response to Plaintiff’s Motion to Compel pursuant to Trial Rule 37(A)(4).” Appellant’s App. at 52. In response, Weldy maintained his position that he was seeking through his motion an order compelling Clarian to respond to the First Discovery Requests, and he refused to withdraw the motion.

Weldy should have been on notice from the February 2008 email correspondence that Clarian’s request for an extension referred to the Second Discovery Requests. Clarian’s request was based on a March 4, 2008, due date for discovery responses, but the stay in effect regarding the First Discovery Requests was still in effect at that time. Thus, there was no due date for responses to the First Discovery Requests. Further, immediately upon receiving the motion to compel Clarian clarified that its February 2008 emails had referred to the Second Discovery Requests. Clarian told Weldy that it would seek fees under Trial Rule 37(A)(4) if he did not withdraw his motion. Weldy flatly refused. In light of these facts, Weldy was on notice that Trial Rule 37(A)(4) was implicated. His argument on appeal that there is no legal basis for the sanction imposed must fail.

Affirmed in part and dismissed in part.

FRIEDLANDER, J., and BRADFORD, J., concur.