

Case Summary

Terrance R. Huber brings this interlocutory appeal as of right in which he challenges the trial court award of \$700 in discovery sanctions in his lawsuit against the Montgomery County Sheriff. We conclude that the trial court did not abuse its discretion in awarding the discovery sanctions and remand to the trial court for a determination of appellate attorney fees and costs.

Facts and Procedural History

In May 2007, Huber filed a complaint against the Sheriff stemming from an alleged unlawful arrest that occurred at his place of work in June 2005 in which excessive force was used to handcuff him. Huber requested damages, attorney fees, costs, and expenses. He also requested attorney fees and expenses in connection with the criminal case.

A discovery dispute eventually erupted. On July 20, 2007, the Sheriff served discovery on Huber. Huber finally served his responses on January 31, 2009. On several occasions thereafter, the Sheriff requested supplementation of Huber's responses that the Sheriff believed to be evasive or incomplete. The requested discovery from Huber concerned his sources of income, income tax returns, medical records, and fee arrangement with his attorney. Because Huber did not provide any supplementation, the Sheriff filed a motion to compel discovery and request for sanctions pursuant to Indiana Trial Rule 37. Without first holding a hearing, the trial court entered an order compelling Huber to comply with the discovery requests. *See* Appellant's App. p. 38-39 ("[Huber] shall provide complete answers to Interrogatory 8 [sources of income]," "shall fully

answer Interrogatory 21 and respond to Request for Production 15 [attorney fees],” “shall fully execute and provide to [the Sheriff’s] counsel two HIPAA release forms,” and “shall fully execute and provide to [the Sheriff’s] counsel an IRS Form 4506, Request for Copy of Tax Return, authorizing release of [Huber’s] federal tax returns to counsel for [the Sheriff] for tax years 2001-2008 inclusive.”). The court awarded the Sheriff the “reasonable costs and attorney fees incurred by the necessity to move for this order compelling discovery.” *Id.* at 39. The court ordered the Sheriff’s attorney to supplement his itemization of costs and fees within fourteen days of the order. Thereafter, Huber filed a compliance with court order and motion to reconsider, but the trial court, without holding a hearing, denied Huber’s motion to reconsider and awarded additional sanctions. That is, the court awarded the Sheriff “his costs and attorney fees for opposing the motion to reconsider” and ordered the Sheriff’s attorney to supplement his itemization of costs and fees within fifteen days of the order. *Id.* at 59. Huber paid the full amount requested by the Sheriff, \$697.50. *Huber v. Montgomery Cnty. Sheriff*, 940 N.E.2d 1182, 1184 (Ind. Ct. App. 2010).

Huber then brought an interlocutory appeal as of right, *see* Ind. Appellate Rule 14(A)(1), in which he argued that the trial court was required to hold a hearing before entering sanctions against him. *Huber*, 940 N.E.2d at 1185. We noted that 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.” *Id.* We also noted that the discovery process is intended to require “little, if any, supervision or assistance by the trial court,” but that when the goals

of this system break down, Indiana Trial Rule 37 steps in to provide the trial court with tools to enforce compliance. *Id.* at 1186. Trial Rule 37(A)(4) provides in relevant part:

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.

We clarified that a person is “substantially justified” for the purposes of avoiding sanctions for resisting discovery if reasonable people could conclude that a genuine issue existed as to whether a person was bound to comply with the requested discovery. *Id.* In addition, we noted that trial courts are required to hold a hearing in order to ascertain whether a party's noncompliance with discovery was substantially justified or whether other circumstances make an award of expenses unjust. *Id.* Accordingly, we concluded that the trial court erred in not holding a hearing before awarding the Sheriff fees and expenses. *Id.* at 1187. We therefore reversed and remanded and ordered the trial court to hold a hearing in order

to make the threshold determination as to whether there has been compliance with discovery and, if not, whether substantial justification exists for the opposing party's conduct. Accordingly, upon remand, the trial court is to hold a hearing to determine whether Huber's conduct was substantially justified or whether an award of expenses would be otherwise unjust.

Id.

