

CHRISTOPHER BARBAREVECH, M.D.,
and TERESA BARBAREVECH,

Plaintiffs

vs.

NICOLE A. TOMLINSON, HERTZ
VEHICLES, LLC, THE HERTZ
CORPORATION, and HERTZ GLOBAL
HOLDINGS, INC.,

Defendants

IN THE COURT OF COMMON PLEAS
OF LACKAWANNA COUNTY

CIVIL ACTION – LAW

NO. 18 CV 4821

ORDER

MAURIE B. KELLY
LACKAWANNA COUNTY
2021 OCT 29 P 2:39
CLERK OF
JUDICIAL DEPT
CIVIL DIVISION

Plaintiffs, Christopher Barbarevech, M.D., and Teresa Barbarevech (the “Barbarevechs”), filed a “Motion for Sanctions” and supporting brief on September 20, 2021, seeking the imposition of sanctions against defendants, Nicole Tomlinson, Hertz Vehicles LLC, the Hertz Corporation, and Hertz Global Holdings, Inc. (“Hertz”), based upon their “brazen failure to comply with the Court’s May 16, 2019, November 14, 2019, and August 24, 2021 Orders.” (Docket Entry No. 196 at p. 1; Docket Entry No. 197 at p. 1). Pursuant to paragraph 2 of the Scheduling Orders dated October 9, 2020, and April 1, 2021, Hertz’s opposing brief was to be filed by no later than September 30, 2021. (Docket Entry No. 138 at ¶ 2; Docket Entry No. 150 at ¶ 2). Hertz has never filed a

responsive brief challenging the Barbarevechs' factual assertions or otherwise opposing their requested relief.

The Barbarevechs assert that plaintiff, Christopher Barbarevech, M.D. ("Dr. Barbarevech"), sustained serious personal injuries on January 2, 2018, when Hertz's employee, Nicole A. Tomlinson, "made an improper left turn in the path" of Dr. Barbarevech's vehicle that was proceeding in the opposite direction in his lawful lane of travel. Barbarevech v. Tomlinson, 2020 WL 3039251, at *2 (Lacka. Co. 2020). They maintain that Dr. Barbarevech sustained significant low back injuries, "which required him to undergo L2, L3, partial L4 laminectomy, L2-L3, L3-L4 bilateral microdiscectomy and bilateral foraminotomy, and L1-L5 decompression and fusion surgery," a "complete rupture of the right quadriceps tendon, superior pole of the patella with extension of tear into the medial and lateral retinaculum, which necessitated a right knee quadriceps tendon repair," and "left ulnar neuropathy, bilateral hand neuropathy, and bilateral foot drop that have resulted in bilateral hand weakness, numbness, and tingling, antalgic and altered gait, persistent pain, fatigue, stiffness and weakness, and self-care dysfunction." Id. According to Hertz, the Barbarevechs are "seeking \$38,000,000.00 because [Dr. Barbarevech] can never practice medicine again." Id. at *4.

In accordance with Pa.R.C.P. 4003.2, which entitles a party to "obtain discovery of the existence and terms of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action," the Barbarevechs served discovery seeking Hertz's relevant insurance coverage information and policies, and after waiting eight months for Hertz's discovery responses, they filed a "Motion to Compel Full and Complete Discovery

Responses.” (Docket Entry Nos. 22-23). On May 20, 2019, Senior Judge Carmen D. Minora entered an Order dated May 16, 2019, granting the Barbarevechs’ motion and directing Hertz to “serve, without objections, full and complete responses to [the Barbarevechs’] discovery related to insurance and entity information within five (5) days from the date of this Order.” (Docket Entry No. 26). Judge Minora further cautioned that Hertz “shall suffer further appropriate sanctions for [Hertz’s] non-compliance.” (Id.).

