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APPELLANT PRO SE:

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Indianapolis, Indiana



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**IN THE  
COURT OF APPEALS OF INDIANA**

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JESSE CLEMENTS, )  
 )  
Appellant-Plaintiff, )  
 )  
vs. )  
 )  
RALPH ALBERS, )  
 )  
Appellee-Defendant. )

No. 49A02-0910-CV-1033

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INTERLOCUTORY APPEAL FROM THE MARION SUPERIOR COURT  
The Honorable Timothy W. Oakes, Judge  
Cause No. 49D13-0710-PL-46451

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**May 5, 2010**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**CRONE, Judge**

Jesse Clements appeals the trial court's award of discovery sanctions to Ralph Albers. We affirm and remand for a hearing to determine the expenses to which Albers is entitled for successfully defending his motion to compel discovery on appeal.

Clements, who has represented himself throughout these proceedings, filed a six-count complaint against Albers on July 1, 2008. On October 16, 2008, Albers's original counsel served discovery on Clements. On April 20, 2009, Albers's current counsel, Davina Curry, entered her appearance. On June 10, 2009, Curry requested that Clements provide more sufficient responses to the initial discovery and served additional discovery on Clements. In a letter to Clements dated July 30, 2009, Curry inquired about the discovery responses.

On August 17, 2009, having received no response from Clements,<sup>1</sup> Curry filed a motion to compel Clements to respond to discovery pursuant to Indiana Trial Rule 37(A) and requested "an award of reasonable attorney's fees and expenses for bringing this motion[.]" Appellee's App. at 13. Curry served a copy of the motion on Clements via mail. On August 24, 2009, the trial court entered an order granting the motion to compel and setting a hearing "with regard to Ralph Albers' reasonable attorney's fees and expenses for bringing this Motion" for September 21, 2009. *Id.* at 35.

Also on August 24, 2009, Clements submitted responses to Albers's second set of interrogatories. In a letter to Clements dated August 26, 2009, Curry pointed out deficiencies in these responses and reminded him of his "prior deficient responses to discovery, which

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<sup>1</sup> Clements states that "[o]n August 9, 2009, [he] sent a letter [presumably to Curry] indicating that discovery would be responded to by August 24, 2009." Appellant's Br. at 3. As Clements himself acknowledged in a subsequent letter to Curry, however, the August 9 letter was sent to the wrong address. *See* Appellant's App. at 29 (letter dated August 21, 2009).

have not been addressed.” *Id.* at 89. On August 27, 2009, Clements left a threatening voicemail message for Curry.<sup>2</sup> Curry reported this incident to the Marion County Sheriff’s Department.<sup>3</sup>

On August 28, 2008, Clements filed a notice stating that he would be available for the production of documents on various dates in September but cautioning that his “schedule [was] due to change at a moments [sic] notice” and that copy expenses would be borne by Albers. *Id.* at 109. On September 4, 2009, Albers filed a motion for protective order and to

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<sup>2</sup> Curry’s transcript of Clements’s message reads as follows:

Hey Miss Curry, uh, this is Jesse Clements, uh, Clements v. Albers, um, yeah, I want, you need to call me back, I’m going to give you until the end of the business day tomorrow to give me a call back, and, to see if I can’t straighten you out on a few facts here [...] and, uh if I don’t hear from ya, I’m going to take action that you are not going to believe. You need to recognize that if you are going to keep practicing as a lawyer in Indiana, you have to understand what your ethical responsibilities are, and I do not know how in the hell this ex parte bullsh\*t is happening down at that [...] courtroom, but that is going to cease and desist, and if I need to get a new judge set up there, that’s what I’ll do. But you [...] are making misrepresentations in your filings, you are dishonest, you are a liar, and I’m not even going to do you the courtesy of taking the time to put together a letter. Any letter that I put forward is going to be done to [...] take you over my figurative knee and give you a spanking, alright? Now, (laughter), uh, so, this is America, you have the choice to pick up the phone and call me, but if you do not call me by the end of the business day tomorrow, I will assume that you have not [sic] interest in acting properly and I will to the fullest extent that the law provides in every possible avenue, I will punish you and I will see to it that your law license is taken away from you as well as damages that you’re going to experience. You’re going to, it’s unfortunate that your mamma and daddy didn’t teach you proper manners, alright, and I don’t want to have to be the one to do that so maybe you’re just operating under some sort of misconception, but Miss Curry, please give me a call back by the end of the business day tomorrow, or [...] I’m going to assume that you intend with your purposeful and willful degradation of the procedure, degradation of your ethical responsibilities under the law, uh, under the procedures here in Illinois, and your ethical oath you’ve taken to uphold the constitution and I’m going to reign holy hell down on you for your conduct; legal holy hell because you are completely out of control young lady. Thank you.

