

No. 30121 -- Milton Lee Mills and Vanessa F. Mills v. Herman William Davis, U-Haul Rental Company and Republic Western Insurance Company

Maynard, Justice, dissenting:

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The undisputed facts of this case show that on October 3, 2000, the circuit court entered an order requiring Mr. Mills to submit to an independent medical examination. A medical examination was scheduled for October 25, 2000, and Mr. Mills failed to attend. At a pre-trial conference, counsel for Mr. Mills speculated that he may have been unable to attend the examination due to his attendance at a funeral. The circuit court then gave Mr. Mills the opportunity to substantiate this excuse which he was unable to do. As a result, the circuit court dismissed with prejudice Mr. Mills' remaining claim for underinsured motorist benefits against State Farm. This Court now reverses the dismissal because there was no motion to compel discovery prior to dismissal.

The majority hinges its decision on our rule that generally, prior to the imposition of sanctions under W.Va.R.Civ.P. 37, the other party must file a motion to have the court compel discovery. In the instant case, however, the application of this rule improperly places form over substance and, as a result, works an injustice to the appellee. According to Rule 37(b)(2), in part, "If a party . . . fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35 . . . the court in which

the action is pending may make such orders in regard to the failure as are just[.]” The rule proceeds to list several available sanctions, one of which is dismissal of the case. The circuit court’s October 3, 2000 order stated, in part, “It is ORDERED that the discovery deadline in this matter shall be September 30, 2000. However, it is further ORDERED that the defendant will be allowed to get any necessary independent medical examinations of the plaintiffs after that date.” I believe that this order constitutes “an order to provide or permit discovery,” under Rule 37(b)(2). Therefore, according to the clear provisions of Rule 37, sanctions may be ordered.

Concerning the propriety of sanctions in a given set of circumstances, this Court provided in *Bartles v. Hinkle*, 196 W.Va. 381, 390, 472 S.E.2d 827, 836 (1996):

The party seeking sanctions under Rule 37(b) has the burden of proving noncompliance with a discovery order. If established, the burden of proof shifts to the noncompliant party to demonstrate either that it was unable to comply or that special circumstances exist which make the imposition of sanctions unjust. If it is demonstrated that a noncompliant party intentionally or with gross negligence failed to obey a court order, the full range of sanctions under Rule 37(b) is available to the court.

(Citations omitted). Applying this rule to the instant facts, it is uncontested that Mr. Mills failed to comply with the circuit court’s October 3, 2000 order to provide or permit discovery. The burden then shifted to Mr. Mills to demonstrate either that he was unable to comply or that special circumstances exist which make the imposition of sanctions unjust. Mr. Mills was

completely unable to meet this burden despite being given ample opportunity to do so by the circuit court. In its November 17, 2000 order of dismissal, the circuit court said:

At the hearing on the motion for sanctions of the defendant, Herman William Davis, held on November 14, 2000, this court ordered the plaintiff to produce, by November 17, 2000 at 2:00 p.m., the reason he was not in attendance at the independent medical examination. The plaintiff has not produced such evidence.

Accordingly, because of Mr. Mills failure to justify his noncompliance with the circuit court's order, I believe that sanctions were appropriate.

Moreover, I do not believe that the sanction imposed was too severe under the facts of this case. In *Bartles*, 196 W.Va. at 389, 472 S.E.2d at 835, this Court set forth several pertinent considerations in the assessment of appropriate sanctions:

Among those commonly mentioned are the public's interest in the expeditious resolution of litigation, the court's need to manage its docket, the severity of the violation, the legitimacy of the party's excuse, the repetition of violations, the deliberateness *vel non* of the misconduct, mitigating excuses, prejudice to the other side and to the operations of the court, and the adequacy of other sanctions.

(Citation omitted). The facts indicate that Mr. Mills deliberately failed to attend an independent medical examination. Further, because Mr. Mill's medical condition was to be the most significant issue at trial, his failure to attend the examination had a major impact on the case. In addition, Mr. Mills did not provide any mitigating excuses to the circuit court to explain the missed appointment. In light of these facts, I believe that dismissal of the case with

prejudice was appropriate.

Finally, I am concerned that the majority opinion may have unfortunate consequences for the discovery process in future cases. For example, parties may be encouraged to delay or disregard compliance with discovery orders until specifically threatened with impending sanctions by circuit courts. This would impede efforts by circuit courts to efficiently manage their dockets, and in turn prevent the speedy resolution of disputes.

In conclusion, for the reasons stated above, I do not believe that the circuit court abused its discretion in dismissing the case below. Accordingly, I dissent.