Upon remand, the trial court held a hearing on April 30, 2010. The court entered the following order on July 2:

The parties appeared by counsel on April 30, 2010, for hearing pursuant to the . . . decision of the Court of Appeals, which reversed the award of sanctions for [Huber's] failure to comply with [the Sheriff's] discovery requests, and remanded for a hearing to determine whether [Huber's] conduct was substantially justified or whether an award of expenses would be otherwise unjust. The Court heard argument of counsel and granted the parties leave until May 21, 2010, to file any pleadings.

[The Sheriff] filed his Verified Motion to Compel Discovery on July 6, 2009. His motion, [Huber's] motion and the Court records reveal the following timeline regarding discovery:

- 07-20-07 [The Sheriff] serves interrogatories and request for production.
- 08-23-07 Due date for responses.
- 11-15-07 Date requested by [Huber] for extension of time.
- 06-23-08 [Huber] promises to respond by July 15, 2008. [Huber] provides medical records of Dr. Muckway.
- 11-12-08 Court issues T.R. 41(E) Rule to Show Cause.
- 11-13-08 [Huber] wrote to [the Sheriff] that responses would be sent "in a few days."
- 11-14-08 [Huber] responded to T.R. 43(E) notice and Court vacated hearing.
- 01-15-09 [The Sheriff] attempted to resolve to resolve the matter by offering to accept responses by February 2, 2009.
- 01-31-09 [Huber] served responses.
- 02-05-09 [The Sheriff] contended [Huber's] responses were inadequate, incomplete or evasive, and wrote to [Huber] for supplementation, provided HIPAA release forms and a form to release [Huber's] federal tax returns.
- 05-19-09 [The Sheriff] asked [Huber] about status of supplementation.

- 06-10-09 [The Sheriff] wrote to [Huber] to supply supplementation by June 19, 2009.
- 07-06-09 [The Sheriff] filed his Verified Motion to Compel Discovery.
- 07-20-09 Order granting [the Sheriff's] motion to compel.
- 08-03-09 [Huber] served supplemental answers and response.
- 08-27-09 [Huber] filed Compliance With Court Order and Motion for Reconsideration of Sanctions.
- 09-16-09 [The Sheriff] filed response.
- 09-22-09 Order denying [Huber's] Motion for Reconsideration of Sanctions.
- 03-25-10 Order of Court of Appeals reversing and remanding for hearing.

The burden is on [Huber] to show that his opposition to the motion to compel discovery was substantially justified or that other circumstances make an award of expenses unjust.

[The Sheriff] contends that [Huber] failed to completely answer *Interrogatory 8* which requested all sources of income. [Huber] answered that he had no income in 2001-04 and only \$5,000 in 2005-06. [Huber] did not answer for 2007-09. [The Sheriff] contends that [Huber's] responses are "highly improbable", "extremely unlikely" and "inconsistent". The probity of the responses is not now before the Court; [the Sheriff] can explore [Huber's] income or lack thereof by deposing him. However, [Huber's] responses were dilatory by any reasonable measure.

[The Sheriff] requested information on [Huber's] fee arrangement in *Interrogatory 21 and Request for Production 15*. [Huber] responded: "Not relevant." [Huber] cites federal decisions to support his position. However, even if [Huber's] cited authority controls the issues as to the attorney fees sought in connection with this action, [Huber] has alleged in his complaint that he should recover the fees and expenses he incurred in the defense of the related criminal case. [Huber] has offered no justification for the failure to respond to the interrogatory and request for production as to such information.

[The Sheriff's] *Request for Production 9* requested complete medical records of any healthcare provider who treated [Huber] for any condition caused by or exacerbated by [the Sheriff]. [Huber] produced only

Dr. Muckway's records, although he named three treating physicians in his answer to *Interrogatory 14*. [The Sheriff] supplied HIPAA forms so records could be obtained directly from providers, but [Huber] did not execute and return the releases to [the Sheriff]. [Huber] asserts that he provided release forms for every healthcare provider who provided treatment; [Huber's] motion does not say when this was done, but according to [the Sheriff's] motion dated July 6, 2009, [the Sheriff] had not been furnished with such releases. At the hearing, [Huber] contended that, unlike federal discovery practice, in state court a party is not required to submit HIPAA forms and the opponent must proceed under the third-party discovery mechanism. [The Sheriff] concedes that such records must be obtained from the third-party doctor, but points out that [Huber] failed to provide the requested medical releases to obtain the records.

