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**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0656**

Estate of Thomas J. McCarthy

**Filed February 4, 2013
Affirmed
Larkin, Judge**

Morrison County District Court
File No. 49-P8-06-000922

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(for respondent)

Considered and decided by Stoneburner, Presiding Judge; Kalitowski, Judge; and
Larkin, Judge.

UNPUBLISHED OPINION

LARKIN, Judge

Appellant challenges the district court's dismissal of his claim against his father's estate for medical support, including unreimbursed medical expenses and payments for health insurance, arguing that the district court abused its discretion by granting dismissal as a discovery sanction. Appellant also argues that the district court erred by failing to correct the record to reflect that his child-support claim extends back ten years from the date of his father's death rather than the date of his claim. Because the district court did

not abuse its discretion by dismissing appellant's claim and because appellant did not timely appeal the district court's order regarding his child-support claim, we affirm.

FACTS

Appellant Richard D. McCarthy is 52 years old. He was born with cerebral palsy and spastic quadriplegia, and he has lived with his mother, Irene McCarthy, his entire life. Decedent Thomas J. McCarthy and Irene McCarthy divorced in 1973. In the divorce decree, decedent was ordered to pay child support until appellant married, became emancipated, attained his majority or died, or until decedent died, whichever event occurred first. The divorce decree also required decedent to "maintain medical and hospital insurance coverage on [appellant]" for the same duration and to pay "all medical expenses incurred in the care and treatment of [appellant] that are in excess of applicable insurance coverage." Finally, decedent was required to maintain a \$50,000 life-insurance policy naming appellant as a beneficiary.

Decedent stopped paying child support on appellant's 21st birthday, June 6, 1981, and died on May 24, 2006. Respondent Linda McCarthy, decedent's surviving wife and named personal representative, filed a petition for formal probate of decedent's will, which specifically excluded appellant. Appellant made a claim against the estate on December 7, 2006, seeking an amount in excess of \$1.2 million for past and ongoing child support, including medical support, and \$50,000 in life-insurance benefits. Respondent disallowed the claim, and appellant petitioned the district court for allowance of the claim. The district court ordered that appellant could proceed with his child-support claim but limited his claim to the ten-year period before the date of his claim.

Respondent filed a final account of the estate's assets, which showed that the estate was insolvent. Appellant filed a separate lawsuit against decedent's revocable trust; that action was stayed pending the outcome of this matter. Respondent moved the district court to establish and allow appellant's claim against the estate in the amount of \$47,700. Respondent also moved the district court to amend its scheduling order, claiming that appellant had failed to respond to discovery requests and canceled his deposition the evening before it was to take place. The district court granted respondent's motion to establish and allow appellant's claim. Appellant appealed, and this court reversed, concluding that the district court erred in failing to consider past medical expenses when calculating child-support arrearages.

On remand, the district court scheduled separate trials on the issues of liability and damages. The district court also granted respondent's motion to compel discovery, ordering that appellant execute and provide a social security release-of-information form and a supplementary response to an interrogatory, regarding his claim for medical expenses. After the liability trial, the district court found that, because of his physical condition, appellant was incapable of self-support, and had been from the age of 21. The district court ordered that appellant be permitted to move forward with his claim for child support, including medical support, for the ten-year period prior to filing his claim.

The district court left discovery open following the liability trial but entered an order setting a date for the close of discovery and denying appellant's motion for a protective order. The district court also set a date for appellant to answer all previously served interrogatories and requests for production, deliver all documents he intended to

rely upon to respondent, and provide a statement of the full amount of the claim he intended to seek at trial. Appellant moved the district court for an order correcting the record to show that his claim extends back ten years from the date of decedent's death rather than the date of his claim. The district court denied the motion.

