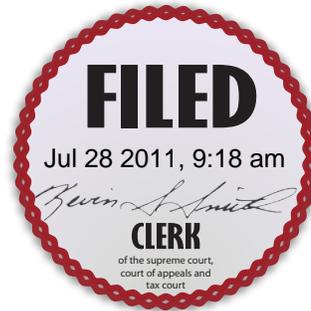


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

CHRISTINA SMITH,)
)
Appellant-Plaintiff,)
)
vs.) No. 67A05-1006-PL-644
)
TRILOGY HEALTH SERVICES,)
)
Appellee-Defendant.)

APPEAL FROM THE PUTNAM SUPERIOR COURT
The Honorable Sam Swaim, Special Judge
Cause No. 67D01-0901-PL-1

July 28, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Christina Smith appeals from the trial court's order requiring her to pay \$1,000 in attorney fees to Trilogy Health Services (Trilogy) as a sanction for a discovery dispute. Smith presents the following restated issue for our review: Did the trial court err by concluding that Smith had failed to comply with discovery such that a monetary sanction was warranted?

We reverse and remand.

Smith's employment with Trilogy at its nursing facility in Greencastle, Indiana, was terminated on April 1, 2008. On January 8, 2009, Smith filed a complaint in which she alleged that various torts were committed against her by Trilogy and its agents, including wrongful termination, blacklisting, and defamation.

Trilogy mailed requests for production and interrogatories to Smith on December 7, 2009. The responses were therefore due on January 11, 2010. The parties also had arranged for Smith's deposition to take place on February 25, 2010. On January 29, 2010, Trilogy's counsel sent a letter to Smith's counsel via facsimile and U.S. Mail requesting Smith's discovery responses and discussing her failure to respond. The letter also requested that counsel for Smith call Trilogy's counsel to discuss the matter on February 1, 2010. On February 9, 2010, counsel for both parties conferred by telephone and counsel for Smith proposed a February 25, 2010 deadline for service of the overdue discovery responses. At that point in time, Smith's counsel believed that the parties had reached an agreement regarding the submission of the discovery responses, but received a letter via facsimile from counsel for Trilogy the next day indicating that Trilogy intended to file a motion to compel

discovery by February 25, 2010, and would seek sanctions and the denial of Smith's right to object to production and waiver of claims of privilege.

On February 11, 2010, Smith filed a motion for enlargement of time in which to respond to Trilogy's discovery requests by the previously agreed upon date, February 25, 2010. That same day, Trilogy filed its motion to compel in which Trilogy stated that the parties were in dispute about the discovery responses, and asked the trial court to execute a proposed order that would direct Smith to respond to discovery by February 25, 2010, pay Trilogy's attorney fees for filing the motion to compel, and to prevent Smith from filing any objections to the discovery requests.

On February 12, 2010, the trial court approved Trilogy's proposed order as to its motion to compel. On February 18, 2010, the trial court granted Smith's motion for enlargement of time to respond to Trilogy's discovery requests by February 25, 2010. Smith served her responses on February 25, 2010, in which she lodged objections. On March 1, 2010, Smith filed a notice of compliance in which she certified that she had served her answers and responses to Trilogy on February 25, 2010.

Trilogy filed a petition for attorney fees on February 25, 2010. In the petition, counsel for Trilogy claimed entitlement to reasonable attorney fees pursuant to the trial court's previous order. Trilogy's counsel's affidavit claimed attorney fees in the amount of \$1,625.00 as a result of the discovery dispute and motion to compel. On March 2, 2010, the trial court gave Smith thirty days in which to respond to Trilogy's petition. On April 1, 2010, Smith filed her response to Trilogy's petition for attorney fees and motion to reconsider and strike the court order awarding sanctions. In that response, Smith explained that her delay in

responding was caused by the fact that she had relocated twice, and was attempting to unpack items in order to find the requested documents. Smith also requested a hearing on the pending matters.

Trilogy filed a reply in support of its petition for attorney fees and a response to Smith's motion to reconsider. Trilogy also filed a new motion for contempt and other sanctions for Smith's noncompliance with discovery and additional sanctions based upon Smith's objection to certain interrogatories and requests for production.

The trial court heard argument on May 5, 2010, at which time Trilogy submitted a supplemental petition for attorney fees, now totaling \$7,742.50. The trial court issued its order on May 26, 2010, which reads as follows:

Comes now the Court on [Trilogy's] Motion to Compel and Sanctions, and [Smith's] Motion to Reconsider the Court's February 12, 2010 Order imposing sanctions on [Smith]. The Court must confess that the Court did not intend to Order that [Smith] had "waived all objections and claims of privilege with regard to pending discovery." That language was included in [Trilogy's] prepared Order and was overlooked by this Judge. The Court did intend to compel [Smith] to answer discovery by February 25, 2010, yet it is also this Court's policy to always allow for a hearing before issuing sanctions, including attorney fees. A Hearing was held on May 5, 2010 and after hearing arguments and receiving exhibits, the Court does now find that [Smith] has been tardy and evasive with her discovery responses and that reasonable attorney fees must be awarded to [Trilogy] per Trial Rule 37(A)(4). However, the Court recognizes that discovery disputes are a regular part of civil litigation. In addition, given that the portion of the Court's February 12, 2010 [order] concerning waived privileges was issued erroneously, the Court may have added to the problem and caused additional fees. Based on these circumstances, the Court will award [Trilogy] \$1,000 in attorney fees to be paid by [Smith] for her conduct in necessitating discovery enforcement.