Appellee’s App. at 96-97.

<sup>3</sup> On September 2, 2009, Clements filed a handwritten statement with the Marion County Sheriff’s Department alleging that Curry had provided “false information” to authorities and that her husband had threatened him via telephone. Appellee’s App. at 107-08.

compel pursuant to Indiana Trial Rule 26(C),<sup>4</sup> requesting that the trial court issue an order requiring Clements

to provide copies of the documents requested in Defendant's Request for Production rather than that counsel for Defendant meet with Plaintiff to obtain the requested information, and that Clements be compelled to produce said documents at his expense within 14 days of the Court's Order, and for an award of attorney's fees for bringing this Motion.

*Id.* at 92. On September 9, 2009, the trial court set a hearing on the motion for September 21, 2009.

On September 11, 2009, Clements filed with the circuit court clerk a petition requesting that the trial court reschedule the September 21 hearing. Clements's petition stated that the hearing had been set "without [his] input" and that he would "be in Florida on that day and [would] be unable to attend said hearing." Appellant's App. at 39. Also on that date, Clements filed a motion requesting that the court reconsider its order on Albers's motion to compel, in which he accused the court of "determin[ing] *ex parte* that [Clements] should be relieved of his personal property" in "violation of fundamental fairness and due process of law." *Id.* at 26. The trial court's chronological case summary indicates that the

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<sup>4</sup> Trial Rule 26(C) provides in pertinent part,

Upon motion by any party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending ... may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

...

(2) that the discovery may be had only on specified terms or conditions, including a designation of the time or place[.]

court received the petition and motion on September 14, 2009. Clements served the petition and the motion on Albers via mail.

When the hearing convened on September 21, 2009, both Albers and Curry were present. Clements failed to appear. The trial court stated that it had received Clements's petition to reschedule and that "it appear[ed] that [Clements] had knowledge of this [hearing] being set." Tr. at 6. The court asked Curry her "position with regard to the continuance[.]" and she replied, "Well, I would request that we go forward with the hearing. My client's here and he's missing work[.]" *Id.* at 7-8. The court then questioned Curry about Albers's motion to compel and motion for protective order, as well as Clements's motion to reconsider. Curry submitted an affidavit for attorney's fees, as well as a proposed order on Albers's motions, which the trial court amended slightly and signed. As amended, the order reads in pertinent part as follows:

**ORDER ON DEFENDANT'S MOTION TO COMPEL  
AND FOR PROTECTIVE ORDER**<sup>[5]</sup>

Ralph Albers, by counsel having filed his Motion to Compel responses to discovery served on Plaintiff, and his Motion for Protective Order concerning the conduct of discovery, and the Court being duly advised in the premises GRANTS said motions. Plaintiff shall have twenty-one (21) days from the date of this Order to fully comply with Defendant's discovery requests by fully responding to all Interrogatories propounded to date, and by providing copies of all documents requested by Defendant in all of Defendant's Request for Production of Documents propounded to date.

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<sup>5</sup> At the hearing, the trial court remarked, "I'm not sure I want to call it a protective order. We'll call it the orderly disposition of discovery or something.... But give me an order to that effect and then we'll show that granted." Tr. at 10. As Clements suggests, the trial court's failure to amend the title of the proposed order to conform to this remark is clearly nothing more than an "inadvertent mistake[.]" which has no substantive consequences. Appellant's Br. at 13.