A week after the deadline for appellant to answer interrogatories and deliver documents passed, respondent moved the district court to disallow appellant's claims for unreimbursed medical expenses, payments for health insurance, and attorney fees and costs based on appellant's failure to comply with the district court's discovery orders. Following a hearing, the district court granted respondent's motion in part, dismissing with prejudice appellant's claim for medical support, including unreimbursed medical expenses and payments for health insurance, based on appellant's failure to comply with the discovery orders. This appeal follows.

D E C I S I O N

I.

Appellant first challenges the dismissal of his claims for unreimbursed medical expenses and payments for health insurance as a sanction for failing to comply with the district court's discovery orders. A district court has broad discretion to issue discovery orders which will not be disturbed on appeal absent a clear abuse of that discretion. *Shetka v. Kueppers, Kueppers, Von Feldt & Salmen*, 454 N.W.2d 916, 921 (Minn. 1990). "But dismissal with prejudice is the most severe sanction available and should be granted in only exceptional circumstances." *Frontier Ins. Co. v. Frontline Processing Corp.*, 788 N.W.2d 917, 922-23 (Minn. App. 2010), *review denied* (Minn. Dec. 14, 2010). Thus, a

court must consider two competing policies when reviewing dismissal as a discovery sanction:

On the one hand, a broad measure of discretion must be left to trial judges to enforce calendar rules, to prevent unnecessary and inexcusable delays, and to promote the public interest in keeping court dockets free of stale claims. On the other hand, [a]n order of dismissal on procedural grounds runs counter to the primary objective of the law to dispose of cases on the merits.

Hous. & Redev. Auth. of City of St. Paul v. Kotlar, 352 N.W.2d 497, 499 (Minn. App. 1984) (quotations and citation omitted).

The Minnesota Rules of Civil Procedure authorize a court to impose sanctions for failure to comply with a discovery order, and such sanctions include dismissing the claims of the disobedient party in whole or in part. Minn. R. Civ. P. 37.02(b). A district court is justified in dismissing a claim when a party willfully fails to comply with a discovery order without justification or excuse. *Breza v. Schmitz*, 311 Minn. 236, 237, 248 N.W.2d 921, 922 (1976). Because “[w]hen a party ‘has willfully and without justification or excuse refused to comply with discovery orders’ that party has ‘forfeited [the] right to a trial of [the] case on the merits.’” *Frontier*, 788 N.W.2d at 922 (quoting *Breza*, 311 Minn. at 237, 248 N.W.2d at 922). In Minnesota,

[a]ppellate courts have examined the following factors in determining whether a district court has abused its discretion in imposing discovery sanctions: (1) if the court set a date certain by which compliance was required, (2) if the court gave a warning of potential sanctions for non-compliance, (3) if the failure to cooperate with discovery was an isolated event or part of a pattern, (4) if the failure to comply was willful or without justification, and (5) if the moving party has demonstrated prejudice.

Id. at 923.

As to these factors, appellant argues that (A) the district court failed to warn of potential sanctions for noncompliance with the district court's discovery deadlines, (B) the district court failed to consider available alternatives to dismissal, (C) appellant's noncompliance was not willful or without justification, and (D) respondent did not demonstrate prejudice. We address each argument in turn.

A. *Clear warning of potential sanctions*

“Minnesota case law emphasizes two elements that an order compelling discovery should contain: (1) a date certain by which compliance is required, and (2) a warning of potential sanctions for non-compliance.” *Jadwin v. City of Dayton*, 379 N.W.2d 194, 196 (Minn. App. 1985). If “no specific date is ordered for compliance with a discovery order, dismissal is an inappropriate sanction.” *Bio-Line Inc. v. Wilfley*, 365 N.W.2d 338, 340 (Minn. App. 1985), *review denied* (Minn. July 26, 1985). Further, “[t]he existence of a clear warning by the [district] court that dismissal or a similar sanction would automatically result if the party did not comply with a discovery deadline has been a significant factor in determining on appeal whether such a sanction was appropriate.” *Frontier*, 788 N.W.2d at 923 (quotation omitted).