Hertz “produced an excess insurance policy for Hertz Global Holdings, Inc.,” that was issued by CHUBB, but the “CHUBB policy does not provide any information relevant to Defendant Hertz Vehicles, LLC or The Hertz Corporation and does not make clear whether the coverage is an aggregate amount per each occurrence or a total aggregate for the year, and if a total aggregate for the year, how much of the aggregate is still available.” (Docket Entry No. 197 at ¶¶ 6-7). Although the Barbarevechs requested those terms of Hertz’s insurance coverage, Hertz rejected their “request for further insurance information beyond the \$10M in self insurance coverage,” and stated that it was not “providing any more information about claims against Hertz.” (Docket Entry No. 197, Exhibit B). Consequently, the Barbarevechs filed a “Motion to Compel Defendants’ Compliance with the Court’s May 16, 2019 Order and for Sanctions” on June 12, 2019, (Docket Entry No. 53), and on November 14, 2019, Judge Minora granted that motion. (Docket Entry No. 76 at p. 9). He found Hertz’s “non-compliance to be technical” and decided to “impose no sanctions for same,” but admonished Hertz that it was “to provide the discovery responses sought by the [Barbarevechs] within twenty (20) days of the date of this Order, said responses to be made in strict conformity with the Rules of Civil Procedure governing discovery, a failure to do so resulting in the imposition of sanctions

against [Hertz] as governed by Rule 4019 of the Pennsylvania Rules of Civil Procedure.”
(Id.).

However, “[f]rom November 14, 2019, through December 23, 2020, [Hertz] failed and/or refused to provide any further insurance information.” (Docket Entry No. 197 at ¶ 11). On December 23, 2020, Hertz produced a two-page “Broker’s Letter of Authorization” stating “that effective January 18, 2020, Hertz appointed Aon Risk Services Central, Inc. as the exclusive Broker of Record for Hertz Global Holdings, Inc. with respect to a number of insurance policies,” but “none of the listed policies on the Broker’s Letter match[ed] the CHUBB policy previously produced by [Hertz].” (Id. at ¶ 12). Moreover, the corporate designee produced by Hertz to address “all insurance coverages, including primary, excess, and those coverages in existence and applicable to the motor vehicle collision,” had not “look[ed] at an umbrella policy,” could not recall the insurance documents that defense counsel had provided to him to review, did not “bring any documentation with [him] with respect to Hertz’s insurance coverages as they apply to this case,” and was instructed by Hertz’s counsel not to answer any further inquiries concerning the insurance coverages. (Deposition of Christopher J. Zitkevitz dated 1/3/20, attached to Docket Entry No. 197 as Exhibit D, at pp. 81-86). As a result, the Barbarevechs remained “unable to determine . . . whether there are any other insurance policies applicable to [Hertz] that are relevant to this incident,” particularly since the police report indicates that the subject vehicle “was owned by Hertz Vehicles LLC and was insured by Ace American Insurance.” (Docket Entry No. 197 at ¶¶ 15-16).

For that reason, on July 26, 2021, the Barbarevechs filed a “Motion to Enforce Defendants’ Compliance with the Court’s May 16, 2019 and November 14, 2019 Orders

and For Sanctions.” (Docket Entry No. 162). Following Hertz’s submission of its response and opposing brief, an Order was issued on August 24, 2021, which decreed:

1. “Plaintiffs’ Motion to Enforce Defendants’ Compliance with the Court’s May 16, 2019, and November 14, 2019 Orders & For Sanctions” is GRANTED in part and DENIED in part;

2. Plaintiffs’ motion is granted to the extent that within the next seven (7) days, defendants shall answer “Plaintiffs’ Discovery related to insurance and entity information,” Barbarevech v. Tomlinson, No. 18 CV 4821, Minora, S.J. (Lacka. Co. May 16, 2019), or suffer the imposition of appropriate sanctions for the failure to do so. The discovery responses to be provided by defendants shall include clarification as to whether the coverage afforded to Hertz Vehicles, LLC, and/or the Hertz Corporation by the excess insurance policy issued by CHUBB to defendant, Hertz Global Holdings, Inc., consists of an aggregate amount per each occurrence or a total aggregate per annum, and if the latter, how much of that total aggregate remains available for plaintiffs’ claims. Responsive information shall also be furnished with respect to any policy issued by Ace American Insurance which provides coverage for the 2017 Toyota Corolla that was owned by Hertz Vehicles, LLC, and involved in the subject accident. Additionally, defendants shall provide comparable information with regard to any policies identified in defense counsel’s letter of December 23, 2020, regarding Aon Risk Services Central, Inc., but only to the extent that those insurance policies may afford coverage for any named defendant in connection with the subject accident. *See* Pa.R.C.P. 4003.2 (“A party may obtain discovery of the existence and terms of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment.”); Szarmack v. Welch, 456 Pa. 293, 300, 318 A.2d 707, 711 (1974) (plaintiff was entitled to pretrial discovery of the extent of automobile liability insurance carried by defendant); Eigen v. Textron Lycoming Reciprocating Engine Division, 874 A.2d 1179, 1186 (Pa. Super. 2005) (“Our Supreme Court has held that as a practical matter, full and complete information regarding insurance coverage is essential to the settlement process.”); Marion v. Lukaitis, 35 Pa. D. & C. 5th 8, 14 (Lacka. Co. 2013) (holding that Rule 4003.2 enabled plaintiff to discover defendant’s liability insurance details, including “information regarding whether the policy, as originally issued, included a mandatory arbitration provision, and the premiums paid”); and