Appellant's Appendix at 213. The trial court also vacated the portion of its February 12, 2010 order that stated Smith had waived all objections and claims of privilege with regard to pending discovery. Smith now appeals.

We note at the outset that Trilogy has failed to file an appellee's brief. When an appellee fails to submit a brief, we need not undertake the burden of developing an argument for the appellee. *MPACT Const. Group, LLC v. Superior Concrete Constructors, Inc.*, 785 N.E.2d 632 (Ind. Ct. App. 2003). This court may reverse the trial court if the appellant makes a prima facie showing of reversible error. *Id.* "Prima facie, in this context, is defined as 'at first sight, on first appearance, or on the face of it.'" *Burrell v. Lewis*, 743 N.E.2d 1207, 1209 (Ind. Ct. App. 2001) (quoting *Johnson Cnty. Rural Elec. Membership Corp. v. Burnell*, 484 N.E.2d 989, 991 (Ind. Ct. App. 1985)).

Indiana Trial Rule 26(B)(1) provides in relevant part that:

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject-matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or the claim or defense of any other party . . .

When the goals of the self-executing discovery system break down, Trial Rule 37 provides the trial court with tools to enforce compliance. *Hatfield v. Edward J. DeBartolo Corp.*, 676 N.E.2d 395 (Ind. Ct. App. 1997). One of those options is a motion to compel discovery under Trial Rule 37(A). A trial court enjoys broad discretion in determining the appropriate sanctions for a party's failure to comply with discovery orders. *Smith v. Smith*, 854 N.E.2d 1 (Ind. Ct. App. 2006). An abuse of discretion occurs when the trial court's decision is against

the logic and natural inferences to be drawn from the facts of the case. *Id.* Where a party disobeys a trial court's discovery order, the trial court may issue

[a]n order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party.

Ind. Trial Rule 37(B)(2)(c).

The genesis of this controversy was Smith's inability to comply with Trilogy's December 7, 2009 discovery request by January 11, 2010. Available to Trilogy were several options, such as filing a motion to dismiss the claim for failure to prosecute, negotiations with Smith's counsel for compliance with Trilogy's discovery request, and a motion to compel discovery. Trilogy initiated a discussion with counsel for Smith in order to secure Smith's compliance with discovery, and an agreed date of February 25, 2010 was proposed and Smith believed was initially accepted.¹ Due to understandable concerns about future compliance hinging upon a verbal agreement, Trilogy apparently opted to renege on the verbal agreement, which it characterized in writing as a proposal, instead seeking a motion to compel compliance by the same date. After the collapse of what Smith believed was a verbal agreement between the parties regarding discovery, Smith sought a motion for enlargement of time in which to respond by the February 25, 2010 date. Both motions were granted by the trial court, and Smith did comply with discovery in the time allotted by those orders.

¹ We characterize the parties' positions and actions in this light because of our standard of review where the appellee has failed to file a brief. The appellee may be considered to have confessed error by not filing a brief, and the appellate court may consider the statements of facts contained in appellant's brief both to be true and sufficient for the disposition of the appeal. *Danov v. Color Tile, Inc.*, 571 N.E.2d 327 (Ind. Ct. App. 1991).

Problems arose from Trilogy's inclusion in the motion to compel and the proposed order on that motion of a discussion regarding an award of attorney fees as sanctions. That request appears to us to have been anticipatory, because as of the date of discussions on February 9, 2010, Trilogy had billed only one hour in regard to discovery issues in this matter. The relief sought via the motion to compel--compliance with the discovery requests by February 25, 2010--was obtained. The imposition of additional sanctions at that point would have been anticipatory and punitive in nature.

Smith correctly asked the trial court to reconsider its February 12, 2010, order. After a hearing on the pending motions, the trial court vacated the portions of its order finding that attorney fees were warranted, as they were premature, and that Smith had waived all objections and claims of privilege with regard to pending discovery. The trial court expressly explained in its May 26, 2010 order that it had intended to compel Smith to comply with Trilogy's discovery requests by February 25, 2010, but had not intended to find a waiver of claims or privileges, and normally awarded attorney fees as a sanction for non-compliance with discovery after holding a hearing, which it had not done as of February 12, 2010.

As of the date of the hearing on May 5, 2010, a new deposition date had been scheduled and Smith was in compliance with the trial court's discovery orders. Thus, it appears to us that an award of attorney fees as a sanction, certainly not in the amount of \$1,000, was unnecessary and not warranted. The additional fees amassed by Trilogy appear to be the direct result of the language in the proposed order, erroneously adopted by the trial court, suggesting that the trial court find that Smith had waived all objections and claims of privilege with regard to pending discovery. Those fees were not incurred as a result of non-

compliance with the trial court's order on the motion to compel with responses due on February 25, 2010. We find that the trial court abused its discretion in awarding attorney fees to Trilogy and reverse its order to that effect.

Judgment reversed and remanded.

BAILEY, J., and BROWN, J., concur.