In order to find that [Huber's] conduct was substantially justified, the Court would in effect be rewriting the Rules of Trial Procedure to nullify the scope, time limitations and duties of parties found in the discovery rules. [Huber's] incomplete responses, unsupported claims of "not relevant" and repeated failures to respond by deadlines have delayed [the Sheriff's] basic discovery efforts by two years. [Huber] should not be entitled to use [the Sheriff's] forbearance in applying to the Court for relief as justification for his lack of compliance with [the Sheriff's] repeated efforts to obtain responses to discovery. [The Sheriff's] motion to compel was necessitated by [Huber's] conduct, and [the Sheriff] is entitled to the attorney fees previously ordered by this Court.

IT IS THEREFORE ORDERED that [Huber] pay the reasonable costs and attorney fees incurred by the necessity of filing the motion to compel discovery, in the sum of \$700.

Appellant's App. p. 109-13 (emphases added).

Huber filed a combined motion to reconsider and to correct errors, which the trial court denied. Huber now appeals.¹

Discussion and Decision

Huber contends that the trial court abused its discretion in imposing \$700 in discovery sanctions pursuant to Trial Rule 37(A)(4). Specifically, Huber argues that for

¹ In his appellee's brief, the Sheriff argues that this appeal should be dismissed because Huber did not timely file his notice of appeal. The motions panel of this Court already denied the Sheriff's motion, and we decline to reconsider it.

the challenged Interrogatory 14 and Request for Production 9 (Medical Records), Interrogatory 8 (Income Tax Records), and Interrogatory 21 and Request for Production 15 (Fee Agreement), he “fairly responded to or fairly objected to [them] [and] [n]one of [his] responses were deceptive or misleading. The information supplied was accurate and the objections well founded.” Appellant’s Br. p. 12.

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action. Ind. Trial Rule 26(B). It is not ground for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. *Id.* Indiana discovery rules are specifically designed to avoid surprise and trial by ambush. *Outback Steakhouse of Fla., Inc. v. Markley*, 856 N.E.2d 65, 76 (Ind. 2006). Accordingly, the trial court, acting as the referee, has broad discretion when ruling on discovery issues, and we will reverse only upon a showing that the trial court abused its discretion. *See Huber*, 940 N.E.2d at 1185-86. An abuse of discretion occurs when the trial court’s decision is clearly against the logic and effect of the facts and circumstances before the court or when the trial court has interpreted the law. *Id.* at 1186. As noted above, Trial Rule 37(A)(4) provides for an award of reasonable expenses related to a motion to compel, including attorney fees. *Id.* The award of sanctions is mandatory subject only to a showing that the losing party’s conduct was substantially justified or that other circumstances make an award of expenses unjust. *Id.*

Here, the trial court awarded sanctions because of Huber’s dilatory, incomplete, and evasive responses. When reviewing the trial court’s award, we start with

Interrogatory 8, which provided, “State all sources and amounts of income, earned or unearned, you received from January 1, 2001, to the present.” Appellant’s App. p. 21. This interrogatory is relevant to Huber’s request for damages. Huber answered “none” for 2001-04 and “\$5000” for 2005-06 for the rental of a trailer. *Id.* He did not answer for 2007-09, which is misleading and could mean no income or a failure to answer. *Id.* In the related Request for Production 8, the Sheriff asked for “[a]ny federal or state tax return that [Huber] filed, or prepared but did not file, for tax years 2001 through the present.” *Id.* at 31. Huber answered, “There are no such documents in [Huber’s] possession, custody or control.” *Id.* He did not answer that that he had never filed any tax returns, if that was indeed the case. We find this to be too clever by half.

Interestingly, in response to the trial court’s order later compelling discovery, Huber magically supplemented his response by stating that he had no income for 2007 and then provided a copy of his 2008 federal tax return. We find that this sort of gamesmanship justified the Sheriff’s efforts to seek more complete responses and the trial court’s award of sanctions.