Appellant does not dispute that the district court set several specific deadlines for compliance in this case. As the district court summarized in its dismissal order,

[a]ll documents upon which [appellant] and Irene McCarthy intended to rely on for their claim for medical support, as well as a statement setting forth the full value of their claim and supplemental responses to all interrogatories, were to have been submitted to [respondent]'s attorney by February 15,

2012. Discovery also was to have been completed by March 9, 2012. None of these was done, even after multiple extensions of the discovery deadline and accommodations to [appellant] and Irene McCarthy regarding trial dates. The first discovery deadline was March 3, 2008. This was later changed to June 15, 2010. After this court granted [respondent]’s motion to compel, discovery was to have been completed by March 31, 2011. Yet [appellant] and Irene McCarthy missed each and every deadline.

Appellant argues, however, that “[n]owhere is there a clear and unambiguous admonition that any of the claims of [appellant] would be dismissed if there was failure to make the necessary responses by February 15, 2012.” Appellant asserts that “the District Court’s Order of November 7, 2011, does not contain any type of clear warning of specific potential sanctions.” The record refutes that assertion. The district court warned appellant of the potential sanctions for failing to comply with its discovery orders. In its November 7 order, the district court advised, “[t]o the extent [appellant] and Irene McCarthy are unwilling to allow [respondent to review the documents that support appellant’s claim], they will *forfeit* that portion of their claim.” (emphasis added). Further, in its memorandum supporting the November 7 order, the district court explicitly stated, “[r]ecovery will only be available for documented claims.” Although the district court did not say the claim would be “dismissed,” it said it would be “forfeited.” We discern little practical difference between the two terms—the district court warned that failure to comply with discovery would result in appellant’s inability to pursue and recover on the claim.

Moreover, *Frontier* does not require an explicit, “unambiguous admonition,” as appellant asserts. In *Frontier*, the district court imposed the sanction of dismissal

“[b]ased on the pattern of untimely discovery and the inadequate supplementation.” 788 N.W.2d at 923. On appeal, this court stated:

Despite the lack of an explicit statement by the special master prior to December 26, 2007, that failure to complete discovery would result in the dismissal of Frontier’s claims, we conclude that the special master’s detailed review of the inadequate discovery in the November 2, 2007 hearing, the firm December 20, 2007 discovery deadline, and the special master’s admonition requiring Frontier to comply with the rules of civil procedure, provided a clear, albeit implicit, warning . . . of the need to comply with the rules of civil procedure or be subject to sanctions.

Id. at 923-24 (emphasis added).

Similar facts support the district court’s dismissal in this case. In its memorandum in support of its November 7, 2011 order, the district court set forth the lengthy history of inadequate discovery and expressed its frustration with “the ongoing discovery issues and requests for continuances.” Further, the district court ordered that “[d]iscovery shall be completed in full by March 9, 2012,” and that appellant and Irene McCarthy shall answer interrogatories and requests for production of documents, produce all documents they intended to rely on to support their claims, and provide a statement of the full amount they planned to seek at trial. Lastly, the order advised that appellant’s failure to provide discovery would result in appellant’s forfeiture of the corresponding claim. The district court’s November order provided a more explicit warning than the one in *Frontier*, and we conclude that it was adequate to put appellant on notice of the potential sanction of dismissal should he fail to comply.

B. Alternatives to dismissal

Appellant next argues that the district court abused its discretion by failing to “consider less severe alternative sanctions to dismissal.” Minnesota courts have taken into account the availability of alternative sanctions when determining whether a district court abused its discretion by granting dismissal as a sanction. *See, e.g., Beal v. Reinertson*, 298 Minn. 542, 544, 215 N.W.2d 57, 58-59 (1974) (“[I]n view of . . . the alternatives available . . . the action taken was too drastic.”); *Sudheimer v. Sudheimer*, 372 N.W.2d 792, 795 (Minn. App. 1985) (“[I]n view of . . . the alternatives available, and the severity of the sanction, the court’s action was premature.”). Without indicating what alternative sanctions were available or explaining how or why an “alternative sanction” would have been more appropriate, appellant essentially argues that the district court must not have considered any alternatives because it did not discuss such alternatives in its dismissal order. Appellant’s argument is unavailing.