3. Plaintiffs’ motion for sanctions is DENIED pending defendants’ compliance with this Order by August 31, 2021, *without prejudice to*

plaintiffs' right to request the imposition of sanctions if defendants do not comply with this final opportunity to satisfy their discovery obligations under the earlier Discovery Orders issued by Senior Judge Carmen D. Minora on May 16, 2019, and November 14, 2019.

(Docket Entry No. 181) (emphasis added).

After Hertz failed to provide that court-ordered information and documentation within seven days, the Barbarevechs' counsel emailed a letter to Hertz's counsel on September 1, 2021, demanding the same "by the close of business on Thursday, September 2, 2021," and indicating that the Barbarevechs would "have no choice but to seek the appropriate remedies" if Hertz failed to do so. (Docket Entry No. 197, Exhibit E). Hertz's counsel "request[ed] an extension until Tuesday, September 7, 2021, to provide the discovery materials," and although the Barbarevechs granted that request, "September 7, 2021 passed without [Hertz] producing the court-ordered discovery materials." (Docket Entry No. 197 at ¶ 22). On September 9, 2021, the Barbarevechs' counsel forwarded an email to Hertz's counsel which read:

I am now contacting you about the insurance information that Judge Nealon ordered you to produce. I believe that we have extended you every courtesy and am advising that if we do not receive all of this information by tomorrow, we will have to file another Motion with Judge Nealon who did indicate that he was giving you one last chance without imposing sanctions.

Hopefully you will, as promised, make that unnecessary.

(Docket Entry No. 197, Exhibit F).

In the absence of any compliance by Hertz during the ensuing week, the Barbarevechs' counsel transmitted another email to Hertz's counsel on September 17, 2021, reminding them that "it [wa]s almost two weeks from the day that you assured me that we would receive the Court directed ins[urance] info[r]mation[.]" advising Hertz's

counsel that the Barbarevechs “can no longer avoid seeking the Court’s intervention,” and informing them that “we will do so on Monday.” (Docket Entry No. 197, Exhibit G). On Monday, September 20, 2021, the Barbarevechs filed the instant “Motion for Sanctions” asserting that “[g]iven [Hertz’s] willful disregard and continued refusal to comply with three court orders, [the Barbarevechs] respectfully request that the Court enter an Order sanctioning [Hertz] and finding them in contempt of the Court’s Orders.” (Docket Entry No. 197 at ¶ 30) (emphasis in original). Hertz has never responded to the Barbarevechs’ latest motion for sanctions.

“The trial court is responsible for overseeing discovery between the parties and, therefore, it is within that court’s discretion to determine the appropriate measures necessary to insure adequate and prompt discovery of matters allowed by the Rules of Civil Procedure.” Perelman v. Raymond G. Perelman Revocable Trust, 2021 WL 3009802, at *4 (Pa. Super. 2021) (quoting Berkeyheiser v. A-Plus Investigations, Inc., 937 A.2d 1117, 1125 (Pa. Super. 2007)). “This courtroom-managed system includes imposing sanctions under Rule 4019 when trial courts’ orders are not obeyed.” Sahutsky v. Mychak, Geckle & Welker, P.C., 900 A.2d 866, 870 (Pa. Super. 2006), *app. denied*, 591 Pa. 673, 916 A.2d 1103 (2007). Rule 4019(a)(viii) states that a court may enter an order imposing sanctions whenever a party or person “fails to make discovery or to obey an order of court respecting discovery.” Pa.R.C.P. 4019(a)(viii). “It is well settled that the specific sanctions imposed under Pa.R.C.P. 4019 for violation of discovery rules are left to the sole discretion of the trial court.” SLT Holdings, LLC v. Mitch-Well Energy, Inc., 217 A.3d 1248, 1251 (Pa. Super. 2019).