IT IS FURTHER ORDERED that pursuant to Trial Rule 37(A)(4), the Court hereby awards Defendant his reasonable attorney's fees and expenses for bringing these Motions in the amount of One Thousand One Hundred Forty-Five Dollars (\$1,145.00), which shall be paid to counsel for Defendant within thirty (30) days of the date of this Order, or Plaintiff shall be subject to further sanctions, including but not limited to dismissal of this cause.

Appellant's Br. at 18. Also on that date, the trial court wrote "DENIED" on what appears to be a proposed order submitted by Clements rescheduling the September 21 hearing, thus effectively denying Clements's petition to reschedule. Appellant's App. at 57. Clements now appeals.<sup>6</sup>

At the outset, we observe that a litigant who elects to proceed pro se "will be held to the same rules of procedure as trained legal counsel and must be prepared to accept the

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<sup>6</sup> On October 15, 2009, Clements filed an "Emergency Verified Motion for Suggestion of Recusal" and a "Motion to Clarify Order." The trial court did not rule on either motion, and thus they are deemed denied pursuant to Indiana Trial Rule 53.4(B). Clements's assertions in these motions range from unusual to downright bizarre. For example, he stated that he ordered a transcript of the September 21 hearing "and was physically sickened to the point of vomiting after reading the events of that hearing." Appellant's App. at 81. Clements also compared the merits of Curry's position with racist sentiments of the Imperial Wizard of the Ku Klux Klan. *See id.* at 82 ("Sometimes one can determine the validity of an argument simply by listening to one side of an argument... The reason is because the Court simply by listening to the irrational, unsupported and candor-less dogma provides evidence only that the wizard is pathologically corrupt, morally bankrupt, so dishonest that if you removed every prevaricating molecule from his body, you would be left with a scheme [sic] from the Wizard of Oz... 'I'm melting...I'm melting [then of a steaming pile of clothes]'. Hence, the validity of the wizard's argument collapses under its own weight... Likewise Davina Curry's unsupported dogmatic statements in support of her affidavit for purported fees constitute an inappropriate attack on the Plaintiff, but also prove that Curry's argument is ridiculous and not credible, much like the aforementioned imperial wizard."). Finally, Clements accused the trial court of conspiring with Curry to unlawfully deprive him of his personal property. *See id.* at 85 ("The Court's purposeful reliance on the Defendant's position alone, at times a position of ridiculous dishonesty; the Court's participation in the flagrant disregard of the Trail [sic] Rules and Codes of Conduct; and the Court's acquiescence and perhaps assistance in Curry's scheme to deprive the Plaintiff of his day in Court and his personal property; requires this Court to recuse itself."); *id.* at 89 (motion to clarify) ("[T]he Plaintiff asserts an absolute objection to the subject order that was obtained through fraud and a derogation of the Indiana's [sic] Rules of Procedure, Indiana's Judicial and Professional Codes of Conduct, Indiana common law holdings, the Indiana Constitution, the US Constitution, common sense and just plain ol' good manners, and reserves all his rights under law, in equity and on appeal."). We admonish Clements that such intemperate language, whether used by pro se litigants or licensed attorneys, has no place in legal proceedings of any sort at any time.

consequences of his action.” *Shepherd v. Truex*, 819 N.E.2d 457, 463 (Ind. Ct. App. 2004).

We further observe that

[t]he trial court is vested with broad discretion in ruling on the issues of discovery, and this court will interfere only when an abuse of discretion is apparent. We will find an abuse of discretion only when the result reached by the trial court is clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable and actual deductions flowing therefrom.

The rules of discovery are designed to allow a liberal discovery process, the purposes of which are to provide parties with information essential to litigation of the issues, to eliminate surprise, and to promote settlement. Discovery is designed to be self-executing with little, if any, supervision or assistance by the trial court. However, when the goals of this system break down, [Trial Rule] 37 provides the court with tools to enforce compliance.