At the motion hearing, the district court specifically asked counsel for both parties about alternatives to dismissal. Counsel for respondent stated, “At this point I don’t know what it would be, your honor. I mean, what is the alternative, other than as I say, in effect, start . . . another cycle of orders?” Appellant’s counsel simply referred the court to Minn. R. Civ. P. 37 for “adequate substitutes for outright dismissal.” Rule 37 provides the district courts with a list of available sanctions, including the power to issue an order “dismissing the action or proceeding or any part thereof.” Minn. R. Civ. P. 37.02(b)(3). The only specific alternative mentioned by appellant’s counsel, however, was a continuance, stating, “we don’t have any objection to a continuance of the trial date,

Judge.” The district court’s memorandum supporting its dismissal order states that “[b]ecause this court is unwilling to permit further delay, . . . [respondent]’s motion to disallow [appellant] and Irene McCarthy’s claim for medical support in this case is granted.” This statement reflects the district court’s consideration of alternative sanctions and its conclusion that the additional delay attendant to such sanctions was understandably unacceptable.

C. Willfulness of appellant’s noncompliance

As to appellant’s failure to cooperate with discovery, the district court stated:

[Appellant’s] and Irene McCarthy’s failure to cooperate with discovery has been part of a pattern in this case. . . . [T]hey have repeatedly missed discovery deadlines, and even now there was no guarantee that the documents needed to support their claim for medical support would be produced in time for trial, only that they would be produced shortly.

Appellant does not dispute the district court’s finding of a pattern in this case. But appellant argues that “[his] inability to provide documentation to support his claims by March 9, 2012, did not arise out of a willful or bad-faith refusal to comply with discovery orders. It arose out of the combined health issues of both [him and his mother].” Appellant contends that “[t]his is not a case where the [a]ppellant has deliberately failed to comply with discovery orders, or deliberately failed to appear in response to orders requiring personal appearance.” The district court disagreed:

While this court has sympathy for [appellant] and Irene McCarthy given their physical limitations, because it has been more than five years since this case was filed and four years since the first discovery deadline, this court can only assume that their failure to comply with discovery was willful. There can be no reasonable justification for the failure to disclose

medical billing information during the many years this case has been pending. [Appellant]’s and Irene McCarthy’s unwillingness to comply with this court’s orders is further evidenced by their attempts to limit discovery to their own terms and their stated frustration with this court’s unwillingness to grant a protective order in this case.

The record supports the district court’s assessment of the willfulness of appellant’s noncompliance. As respondent points out, this is not a case where the district court sanctioned appellant because he failed to meet a single deadline. Rather, the record reflects that the district court and respondent accommodated appellant and Irene McCarthy’s health issues by granting or agreeing to numerous continuances.

For example, in March 2008, respondent moved the district court to amend the scheduling order because appellant had failed to respond to discovery requests. In September 2010, respondent agreed to a continuance requested by appellant, even though trial was scheduled to begin in three weeks. In December 2010, the district court responded to respondent’s motion to compel discovery by setting a new deadline for appellant to produce certain documents and respond to discovery. In addition, the district court bifurcated the trial because appellant did not have his medical information ready for disclosure and needed additional time for discovery. In January 2011, the district court continued the liability trial. After the liability trial, the district court kept discovery open regarding the remaining issues until October 15, 2011. In October 2011, however, the parties agreed to push the discovery deadline out to March 2012 to accommodate appellant. And, once again, the district court ordered appellant to comply with his discovery obligations without imposing sanctions. Finally, in March 2012, the district

court dismissed appellant's medical-support claims because, after five years, he still had not satisfied his obligations to provide the information and documentation necessary to substantiate his claims for unreimbursed medical expenses and payments for health insurance.