“[T]he purpose of discovery sanctions is to secure compliance with our discovery rules and court orders in order to move the case forward and protect the substantive rights of the parties, while holding those who violate such rules and orders accountable.” Rohm and Haas Co. v. Lin, 992 A.2d 132, 147 (Pa. Super. 2010), *cert. denied*, 565 U.S. 1093 (2011). “Generally, courts are afforded great discretion in fashioning remedies or sanctions for violations of discovery rules and orders.” City of Philadelphia v. Fraternal Order of Police Lodge No. 5 (Breary), 604 Pa. 267, 284, 985 A.2d 1259, 1269 (2009). But when “exercising judicial discretion in formulating an appropriate sanction order, the court is required to select a punishment which ‘fits the crime.’” St. Luke’s Hospital of Bethlehem v. Vivian, 99 A.3d 534, 553 (Pa. Super. 2014) (quoting Estate of Ghaner v. Bindi, 779 A.2d 585, 590 (Pa. Super. 2001)), *app. denied*, 631 Pa. 744, 114 A.3d 417 (2015); Euceda v. Green, 40 Pa. D. & C. 5th 317, 331 (Lacka. Co. 2014). Each of the following factors are considered a “necessary consideration,” but not a “necessary prerequisite,” when considering a request for sanctions based upon a discovery violation:

1. The nature and severity of the discovery violation;
2. The defaulting party’s willfulness or bad faith in failing to comply with discovery;
3. The resulting prejudice to the other party;
4. The non-offending party’s ability to cure any prejudice; and
5. The number of discovery violations by the non-complying party.

Fraternal Order of Police Lodge No. 5 (Breary), 604 Pa. at 286, 985 A.2d at 1270-1271; Fratzola v. Klepadlo, 26 Pa. D. & C. 5th 533, 539 (Lacka. Co. 2012).

The discovery filings and orders in this case reflect that Hertz has repeatedly violated the discovery rules and failed to comply with discovery orders despite being afforded multiple opportunities to do so. In first directing Hertz to

provide clearly discoverable insurance information more than 29 months ago, Judge Minora forewarned Hertz that it “*shall* suffer further appropriate sanctions for [its] non-compliance” if it did not produce that insurance information within five days of May 20, 2019. (Docket Entry No. 26) (emphasis added). On November 14, 2019, Judge Minora again cautioned Hertz that if it did not furnish that discovery within 20 days, sanctions would be imposed “against [Hertz] as governed by Rule 4019 of the Pennsylvania Rules of Civil Procedure.” (Docket Entry No. 76 at p. 9). More recently, Hertz was admonished again on August 24, 2021, that it was being granted a “final opportunity to satisfy [its] discovery obligations under the earlier Discovery Orders.” (Docket Entry No. 198). Notwithstanding those persistent warnings, Hertz has continuously ignored its discovery obligations, willfully disobeyed discovery orders, and unnecessarily strained limited judicial resources by its inexcusable recalcitrance.