We now turn to Interrogatory 21 and Request for Production 15, which relate to attorney fees. In his complaint, Huber requested attorney fees for the related criminal case and made a general request for attorney fees in this case. Interrogatory 21 asked, “In support of your claim for attorney fees, describe your fee arrangement with all counsel who are acting or have acted for you in this case, and the amount of fees incurred to date.” *Id.* at 26. Huber responded, “Not relevant. The entitlement to fees is independent of any contract or of any obligation to even make payments.” *Id.* Request for Production

15 asked for “[a]ll attorney fee agreements and billing under those agreements to date, both for the defense of the criminal charges brought against plaintiff *and* for this civil action.” *Id.* at 33 (emphasis added). Huber responded, “As to representation in this cause, the basics for any fee arrangement is not relevant to any issue between the parties. Notwithstanding such objection, there is no such document in [Huber’s] possession, custody, or control.” *Id.* (formatting altered).

On appeal, the parties argue about whether this case is the equivalent of a Section 1983 case as well as the significance of fee-shifting agreements. However, we need not enter this debate. At the very least, the amount of attorney fees in the related criminal case is relevant because Huber requested them. Request for Production 15 asked for billing in the criminal case, and Huber gave no response whatsoever for the criminal case. As the trial court stated, “[Huber] has offered no justification for the failure to respond to the . . . request for production as to such information.” *Id.* at 111. The trial court did not abuse its discretion in awarding sanctions directed to these discovery requests.

The final issue is Interrogatory 14 and Request for Production 9, which concern Huber’s medical records. Interrogatory 14 asked Huber to “[i]dentify by name and address every healthcare provider who has treated you for any medical, mental or emotional condition which you contend was caused or exacerbated by the defendant or any officer, employee or agent of the Montgomery County Sheriff, including the dates of treatment.” *Id.* at 23. Huber responded with the names of three doctors, Dr. M. A. Muckway, Dr. William B. Kleinman, and Dr. Ray Howell. Request for Production 9 then asked for “[c]omplete medical records of any provider of healthcare services who treated

or examined [Huber] for any medical or mental condition that [Huber] claims defendant caused or exacerbated. Tender of an executed authorization for release of medical records for each such provider will suffice. Blank authorizations are attached.” *Id.* at 31. Huber responded, “[Huber] produces those documents responsive to the Request which are in his possession, custody or control. *Id.* Huber is correct in his argument on appeal that the Sheriff was required to serve on all doctors a request for production of documents under Trial Rule 34(C). *See Canfield v. Sandock*, 563 N.E.2d 526, 527 (Ind. 1990) (“Pursuant to Ind. Trial Rule 34(C), Canfield then served on all six doctors a request for production of documents and a subpoena duces tecum which requested [medical records]. Trial Rule 34(C) requires that production requests made on nonparties be served on parties, and Canfield complied with this part of the rule by forwarding a copy of each request to Sandock’s attorney.”), *reh’g denied*. Accordingly, Huber could have objected to Request for Production 9. But Huber did not object. Instead, he elusively answered that he produced those documents that were in his possession and control. This was yet another attempt at gamesmanship. Taken alone, we may have determined that this response did not warrant sanctions, but given the totality of the circumstances and overarching policy favoring the discoverability of information, we conclude that the trial court’s \$700 discovery sanction is more than justified.

As a final matter, the Sheriff has requested appellate costs and attorney fees pursuant to Trial Rule 37(A)(4). We agree such expenses are warranted. If these expenses were not awardable, then the original, meager award of \$700 would be offset and its benefit negated. *See Georgetown Steel Corp. v. Chaffee*, 519 N.E.2d 574, 577

(Ind. Ct. App. 1988), *reh'g denied, trans. denied*. However, the trial court is the more appropriate forum for the evidentiary hearing necessary to determine the amount of such an award, and we therefore remand to the trial court on this issue. *See Mallard's Pointe Condo. Ass'n, Inc. v. L&L Investors Group, LLC*, 859 N.E.2d 360, 367 (Ind. Ct. App. 2006).

Affirmed in part and remanded.

KIRSCH, J., and MATHIAS, J., concur.