In sum, because appellant was given numerous opportunities to comply with his discovery obligations before dismissal—based on the same reasons that appellant now asserts for his noncompliance—the district court appropriately found that appellant's pattern of noncompliance and delay was willful and without justification.

D. Prejudice

“In order to justify the harsh discovery sanction of dismissal the moving party must demonstrate that it suffered prejudice from the discovery violation.” *Frontier*, 788 N.W.2d at 924. The Minnesota Supreme Court has stated:

The primary factor to be considered in determining whether to grant a dismissal with or without prejudice is the prejudicial effect of the order upon the parties to the action, although under extraordinary circumstances a dismissal with prejudice might be justified even though no prejudice to defendant is shown. Obviously, the prejudice to plaintiff of such a dismissal is certain and usually permanent. As to defendant, the ordinary expense and inconvenience of preparation and readiness for trial, which can be adequately compensated by the allowance of costs, attorney's fees, or the imposition of other reasonable conditions, are not prejudice of the character which would justify either a refusal to permit plaintiff to dismiss without prejudice or a dismissal with prejudice. The defense has the burden of showing particular prejudice of such a character that some substantial right or advantage will be lost or endangered if plaintiff is permitted to dismiss and reinstitute the action. Such prejudice should not be presumed nor inferred from the mere fact of delay.

Firoved v. Gen. Motors Corp., 277 Minn. 278, 283-84, 152 N.W.2d 364, 368 (1967) (citation omitted).

Appellant argues that “there has been no showing that [respondent] would be meaningfully prejudiced by a delayed document disclosure.” The district court determined that respondent had been prejudiced by appellant’s discovery violations in that she was “unable to meaningfully prepare for cross-examination given the complexity of [appellant’s] claim for medical support.” The district court also noted that respondent was unable to close the estate “in a speedy and efficient manner.” Appellant contends that any prejudice resulting from respondent’s inability to prepare for cross-examination no longer exists because a new trial date will have to be set if he prevails on appeal. Appellant also contends that respondent’s interest in closing the estate in a speedy and efficient manner is neutralized by appellant’s parallel action against decedent’s trust, which would continue even after his claim against the estate is resolved. These arguments are unpersuasive.

In *Frontier*, this court recognized that a party’s inability to mount an effective defense due to the opposing party’s failure to comply with discovery and court orders was sufficient prejudice to warrant sanctions. 788 N.W.2d at 925. More specifically, this court concluded that “[i]n light of Frontier’s persistent, willful failure to provide meaningful discovery after four years of litigation, prejudicing respondents by preventing them from preparing a defense, we conclude that the district court did not abuse its discretion by ordering dismissal as a discovery sanction.” *Id.* Here, the damages trial was scheduled to take place on April 12, 2012, and, as appellant’s counsel admitted at the

March 9 hearing, appellant had not yet turned over information to substantiate his claim for medical support. Therefore, the record reflects that, as of March 9—five years and three months after appellant filed his claim for unreimbursed medical expenses and payments for health insurance and approximately four weeks before trial—the personal representative did not have the necessary information to form an effective defense against the claims.

Appellant’s argument that respondent will now have adequate time to prepare for a newly scheduled trial after appeal is unavailing. This court reviews the discovery sanction in the context of the facts as they existed at the time of the district court’s order. Similar to the defendant in *Frontier*, respondent was unable to prepare an effective defense after more than five years of litigation, due to appellant’s willful failure to provide the information and documentation necessary to substantiate his medical-support claim.