*Hatfield v. Edward J. DeBartolo Corp.*, 676 N.E.2d 395, 399 (Ind. Ct. App. 1997) (citations omitted), *trans. denied*.

Both Albers’s motion to compel discovery and the trial court’s award of fees and expenses are based on Trial Rule 37(A), which reads in pertinent part as follows:

(A) Motion for order compelling discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

(1) Appropriate court. An application for an order to a party may be made to the court in which the action is pending ....

(2) Motion. If a party refuses to allow inspection under Rule 9.2(E), or if ... a party fails to answer an interrogatory submitted under Rule 33, or if a party or witness or other person, in response to a request submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request....

If the court denied the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 26(C).

(3) Evasive or incomplete answer. For purposes of this subdivision an evasive or incomplete answer is to be treated as a failure to answer.

(4) Award of expenses of motion. If the motion is granted, the court shall, *after opportunity for hearing*, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

(Emphasis added.)

Clements raises several challenges to the trial court's award. He first contends that the award was improper because Curry did not file her fee affidavit prior to the hearing. Clements cites no relevant authority – and we are aware of none – that imposes such a requirement.<sup>7</sup> We are likewise unaware of any authority stating that a trial court must grant a party an opportunity to be heard on a motion to compel before ruling on the motion, as Clements insists. In fact, Trial Rule 37(A)(4) clearly states just the opposite. Moreover,

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<sup>7</sup> To the extent Clements contends that Curry's failure to submit an affidavit prior to the hearing resulted in a denial of due process, we note that he could have challenged the affidavit at the hearing, of which he had notice and at which he failed to appear. Clements does not specifically challenge the trial court's denial of his petition to reschedule the hearing, which was filed ten days before the hearing and stated only that he would "be in Florida on that day and [would] be unable to attend said hearing." Appellant's App. at 39. We note that any such challenge would be meritless. *See* Ind. Trial Rule 53.5 (stating that postponement or continuance of proceeding "shall be allowed *upon a showing of good cause* established by affidavit or other evidence.") (emphasis added); *see also* *Loudermilk v. Feld Truck Leasing Co. of Ind.*, 171 Ind. App. 498, 506-07, 358 N.E.2d 160, 165-66 (1976) (holding that trial court did not abuse its discretion in denying defendant's motion for continuance, which was filed ten days before trial and stated that defendant "would be at a Georgia Motor Truck Association meeting on the scheduled trial date": "[H]ere the moving party is exercising his free will and discretion in choosing his whereabouts on the trial date.... The requirements of good cause for the request continuance were not met in the case at bar and thus a continuance was properly denied.").

Clements had an opportunity to respond to both the motion and the order at the September 21 hearing, of which he had notice, but he failed to appear.<sup>8</sup>

By failing to appear at the hearing, Clements has waived his arguments regarding the sufficiency of Curry's fee affidavit and the fact that her statements at the hearing "were not sworn[.]" Appellant's Br. at 15. *See Hallberg v. Hendricks County Office of Family & Children*, 662 N.E.2d 639, 646 n.7 (Ind. Ct. App. 1996) (concluding that appellant waived procedural arguments regarding hearing because he had received notice of hearing yet failed to appear). Likewise, Clements has waived any argument that his opposition to the discovery was substantially justified or that the amount of the trial court's award was improper. Having disposed of Clements's arguments, we affirm the trial court in all respects.

Consequently, we remand for a hearing on the expenses to which Albers is entitled for successfully defending his motion to compel on appeal. *See Georgetown Steel Corp. v. Chaffee*, 519 N.E.2d 574, 577 (Ind. Ct. App. 1988) (holding that appellees were entitled to expenses of successfully defending motion to compel on appeal, given that such expenses were created by appellant's "failure to reply with a reasonable discovery request" and that "if appellate expenses were not awardable, then the original award [for discovery sanctions] would be offset and its benefit negated."), *trans. denied*.

Affirmed and remanded.

BAKER, C.J., and DARDEN, J., concur.

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<sup>8</sup> As such, we are unpersuaded by Clements's arguments that the hearing was illegally conducted *ex parte*.