Hertz’s contemptuous actions no longer justify the mere threat of future sanctions; rather, they warrant the imposition of sanctions “to secure compliance with our discovery rules and court orders in order to move the case forward,” to “protect the substantive rights of the parties,” and to hold Hertz “accountable” for its repeated violations. Rohm and Haas, *supra*. Pursuant to Pa.R.C.P. 4019(g)(1), Hertz will be ordered to pay the Barbarevechs the reasonable expenses and counsel fees incurred in preparing and presenting their motion for sanctions. Within the next seven days, counsel for the Barbarevechs shall serve upon opposing counsel affidavits setting forth the counsel fees and reasonable expenses incurred in connection with the preparation and presentation of the Barbarevechs’ motion for

sanctions. If Hertz does not dispute the reasonableness and necessity of those fees, as opposed to the propriety of their recovery under Rule 4019, the parties shall submit an appropriate Order for execution within seven days of the service of the affidavits of the Barbarevechs' counsel. However, if Hertz contests the reasonableness or necessity of the fees and costs set forth in those affidavits, a hearing to determine the reasonableness and necessity of those fees will be conducted on Wednesday, November 24, 2021, at 1:30 PM in Courtroom No. 1, Lackawanna County Courthouse.

After this litigation was reassigned to the undersigned following the recusal by Judge Margaret Bisignani-Moyle, the Barbarevechs and Hertz presented six discovery disputes for consideration, together with the Barbarevechs' "Emergency Motion Regarding Defense Counsel's Violations of the Code of Civility and Rules of Professional Conduct" seeking "a formal admonishment" of Hertz's counsel. Barbarevech, supra, at *1. The documentary record submitted by the parties established that "letters and emails that were authored by defense counsel . . . are needlessly riddled with snarky, belligerent, and at times, sophomoric comments by defense counsel," "unjustly accuse the Barbarevechs' counsel of serious attorney misconduct," and make "unwarranted allegations of judicial impropriety by other members of this court." Id. at *20. It was concluded that those written communications "are violative of the Code of Civility's aspirational provisions advocating civil, respectful, and courteous discourse, discouraging acrimonious speech and disparaging personal remarks, and promoting the defense of the judiciary from unfounded criticism and attack," and Hertz's counsel were

“specifically forewarned that another instance of comparable conduct will result in the imposition of sanctions and perhaps even more serious action.” Id.

Shortly thereafter, Hertz filed a “suggestion of bankruptcy” on June 12, 2020, indicating that two defendants, The Hertz Corporation and Hertz Global Holdings, Inc., had filed petitions in bankruptcy under Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware, and attaching the automatic stay Order issued by U.S. Bankruptcy Judge Mary F. Walrath, and by stipulation of counsel, an Order was entered in this matter staying all discovery “until the parameters of the automatic stay are determined and/or a Motion for Relief from the Automatic Stay is filed and resolved in the United States Bankruptcy Court for the District of Delaware to enable this action to proceed on course in this Court.” (Docket Entry Nos. 133-135). The United States Bankruptcy Court for the District of Delaware subsequently granted the Barbarevechs’ motion for relief from the automatic stay, (Docket Entry No. 137), and the parties presented a “Consented Motion to Extend Case Management Deadlines and Continue Trial Date.” (Docket Entry No. 147). At the time of the resultant status conference, civility among counsel had clearly been restored, and an obvious spirit of cooperation guided their mutual requests to realistically advance the discovery process, exchange pertinent information, and prepare this matter for trial. (Docket Entry Nos. 149-150). In fact, the Barbarevechs, Hertz, and their counsel voluntarily agreed at that time to participate in a settlement conference before the undersigned on December 21, 2021. (Docket Entry No. 151).

Unfortunately, that amiability and collaboration among counsel proved to be short-lived, and the parties and their counsel reverted to their earlier clashes over discovery, which precipitated a series of motions to compel discovery, a motion for a protective order, and a motion to disqualify counsel for a non-party deponent. (Docket Entry Nos. 159, 162-169, 171, 184-185, 187, 192, 194-195). Those disputes have, once again, necessitated the issuance of additional discovery rulings. (Docket Entry Nos. 173, 181-183, 200).

This matter is scheduled for trial on April 4, 2022, with the final pre-trial conference to be conducted on February 28, 2022. (Docket Entry No. 149 at ¶¶ 9-10). As noted above, a settlement conference will be conducted in approximately seven weeks. (Docket Entry No. 151). Both Pa.R.C.P. 212.5(a) and Lacka. Co. R.C.P. 212(f) require counsel to “engage in good faith efforts to resolve the case” prior to the date of the settlement conference. Combative and obstructionist litigation practices severely hinder the ability of counsel to satisfy their obligation to “engage in good faith efforts” to settle this action. *See Hartman v. Baker*, 766 A.2d 347, 354 n.3 (Pa. Super. 2000) (citing Black’s Law Dictionary and its definition of good faith as a state of mind consisting of honesty in belief or purpose, faithfulness to one’s obligation, observance of reasonable standards of fair dealing in a given trade, or absence of intent to seek unconscionable advantage), *app. denied*, 564 Pa. 712, 764 A.2d 1070 (2000).