Moreover, one of the underlying purposes of Minnesota’s Uniform Probate Code is “to promote a speedy and efficient system for liquidating the estate of the decedent and making distribution to successors.” Minn. Stat. § 524.1-102(b)(3) (2012). Appellant does not dispute that his noncompliance with discovery orders has delayed the liquidation and distribution of decedent’s estate. Instead, appellant argues that the delay is neutralized by the fact that the decedent’s estate is insolvent and a parallel action will continue against the decedent’s trust after the estate is closed. But appellant ignores the fact that the district court’s dismissal order came nearly six years after the decedent’s death in a case the district court described as “the oldest matter before this court.”

Appellant also ignores the connection between the probate and trust matters. Despite the estate's insolvency, the action against decedent's trust is stayed until appellant's action against the estate is resolved. Therefore, the parallel trust action is delayed along with the probate action, bolstering the district court's finding of prejudice.

In conclusion, the district court was very patient with appellant during this protracted matter and provided him with numerous opportunities to comply with discovery orders. When appellant had ultimately failed to do so a month before the scheduled trial date, the district court considered all of the relevant factors in deciding respondent's motion to dismiss as a sanction. The district court's detailed order and memorandum reflects its thoughtful consideration of the relevant factors—all of which support the sanction imposed. Therefore, in light of appellant's persistent, willful failure to comply with the district court's discovery orders after more than five years of litigation and the prejudice caused to respondent, we conclude that the district court did not abuse its discretion by ordering dismissal of appellant's claims for unreimbursed medical expenses and payments for health insurance as a discovery sanction.

II.

Appellant also argues that the district court erroneously denied his motion to change the ten-year recovery period for child support to make it end on May 24, 2006, the date of decedent's death, rather than December 7, 2006, the date he filed his notice of claim. In denying appellant's motion, the district court reasoned that appellant was not entitled to the relief sought because the issue was determined by the district court in August 2007, and it was not timely appealed.

In probate proceedings in Minnesota, an appeal to the court of appeals may be taken from “an order permitting, or refusing to permit, the filing of a claim, or allowing or disallowing a claim or counterclaim, in whole or in part, when the amount in controversy exceeds \$100.” Minn. Stat. § 525.71(a)(5) (2012). Such an appeal must be taken “within six months after the filing of the order.” Minn. Stat. § 525.712 (2012). And an “appealable order becomes final if a timely appeal is not taken.” *Janssen v. Best & Flanagan, LLP*, 704 N.W.2d 759, 765 (Minn. 2005).

In the memorandum accompanying its August 21, 2007 order, the district court expressly stated that “[appellant]’s child support arrearages would be limited to those accumulating within the past 10 years from the date of his motion in December 2006.” Further, in the memorandum supporting its July 28, 2008 order, the district court reiterated that appellant’s “[c]hild support arrearages were limited to ten years preceding [appellant]’s written statement of claim which was filed December 7, 2006.” Appellant did not appeal the August 2007 order and did not raise the timing issue in his appeal of the July 2008 order. Instead, appellant waited until January 27, 2012, to challenge the district court’s limitation of his child-support claim. As this court stated in appellant’s previous appeal, the August 2007 order was an appealable order under Minnesota’s probate code because it partially disallowed appellant’s child-support claim by limiting it to a ten-year period preceding the filing of his claim. *Estate of McCarthy*, No. A08-1581, 2009 WL 2926310, at *2 n.1 (Minn. App. Sept. 15, 2009) (citing Minn. Stat. § 525.71(a) (2008)), *review denied* (Minn. Nov. 24, 2009). Because a timely appeal was not taken from the order, it is final and we will not review it.

Appellant argues that Minn. Stat. § 524.1-304(b) (2012) provides the probate court with the “power to correct, modify, vacate, or amend its records, orders, and decrees” for the correction of judicial error. But appellant ignores the express limitations on such power. The statute states that the court may only correct a judicial error “within the time for taking an appeal.” Minn. Stat. § 524.1-304(b)(2). Appellant did not ask the court to correct the alleged error within the time for taking an appeal. Thus, section 524.1-304(b) does not provide a basis for relief.

Affirmed.