As Hertz’s counsel has stated in opposing the Barbarevechs’ demands for insurance coverage information, “Hertz is a Fortune 500 company.” (Christopher J. Zitkevitz depo., *supra*, at p. 85). Despite three judicial admonitions that

sanctions would be imposed for non-compliance with discovery orders, Hertz has inexplicably failed to provide relevant insurance information in conformity with the Orders of May 20, 2019, November 14, 2019, and August 24, 2021. It is arguable whether a monetary sanction comprised of counsel fees and costs associated with the preparation and presentation of a motion for sanctions will adequately deter a Fortune 500 company from further discovery abuses that will continue to impede the progress and ultimate conclusion of this case. Therefore, Hertz and their counsel are cautioned that any additional discovery violations may result in the imposition of non-monetary sanctions with more meaningful impact, such as the preclusion of evidence or expert testimony challenging the Barbarevechs' claims for economic and non-economic damages. *See* Pa.R.C.P. 4019(c)(2).

AND NOW, this 29th day of October, 2021, upon consideration of "Plaintiffs' Motion for Sanctions" and "Plaintiffs' Brief in Support of their Motion for Sanctions," (Docket Entry Nos. 196-197), and based upon the reasoning set forth above, it is hereby ORDERED and DECREED that:

1. "Plaintiffs' Motion for Sanctions" is GRANTED pursuant to Pa.R.C.P. 4019(g)(1) to the extent that defendants shall pay plaintiffs the reasonable counsel fees and expenses incurred in preparing and presenting "Plaintiffs' Motion for Sanctions" and obtaining this Order for sanctions;

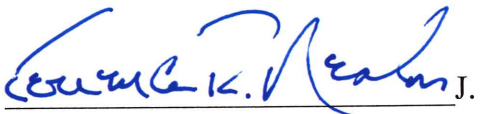
2. Within the next seven (7) days, counsel for plaintiffs shall provide defendants and their counsel with affidavits itemizing the counsel fees and expenses incurred in preparing and presenting "Plaintiffs' Motion for Sanctions,"

and within seven (7) days thereafter, defendants or their counsel shall advise the court and plaintiffs' counsel in writing whether they contest the reasonableness and necessity of those counsel fees and expenses;

3. If defendants do not contest the reasonableness and necessity of those counsel fees and expenses, the parties and their counsel shall submit a stipulated Order to the undersigned within twenty-one (21) days of the date of this Order; and

4. If defendants contest the reasonableness or necessity of the counsel fees or expenses set forth in the affidavits submitted by plaintiffs' counsel, a hearing to determine the reasonableness and necessity of those fees will be conducted on **Wednesday, November 24, 2021, at 1:30 PM** in Courtroom No. 1, Lackawanna County Courthouse.

BY THE COURT:


Terrence R. Nealon

cc: *Written notice of the entry of the foregoing Order has been provided to each party pursuant to Pa. R. Civ. P. 236 (a)(2) by mailing time-stamped copies to:*

Joseph A. Quinn, Jr., Esquire
Nicole M. Santo, Esquire
Ryan N. Molitoris, Esquire
Kathleen DePillis, Esquire
Hourigan, Kluger & Quinn
600 Third Avenue
Kingston, PA 18704-5815
Counsel for Plaintiffs

jquinn@hkqlaw.com
nsanto@hkqlaw.com
rmolitoris@hkq.com
kdepillis@hkqlaw.com

Jay L. Edelstein, Esquire
James J. Walsh, Esquire
A. J. Thomson, Esquire
Edelstein Law, LLP
Suite 900, 230 S. Broad Street
Philadelphia, PA 19102
Counsel for Defendants

jedelstein@edelsteinlaw.com
jwalsh@edelsteinlaw.com
athomson@edelsteinlaw.com